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COMPLEMENTARITY IN ACTION:

**LESSONS LEARNED FROM THE ICTR PROSECUTOR'S
REFERRAL OF INTERNATIONAL CRIMINAL CASES TO
NATIONAL JURISDICTIONS FOR TRIAL**

FEBRUARY 2015

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Foreword

We are at a critical stage in the transition of international criminal justice. The primary responsibility for investigating and prosecuting international crimes no longer lies with *ad hoc* tribunals like the International Criminal Tribunal for Rwanda (ICTR); rather that responsibility has shifted to national authorities. This shift is reflected in the Rome Statute's principle of complementarity, as well as in the establishment of the Mechanism for International Criminal Tribunals (MICT), which makes the referral of cases to national jurisdictions a priority in the completion of the *ad hoc* tribunals' remaining work.

This manual shares my office's experience in securing the referral of ten genocide indictments to national jurisdictions for trial. The referral of these indictments marked an important milestone in the ICTR's completion strategy. Without the referral of these indictments, the ICTR's work would have been incomplete and a gap in impunity could have resulted. By referring these indictments to national jurisdictions for trial, the ICTR also gave practical effect to the principle of complementarity. National authorities, not the ICTR, became primarily responsible for conducting and completing proceedings against the accused.

Our success in securing the referral of indictments to national jurisdictions could not have been achieved without substantial outreach and capacity-building efforts and the cooperation of partners such as Rwanda, the European Union, Canada, and the United States. Together with our partners, the ICTR contributed to a host of legal reforms and infrastructure improvements at the national level that were necessary to secure the fair trial rights of the accused. My office also developed new strategies to demonstrate how fair trial rights would be honored in practice. Many of those strategies could assist other courts or tribunals in assessing national capacity, as well as provide a basis for national jurisdictions to undertake their own assessment of compliance with internationally-recognized standards.

This manual documents those best practices and lessons learned. It is part of a broader strategy my office has undertaken to preserve the ICTR's legacy for future use. It is my hope that this manual will assist other international and national courts to build on the ICTR's achievements and empower national authorities to discharge their primary responsibility to investigate and prosecute international crimes in a manner consistent with international standards.



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I. Introduction

1. International crimes are committed on a large scale, involving thousands—if not hundreds of thousands—of perpetrators and victims. Between April and August 1994, Rwanda experienced one of the worst mass atrocities in human history. During 100 days, between 800,000 to one million men, women, and children were slaughtered. Most of the victims belonged to the minority Tutsi ethnic group; others were moderate Hutus who supported power-sharing and coexistence. The occurrence of this genocide is beyond dispute.¹

2. On 8 November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.”² Since then, the Office of the Prosecutor (OTP) has indicted 93 individuals whom it considered responsible for these serious violations of international humanitarian law; those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.

3. The sheer scale of the atrocities committed in Rwanda, coupled with the ICTR’s limited mandate in terms of resources and time, made it impractical for the ICTR to prosecute all of those responsible. To avoid a gap in impunity, it was essential that national authorities assume a larger

¹ The ICTR established as a matter of incontrovertible fact that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population. *See Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 35; *Emmanuel Rukundo v. the Prosecutor*, Case No. ICTR-01-70-A, Judgement, 20 October 2010, para. 62; *Laurent Semanza v. the Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 192; *Phénéas Munyarugarama v. the Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama’s Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 (*Munyarugarama (AC)*), para. 26.

² UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994.

role in prosecuting the crimes that were committed. Before that could happen, the ICTR had to ensure that national prosecutions would be conducted in a manner consistent with international fair trial standards.

4. Over the past two years, the ICTR successfully referred eight indicted cases to Rwanda for trial. In prior years, it referred two indicted cases to France.

5. The OTP's experiences with the referral of these indictments to national authorities for prosecution at the domestic level demonstrate the principle of complementarity in action. Under this principle, national authorities retain the primary responsibility and obligation to prosecute international crimes.³

6. The OTP's experiences provide useful lessons for other international courts and tribunals seeking to refer international criminal cases to national jurisdictions. They also provide valuable lessons for national jurisdictions seeking to establish their own ability to fairly prosecute international crimes at the domestic level.

7. These lessons include practical steps for partnering with national authorities to rebuild justice sectors in conflict and post-conflict environments. In the wake of the 1994 genocide, Rwanda's justice sector infrastructure was decimated. This infrastructure needed to be restored before international fair trial rights could be ensured. By partnering with the ICTR, UN Member States, and non-governmental organizations (NGOs), Rwanda made great strides in restoring national capacity at all levels of its justice sector.

8. Rwanda also undertook a host of substantive and procedural reforms aimed at bringing its national laws and practices into compliance with prevailing international fair trial standards. These reforms included incorporation of principles of customary international law into its Constitution, elimination of the death penalty, ensuring life tenure for

³ See Rome Statute of the International Criminal Court, U.N. Doc 2187, U.N.T.S. 90, entered into force 1 July 2002 (Rome Statute), at Preamble art. 10, and arts. 17-20 and 53.

judges, and extending broad immunity from arrest or prosecution for witnesses and defence teams working in Rwanda. More recent reforms include allowing international judges to sit on the panel of referred cases and alternative means of securing witness testimony through deposition or video-link.

9. The OTP's experience in referring cases to Rwanda for trial demonstrated however that it often was not enough to simply have laws on the books. To persuade the ICTR's chambers that Rwanda was able to secure fair trial rights, the OTP had to provide tangible proof that those rights were available and honored in practice. The methods the OTP used to develop this objective proof in Rwanda can be put to use in other situations where it is necessary to assess national capacity to prosecute international crimes.

10. Any assessment of national capacity must be flexible enough to account for different methods and means of achieving the desired result. The principle of complementarity requires that national laws and practices be respected so long as they adequately protect the fair trial rights recognized under international law. The OTP's experience demonstrated that the referral of international cases to national jurisdictions does not require the wholesale incorporation of international laws and practices into domestic systems, and that it is wrong to condition referral on matters unrelated to securing fundamental fair trial rights.

11. This best practices manual will share the OTP's experiences in the referral of cases and recommend best practices for future cases. It will focus on the main lessons learned, such as building partnerships to restore national capacity, how to prove national capacity, and how to create effective safeguards through monitoring and revocation mechanisms. In the concluding section, the OTP will identify some lingering concerns that, if not addressed, threaten to undermine the effectiveness of future attempts to refer international criminal cases to national jurisdictions. But first, the

OTP will set the context in which its efforts to secure the referral of cases to national jurisdictions came about.

II. Preventing Impunity by Restoring National Capacity

A. Setting the Context

12. In the wake of the genocide, Rwanda's national infrastructure was overwhelmed with many high-level perpetrators on the run and more than 120,000 suspects in custody.⁴ Insufficient institutional capacity existed at the national level to bring the suspected perpetrators to justice.

13. Only a few qualified judges, lawyers, and defence counsel were available to take up the work. For instance, as a result of the genocide, the number of judges in national service decreased from 600 before April 1994 to only 237 by August 1994. And, out of these 237 remaining judges, only 53 were assigned to courts with jurisdiction over serious crimes. The situation with respect to the numbers of prosecutors, police officers, registrars, and defence lawyers was similarly dire.⁵

14. Recognizing that this lack of national capacity could result in impunity, Rwanda called on the international community to assist by establishing an international tribunal to prosecute those responsible for the genocide.⁶ The United Nations Security Council responded by establishing the ICTR "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."⁷

⁴ Outreach Programme on the Rwanda Genocide and the United Nations, available at <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>.

⁵ Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*, 25 July 2008, p. 12, http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf (last accessed 15 September 2014).

⁶ UN Doc. S/1994/1115 (1994), 29 September 1994, p. 5.

⁷ Article 1 of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994.

15. The ICTR however was not intended to be a permanent court. Nor was it intended to prosecute every person responsible for the genocide, regardless of their level of responsibility.⁸ Starting in 2003, the Security Council encouraged the ICTR to develop a strategy for completing its remaining work by, among other things, considering the referral of some of its pending indictments, such as those against intermediate and lower ranking accused, to competent national jurisdictions for trial.⁹

16. The ICTR's authority to refer pending indictments to national jurisdictions was supported by both its statute and rules. Article 8 of the ICTR Statute provided that the Tribunal had primacy "over the national courts of all states." But, it also provided that the Tribunal's jurisdiction was concurrent with the jurisdiction of national courts to prosecute persons for serious violations of international humanitarian law. The latter clause allowed the ICTR to defer the exercise of its primary jurisdiction in favor of national authorities. In post-conflict Rwanda, this provision enabled national courts, including the traditional *Gacaca* system, to work simultaneously with the ICTR in bringing thousands of perpetrators to justice.¹⁰

17. The procedural rule governing the referral process was supplied by ICTR Rule 11*bis*.¹¹ Pursuant to this rule, the ICTR prosecutor (or the chamber on its own initiative) could seek to refer an ICTR indictment to any

⁸ See *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 170 ("As evidenced by history, [genocide] is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike.").

⁹ UN Doc S/RES/1503, UN Security Council Resolution 1503, 28 August 2003, p. 2.

¹⁰ To assist Rwanda in bringing the large number of suspects to trial, the Security Council emphasized the need for international cooperation to strengthen Rwanda's national justice system. UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994, p. 1. See also, JALLOW, p. 2; ONSEA, I., *The legacy of the ICTR in Rwanda in the Context of the Completion Strategy: the Impact of Rule 11bis*, in RYNGAERT, C., *The Effectiveness of International Criminal Justice*, Intersentia, Antwerp, 2009, p. 174-175.

¹¹ The rule was first adopted in July 2002. See UN Doc. S/2002/733, Seventh Annual Report of the ICTR, for the period from 1 July 2001 to 30 June 2002, 2 July 2002, para. 10; UN Doc S/2003/707, Eight Annual Report of the ICTR, for the period from 1 July 2002 to 30 June 2003, 11 July 2003, para. 6. Since adoption, it has been amended three times (in 2004, 2005, and 2011). ICTR 14th Plenary Session of the Judges, 23 to 24 April 2004; ICTR 15th Plenary Session of the Judges, 21 May 2005; ICTR 23rd Plenary Session of the Judges, 15 March 2011.

national jurisdiction that was “willing and adequately prepared to accept the case,” provided the chamber designated to consider the referral request was satisfied 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.”¹² Unlike the version of the rule adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICTR rule did not impose any requirement relating to the relative rank or seniority of the accused.¹³

18. The rule thus created a limited exception to the ICTR’s primary jurisdiction under Article 8 of the Statute. And, with its adoption and implementation of the completion strategy, the ICTR’s jurisdiction shifted from being “more or less primary” to being “more or less complementary”¹⁴ as it accommodated a greater role for national authorities to assume primary responsibility for the prosecution of international crimes in domestic courts. Unlike Article 17 of the Rome Statute, however, the focus of the ICTR referral process was not on the *genuineness* of national investigations or prosecutions¹⁵ but, rather, on the *fairness* of the trial that would take place in the referral state.¹⁶

19. The rule itself did not define the right to a fair trial. That right was enshrined in Article 20 of the ICTR Statute, which guaranteed an accused all of the fair trial rights recognized under international law:

- equality before the courts;
- public hearing;
- presumption of innocence;

¹² ICTR Rule 11*bis* (A)-(C); *Jean Uwinkindi v. the Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi’s Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 (*Uwinkindi* (AC)), para. 22.

¹³ *Bernard Munyagishari v. the Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari’s Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11*bis*, 3 May 2013 (*Munyagishari* Decision (AC)), paras. 41-43.

¹⁴ For the labelling of jurisdictional arrangements, see HOUWEN, Sarah M.H., and LEWIS, Dustin A., Jurisdictional Arrangements and International Criminal Procedure, in *International Criminal Procedure, Principles and Rules*, edited by SLUITER, Göran *et al.*, Oxford University Press, Oxford, 2013, p. 117, *etc.*

¹⁵ Article 17 of the Rome Statute. See HOUWEN, Sarah M.H., and LEWIS, Dustin A., *o.c.*, p. 127.

¹⁶ ICTR Rule 11*bis* (C).

- advised of charges in language accused understands and free assistance of an interpreter;
- adequate time and facilities to prepare defense and confer with counsel;
- trial without undue delay;
- trial in presence of accused;
- legal assistance from counsel of choice or, if indigent, appointed counsel;
- examination and attendance of witnesses under the same conditions as witnesses against accused; and
- privilege against compelled testimony.

20. Jurisprudence from ICTY referral and Appeals Chambers established that referral to national jurisdictions was permissible so long as the legal framework protecting these fair trial rights existed in the referral state. If the legal framework existed, there was no need for a referral chamber to look further by considering, for instance, how the rights were implemented in practice.¹⁷

21. Out of the 93 indictments the OTP filed, ten indictments were successfully referred to national jurisdictions for trial pursuant to Rule 11*bis*.¹⁸ Two of these indictments were referred to France; eight indictments were referred to Rwanda. Although the number of referred indictments was relatively small, the referral of these indictments was critical to the achievement of the ICTR's completion strategy. And, as shown below, the partnerships that the ICTR formed to pave the way for

¹⁷ See, e.g., *The Prosecutor v Zeljko Mejković et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral Under Rule 11*bis*, 7 April 2006 (*Mejković* (AC)), para. 69 ("The Referral Bench correctly considered whether it was satisfied that the Appellants would receive a fair trial by establishing that the legislation in BiH allows for adequate time and facilities for the preparation of their defence. That was all it is required to do pursuant to Rule 11*bis* of the Rules.")

¹⁸ The referral of indictments pursuant to ICTR Rule 11*bis* is distinguishable from the transfer of files. Where an indictment has been confirmed by an ICTR judge, referral of the indictment to national jurisdictions requires a judicial decision. Where, in contrast, no indictment has been confirmed, the ICTR prosecutor alone may exercise discretion to transfer relevant files to a national jurisdiction for investigation or prosecution. By 8 June 2010, the ICTR prosecutor had transferred 55 files to Rwanda for investigation or prosecution. See Statement of Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council, 18 June 2010, <http://www.unict.org/Portals/0/ictr.un.org/tabid/155/Default.aspx?id=1144> (last visited 21 October 2014).

referral contributed to strengthening national capacity, particularly in post-conflict Rwanda.

B. Challenges to Referral

22. Finding national jurisdictions that were both willing and able to prosecute indictments referred by the ICTR presented several challenges. The prosecutor explained these difficulties in reports to the Security Council:

In preliminary discussions with national authorities, the [OTP] has ascertained that the laws of the State in which some suspects are present may not confer jurisdiction over these suspects or the crimes they allegedly committed. Other States have investigated the cases and not pursued them, and may be reluctant to re-open those cases. Many of the suspects are in countries where judicial systems are under strain, arising from their own judicial and prosecution workload. The Prosecutor has explored with a number of African countries the possibility of transferring cases to African States. However, he has not yet secured an agreement with any African state, other than Rwanda, to accept referral of cases from the ICTR. Outside the African continent and in Europe specifically, the Prosecutor has so far managed to get only three agreements in this regard.¹⁹

23. Many states, as the prosecutor noted, were reluctant to accept referrals from the ICTR because their own national systems were already under strain from the high volume of domestic cases and limited resources. It often was difficult for national authorities to draw the nexus between crimes committed in other countries and their own national interests. Absent that nexus, national authorities often could not justify the expenditure of limited public funds to support the prosecution of international crimes committed in often distant jurisdictions.

24. This difficulty was exacerbated by the high costs usually associated with investigating and prosecuting international crimes. Witnesses and

¹⁹ UN Doc. S/2007/676, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 20 November 2007, p. 10; *see also* UN Doc. S/2008/322, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 1 May 2008), 13 May 2008, p. 12.

other forms of evidence relevant to international crimes often are located outside the country. In post-conflict Rwanda, for instance, key witnesses had scattered literally across the globe. To interview these witnesses and collect other evidence, investigators and prosecutors must travel and depend on mutual legal assistance from other states to facilitate their investigations. For indigent accused, national authorities also must bear the full costs of the defence, including the costs of any defence investigations. To present evidence in court, national jurisdictions must arrange transport for key witnesses to attend trial or make other arrangements such as through video links or other means to hear their evidence. Additionally, authorities from national jurisdictions may not speak the same language as the witness. Interpretation and translation services therefore must be provided so evidence can be properly understood.

25. The ICTR prosecutor had no way of assisting national jurisdictions in offsetting these and other costs associated with national prosecution of international cases. Over the years, the prosecutor was able to persuade only a handful of countries (France, Norway, The Netherlands, and Rwanda) to accept the referral of ICTR indictments.

26. Another major obstacle to referral was national capacity. Questions related to the exercise of universal jurisdiction posed particular challenges. Generally, most states can exercise extraterritorial jurisdiction over international crimes based on universal jurisdiction and treaty obligations.²⁰ The 1949 Geneva Conventions in relation to war crimes is one example of a treaty-based implementation of the principle of universal jurisdiction, pursuant to the *aut dedere aut judicare* principle.²¹ Also, for

²⁰ The term ‘universal jurisdiction’ refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting state. It is a principle of jurisdiction limited to specific crimes. See CRYER, R., FRIMAN, H., ROBINSON, D., WILMHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2011, p. 50-51.

²¹ CRYER, R., FRIMAN, H., ROBINSON, D., WILMHURST, E., *o.c.*, p. 53. The four Geneva Conventions and Additional Protocol I cover war crimes and define particular “grave breaches” that are subject to a mandatory enforcement regime. This means that

the crime of genocide, states are entitled to assert universal jurisdiction because the crime is defined in customary law.²²

27. Article V of the Genocide Convention however requires states to enact necessary legislation to implement the Convention. This requirement indicates that the Convention was not intended to be self-executing. Countries therefore should incorporate the crime of genocide into their domestic legislation to avoid jurisdictional and retroactivity challenges.²³

28. Indeed, limitations exist on the exercise of universal jurisdiction—and these limitations posed several challenges to the OTP’s referral strategy. One of the main limitations in the exercise of universal jurisdiction is the non-retroactivity or *nulla crimen sine lege* principle.²⁴ This principle precludes the exercise of jurisdiction over international crimes that were not incorporated into domestic law at the time of commission or prosecution.

29. The ICTR chambers invoked this principle to reject the prosecutor’s first attempt to refer an indictment to a national jurisdiction. In 2006, the prosecutor attempted to refer the *Bagaragaza* indictment, which included charges of genocide and other crimes, to Norway. Because Norway’s domestic law did not specifically include the crime of genocide, it proposed to prosecute the case as homicide under its national law.²⁵

30. The ICTR referral chamber rejected this application because Norway did not have jurisdiction *ratione materiae* over the crimes charged in the indictment. The crime of homicide, it noted, lacks the specific intent

states which have ratified the Geneva Conventions shall prosecute crimes that lead to those “grave breaches” or extradite the perpetrators to states which will do so.

²² CRYER, R., FRIMAN, H., ROBINSON, D., WILMHURST, E., *o.c.*, p. 51.

²³ BLAKE, J., *Should Domestic Courts Prosecute Genocide? Examining the Trial of Efraín Ríos Montt*, Brooklyn Journal of International Law, Vol. 39:2, 2014, p. 587.

²⁴ CRYER, R., FRIMAN, H., ROBINSON, D., WILMHURST, E., *o.c.*, p. 79-80.

²⁵ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-11bis, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006 (*Bagaragaza* (TC)), paras. 2, 9.

element required for genocide.²⁶ Thus, the elements of the crimes were not the same. Nor was homicide a crime of comparable gravity to genocide.²⁷

31. The Appeals Chamber rejected the prosecutor's appeal from this decision.²⁸ While acknowledging that its decision "may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate," the Appeals Chamber held that it could not sanction the referral of an indictment to a jurisdiction where the conduct could not be charged as a serious violation of international law.²⁹

32. Another barrier to referral was that national legislation and domestic courts often require a certain nexus—a "plus-factor"—to the crime.³⁰ For instance, many domestic courts require that the accused either be present or have previously lived in the forum country before proceedings against them may be initiated.³¹

33. This requirement proved an obstacle to the prosecutor's second attempt to refer the *Bagaragaza* indictment to a national jurisdiction. After the prosecutor's first attempt to refer the indictment to Norway failed, the prosecutor succeeded in obtaining a referral order to The Netherlands, and the accused was transferred there for trial.³² Subsequently however the prosecutor had to revoke the referral for two reasons.³³ First, an

²⁶ *Ibid.*, para. 16.

²⁷ *Ibid.*

²⁸ *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 August 2006 (*Bagaragaza* (AC)).

²⁹ *Bagaragaza* (AC), para. 18. The legal characterization matters because Article 9 of the Statute – reflecting the *non bis in idem* principle – allows the prosecution of a person who has been tried before a national court if the acts for which he or she was tried were categorized as an ordinary crime. *Ibid.*, para. 17.

³⁰ BLAKE, J., *l.c.*, p. 591. This form of universal jurisdiction is also referred to as 'conditional' universal jurisdiction (universal jurisdiction with presence), in contrast to 'pure' universal jurisdiction (also known as universal jurisdiction *in absentia*). See CRYER, R., FRIMAN, H., ROBINSON, D., WILMHURST, E., *o.c.*, p. 52.

³¹ BLAKE, J., *l.c.*, p. 591.

³² *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of The Netherlands, 13 April 2007.

³³ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-11bis, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of The Netherlands pursuant to Rule 11bis (F) & (G), 17 August 2007, para. 11, with reference to the *Interlocutory Decision of the Court of The Hague*, 24 July 2007 (*Mpambara* decision).

intervening decision from a Dutch court held that The Netherlands lacked jurisdiction over the crime of genocide for acts committed in Rwanda in 1994. Second, because the accused was not *voluntarily* present in The Netherlands but detained there by judicial order, it was unlikely that Dutch prosecutors could satisfy the plus-factor required under domestic law for the exercise of universal jurisdiction—physical presence of the accused in The Netherlands when the case was initiated.³⁴

34. The *Bagaragaza* case illustrates just some of the difficulties the OTP encountered in finding willing national jurisdictions able to try referred cases. As will be seen in the next section, additional difficulties arose in persuading the ICTR chambers that trials in the few states that were both willing and able to accept referred cases would be fair.

C. Finding Willing and Able States

35. Two states—France and Rwanda—proved both willing and able to accept the referral of ICTR indictments. The approaches adopted by the ICTR chambers in referring cases to France and Rwanda differed. They provide useful lessons to other international courts or tribunals seeking to refer cases to national jurisdictions; they also provide useful lessons to national jurisdictions seeking to establish their capacity to prosecute cases fairly.

1. Referrals to France

36. Two ICTR fugitives (*Bucyibaruta* and *Munyeshyaka*) were apprehended in France, which expressed its willingness to accept the referral of these indictments. The prosecutor filed applications for referral of both indictments in 2007, relying exclusively on France’s legal framework to demonstrate that all of the requirements established by Rule 11*bis* were met.³⁵ The referral chambers were satisfied based on these submissions

³⁴ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-11*bis*, Prosecutor’s Extremely Urgent Motion for Revocation of the Referral Order pursuant to Rule 11*bis* (F) & (G), 8 August 2007.

³⁵ *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-05-85-I, Request for the Referral of Laurent Bucyibaruta’s Indictment to France Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 12 June 2007; *The Prosecutor v. Wenceslas Munyeshyaka*,

that the accused would receive a fair trial before the competent French courts and that the death penalty would not be imposed.³⁶ To further ensure the fairness of proceedings, the referral chambers directed the prosecutor to monitor both proceedings as provided in Rule 11*bis*(D)(iv).³⁷ Shortly after the establishment of the Mechanism for International Criminal Tribunals (MICT), the MICT President appointed a tribunal monitor for these cases as well.³⁸

37. Although the ICTR referred these indictments to France seven years ago, the cases continue to be investigated by French judges and are not yet concluded.³⁹ This delay reflects the practical difficulties national authorities frequently encounter in investigating and prosecuting international crimes, particularly those committed many years ago and in distant places. France did not indicate a willingness to accept the referral of any additional ICTR indictments, and no additional referrals to France were attempted.

2. First Round of Referrals to Rwanda

38. Rwanda was the only other country to express its willingness to accept the referral of ICTR indictments. It explained its reasons in an *amicus curiae* or “friend of the court” brief submitted to one of the referral chambers:

Case No. ICTR-05-87-I, Request for the Referral of Wenceslas Munyeshaka’s [sic] Indictment to France Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 12 June 2007.

³⁶ *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-05-85-I, Decision on Prosecutor’s Request for Referral of Laurent Bucyibaruta’s Indictment to France, 20 November 2007; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-05-87-I, Decision on Prosecutor’s Request for Referral of Wenceslas Munyeshyaka’s Indictment to France, 20 November 2007.

³⁷ Under the 2007 version of Rule 11*bis*, only the Prosecutor could send observers to monitor the proceedings. In 2011, the rule was amended to allow the referral chamber to appoint monitors as well. *See infra*, para. 142, fn. 156.

³⁸ *See* Article 6 (5) MICT Statute; UN Doc. A/69/226-S/2014/555, Second Annual Report of the MICT, for the period from 1 July 2013 to 30 June 2014, 1 August 2014, para. 70. *See also*, e.g., *Laurent Bucyibaruta*, Case No. MICT-13-44, Fifth Monitoring Report, 25 July 2014; *Wenceslas Munyeshyaka*, Case No. MICT-13-45, Fifth Monitoring Report, 25 July 2014.

³⁹ *Laurent Bucyibaruta*, Case No. MICT-13-44, Fifth Monitoring Report, 25 July 2014; *Wenceslas Munyeshyaka*, Case No. MICT-13-45, Fifth Monitoring Report, 25 July 2015. *See infra*, para. 163.

The 1994 genocide affected the entire world, but the scars are borne by the people of Rwanda alone. The crimes were perpetrated by Rwandans on Rwandan soil. The vast majority of victims were Rwandans. And those Rwandans who survived have suffered and will continue to suffer the pain of loss from now until the end of their lives.⁴⁰

39. The prosecutor started considering the referral of indictments to Rwanda as early as November 2003,⁴¹ but it took more time for him to be persuaded that Rwanda's legal framework provided an adequate basis upon which to seek referral.⁴² By 2007, Rwanda had enacted a series of important legal reforms, including abolition of the death penalty⁴³ and other procedural protections for a fair trial.⁴⁴ With this new legal framework in place, the prosecutor attempted for the first time to refer five indictments to Rwanda for trial.⁴⁵

⁴⁰ *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, *Amicus Curiae* Brief for the Republic of Rwanda in Support of the Prosecutor's Application for Referral pursuant to Rule 11bis, 18 February 2011 (*Uwinkindi* Rwanda's Brief), para. 1.

⁴¹ UN Doc. S/2003/946, Completion Strategy of the International Criminal Tribunal for Rwanda, 6 October 2003, para. 23.

⁴² UN Doc. S/2007/676, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 20 November 2007, para. 35.

⁴³ Rwanda's Organic Law No. 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty (Abolition of Death Penalty Law)

⁴⁴ Rwanda's Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda, Official Gazette of the Republic of Rwanda, 19 March 2007 (2007 Transfer Law), amended in 2009 by Organic Law No. 03/2009/OL modifying and complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, 26 May 2009. The 2007 Transfer Law, as amended, was replaced in 2013 by Law No. 47/2013 of 16 June 2013 relating Transfer of Cases to Republic of Rwanda, Official Gazette of the Republic of Rwanda, 16 June 2013 (2013 Transfer Law).

⁴⁵ *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Prosecutor's Request for the Referral of the Case of *Fulgence Kayishema* to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-I, Prosecutor's Request for the Referral of the Case of *Gaspard Kanyarukiga* to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-I, Prosecutor's Request for the Referral of the Case of *Yussuf Munyakazi* to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55-I, Prosecutor's Request for the Referral of the Case of *Idelphonse Hategekimana* [sic] to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-I, Prosecutor's Request for the Referral of the Case of *Jean-Baptiste Gatete* to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 28 November 2007.

40. During this first round of applications, the OTP relied on the same strategy used by the ICTY in cases like *Mejakić*⁴⁶ and by the ICTR in its previous applications for the referral of indictments to France, Norway, and The Netherlands. The focus was on the legal framework Rwanda had established to protect fair trial rights. Any issues beyond this legal framework, the OTP contended, were irrelevant or unsubstantiated because the framework had not yet been tested as no cases had been referred to Rwanda.⁴⁷

41. In the face of vigorous opposition from defence teams and *amici curiae*, this strategy failed to persuade the referral chambers. The defence and *amici curiae* questioned the effectiveness of Rwanda's legal framework in light of the general political situation and how other cases were being handled in Rwanda's national courts, including the traditional Gacaca process.

42. During the hearing on the *Munyakazi* referral application, it became apparent that the referral chamber was interested in exploring the concerns raised by the defence and *amici*.⁴⁸ The judges asked a number of questions regarding the practical application of Rwanda's legal framework, including provisions relating to: the protection of defence witnesses, independence and impartiality of the judiciary, conditions of detention, presumption of innocence, risk of prosecution for any statements amounting to genocide denial or minimization under the genocide ideology law, availability and qualification of defence lawyers, and legal aid.⁴⁹ It was clear that the referral chamber would look beyond Rwanda's legal framework to actual practice—albeit a practice based on cases handled without benefit of Rwanda's recent legal reforms.

⁴⁶ See *Mejakić* (AC), para. 69.

⁴⁷ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-1997-36-I, Filing of Prosecutor's Written Submissions and Exhibit pursuant to the Directions of the Referral Chamber during the Oral Hearing of 24 April 2008, 25 April 2008, p. 5.

⁴⁸ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-1997-36-I, Oral Hearing on Rule 11bis, 24 April 2008.

⁴⁹ *Ibid.*

43. Ultimately, the referral chambers rejected all five applications based, in large part, on the concerns that had been expressed at the *Munyakazi* hearing.⁵⁰ The prosecutor appealed these decisions, but the Appeals Chamber generally affirmed all of the decisions denying referral of the indictments to Rwanda.⁵¹

44. While disappointing, the concerns raised by the ICTR referral and appeal chambers during the first round of referral applications provided a roadmap for what needed to be done to further strengthen Rwanda's capacity to provide a fair trial in any referred cases. As shown in the next section, the decisions triggered a new round of law reform and capacity building efforts in Rwanda.

Key Lessons Learned

The OTP's experience in identifying national jurisdictions willing to accept the referral of international criminal cases demonstrates that financial incentives may be necessary to help offset or reduce the costs for states willing to accept referred cases.

Additionally, where national capacity is lacking or in doubt, strong partnerships with Member States, international and regional authorities, and NGOs are necessary to help restore capacity, particularly in conflict or post-conflict regions.

⁵⁰ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008 (*Munyakazi* (TC)); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 (*Kanyarukiga* (TC)); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008 (*Gatete* (TC)); *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 16 December 2008 (*Kayishema* (TC)).

⁵¹ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para. 4 (*Munyakazi* (AC)); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para. 4 (*Kanyarukiga* (AC)); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 4 December 2008, para. 4 (*Hategekimana* (AC)). In light of these Appeal Chamber decisions, the Prosecutor decided not to appeal the *Gatete* (TC) and *Kayishema* (TC) referral chamber decisions.

III. Renewed Capacity Building

45. The setbacks encountered during the first round of referral applications did not end the prosecutor's referral strategy. On the contrary, to complete the ICTR's work within the time set by the Security Council, the prosecutor redoubled his efforts to find states willing and able to accept the referral of ICTR indictments. Rwanda again emerged as the primary candidate to fulfil this strategy.

46. A renewed spirit of cooperation marked the OTP's dealings with Rwanda. Shortly after the last Appeal Chamber's decision in the *Hategekimana* referral was delivered, the OTP held a series of consultations with Rwanda's Prosecutor General to identify what steps could be taken to remove the last remaining obstacles to referral.⁵²

47. Over the next few years, the ICTR partnered with Rwanda and committed Member States to strengthen all aspects of Rwanda's justice sector.⁵³ This renewed commitment to capacity building proved to be crucial to the success achieved in connection with the prosecutor's second round of referral applications launched in late 2010.

A. Forging Partnerships

48. While capacity building was always an important part of the ICTR's outreach efforts,⁵⁴ the ICTR had no independent budget to support these

⁵² *Statement by Justice Hassan B. Jallow Prosecutor of the ICTR, to the UN Security Council*, 12 December 2008; *Statement by Justice Hassan B. Jallow Prosecutor of the ICTR, to the UN Security Council*, 4th June 2009, both at <http://www.ictr.org/default.htm> (last visited 3 October 2014).

⁵³ UN Doc. S/2008/726, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 3 November 2008), 21 November 2008, para. 58. *See also* *Statement by Justice Hassan B. Jallow Prosecutor of the ICTR, to the UN Security Council*, 4th June 2009, <http://www.ictr.org/default.htm>, in which he urged "the Security Council to call upon member states to redouble their efforts in supporting the capacity building of the Rwandan legal system" (last visited 3 October 2014).

⁵⁴ *See* UN Doc. S/RES/1503, UN Security Council Resolution 1503, 28 August 2003, p. 2: "Calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the

efforts.⁵⁵ Partnerships therefore had to be forged with external partners to help restore Rwanda's justice sector capacity.

49. Cooperation and funding were secured through partnerships with: Member States (including the Group of Friends of the ICTR),⁵⁶ regional organizations (including the European Union),⁵⁷ and Interpol.⁵⁸ These partnerships resulted in a broad range of capacity building activities, including those discussed in the following subsections.

1. Legislative Reform in Rwanda

50. With advice and support from the ICTR, Rwanda continued its efforts at legislative reform. Many of these reforms were specifically targeted to address the concerns identified in the first round of referral applications. Rwanda's pursuit of these reforms was motivated at least in part by its continued commitment to securing the referral of indictments from the ICTR.

a. Abolition of Solitary Confinement

51. Rwanda abolished the death penalty before the first round of referral applications were filed. But the referral chambers remained concerned that an accused, if transferred and convicted, could be subjected pursuant to Article 4 of the Abolition of Death Penalty Law to imprisonment with

ICTY and the ICTR and encourage the ICTY and ICTR Presidents, Prosecutors and Registrars to develop and improve their outreach programmes.”

⁵⁵ DIENG, A., *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, Northwestern Journal of International Human Rights, Volume 9, Issue 3, p. 406-407.

⁵⁶ The Group of Friends was an informal group of countries, including Belgium, Canada, France, Germany, Italy, United States of America, and The Netherlands, that provided support to the ICTR. See <http://ictr-archive09.library.cornell.edu/ENGLISH/newsletter/aug-sep07/aug-sep07.pdf>; DIENG, A., *l.c.*, p. 411.

⁵⁷ UN Doc. S/2007/676, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 20 November 2007, para. 51; UN Doc. S/2008/322, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 13 May 2008, para. 61.

⁵⁸ Interpol, for example, established the Rwandan Genocide Fugitives Project to help facilitate arrests by coordinating investigative activities among Rwandan authorities and the national investigative authorities of countries where alleged genocide suspects were believed to be hiding. See <http://www.interpol.int/Public/Wanted/images/rwanda.pdf>.

special conditions, including solitary confinement.⁵⁹ The relationship between the Abolition of the Death Penalty Law, which included provisions for solitary confinement, and the 2007 Transfer Law, which provided that life imprisonment would be the maximum penalty, was unclear. It could not be determined which law would prevail as the *lex posterior*⁶⁰ or *specialis*.⁶¹ Thus, the referral chambers found that, if referral were allowed, solitary confinement could be imposed as a penalty under the law existing at the time. If so, this would be contrary to international law, which generally precludes solitary confinement when not applied as an exceptional measure that is necessary, proportionate, restricted in time, and includes minimum safeguards.⁶²

52. The Appeals Chamber affirmed the referral chambers' decisions, noting that, because of the ambiguity in the laws, Rwandan courts could interpret the laws either way.⁶³ Thus, the risk identified by the referral chambers relating to the application of solitary confinement remained.

53. At the ICTR's urging, Rwanda adopted new legislation to remove this ambiguity. Rwanda modified its death penalty law to clarify that solitary confinement (referred to as imprisonment with special provisions) would not apply to cases transferred from the ICTR and other states.⁶⁴ The modified law removed any lingering doubt about application of the death

⁵⁹ *Munyakazi* (AC), paras. 8-21; *Kanyarukiga* (AC), paras. 6-17; *Hategekimana* (AC), paras. 31-38.

⁶⁰ In that case, the Abolition of the Death Penalty Law as the *lex posterior* would prevail over the 2007 Transfer Law, and life imprisonment with special provisions would be applicable to transfer cases.

⁶¹ In that case, the 2007 Transfer Law would prevail, pursuant to its Article 25, and life imprisonment without special provisions would be the maximum punishment.

⁶² See *Kanyarukiga* (AC), para. 15.

⁶³ Rwanda attempted to resolve this ambiguity by advising the *Hategekimana* Appeal Chamber that its parliament had recently amended the Abolition of the Death Penalty Law to render life imprisonment with special provisions inapplicable to cases transferred by the ICTR. The Appeals Chamber declined to credit this submission because there was no evidence to show that the amendment had already taken effect. *Hategekimana* (AC)), para. 38; see also *Kanyarukia* (AC), para. 14 (declining to credit Rwanda's submission that it had asked parliament for an authentic interpretation of the 2007 Transfer Law to clarify the ambiguity because the interpretation had not yet been provided).

⁶⁴ Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

penalty or solitary confinement. Those penalties were now inapplicable in any transferred case.

b. Immunity for Defence Teams and Witnesses

54. Another concern raised during the first round of referral applications related to the availability of defence witnesses and working conditions of defence teams.⁶⁵ The ICTR referral and appeal chambers determined that the defence would face problems in obtaining testimony from witnesses residing in Rwanda because of the consequences they might face. Some witnesses might be afraid to testify for the defence or dissuaded from doing so lest they be arrested or prosecuted for genocide denial, threatened, harassed, or even murdered. Regardless of whether these fears were well-founded, the referral chambers determined that some defence witnesses would be unwilling to testify in trials held in Rwanda. For witnesses residing outside Rwanda, the referral chambers expressed concern that these witnesses might be afraid to travel to Rwanda.

55. With advice and support from the OTP, Rwanda undertook reforms to address these concerns. In 2009, Rwanda amended its Transfer Law to provide enhanced immunity and protection for witnesses and defence teams.

56. Article 13 of the Transfer Law, as amended, stated that, “[w]ithout prejudice to the relevant laws of contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial.”⁶⁶ With this amendments, Rwanda ensured that all witnesses would be extended immunity for anything said or done in the course of trial, including any statements made in the course of trial amounting to genocide denial under either the current or revised ideology law.

57. Article 14 provided an additional guarantee of immunity for witnesses who travel from abroad. It stated that “[a]ll witnesses who travel

⁶⁵ *Munyakazi* (AC), paras. 32-45; *Kanyarukiga* (AC), paras. 18-35; *Hategekimana* (AC), paras. 14-30.

⁶⁶ 2013 Transfer Law, Article 13.

from abroad 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.”⁶⁷

58. Similar protections were afforded to members of defense teams in connection with the investigation or trial of any referred case. Article 15 of the Transfer Law guaranteed defence teams 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.”⁶⁸

c. Alternatives to Live Testimony

59. In addition to expanded protections and immunities for witnesses and defence teams, Rwanda adopted several measures to facilitate the taking of evidence from witnesses from abroad who may be unable or unwilling to physically appear before the High Court to give testimony. Article 14*bis* of the Transfer Law, as inserted in 2009, provided that a witness could testify by three alternative means: (a) by deposition in Rwanda or in a foreign jurisdiction before a presiding officer, magistrate or other judicial officer appointed by the judge for that purpose; (b) by video-link hearing taken by a judge at trial; or (c) by a Rwandan judge sitting in a foreign jurisdiction for the purpose of recording such *viva voce* testimony.⁶⁹ Testimony given in any of these ways must be transcribed so it can be made part of the trial record and shall carry the same weight as testimony given in court.⁷⁰ Each of these alternatives could, with appropriate logistical support, allow the accused to both face the witnesses and hear their testimony *viva voce*.

⁶⁷ *Ibid.*, Article 14.

⁶⁸ *Ibid.*, Article 15.

⁶⁹ *Ibid.*, Article 16.

⁷⁰ 2007 Transfer Law, Article 14 *bis*; 2013 Transfer Law, Article 16.

d. Overhaul of Penal Code and Code of Criminal Procedure

60. Rwanda adopted other legislative reforms to ensure that the accused's fair trial rights would be respected. Rwanda undertook an extensive overhaul of its Penal Code and Code of Criminal Procedure to modernize provisions and substantially reduce the range of criminal sentences, including for persons convicted of genocide ideology.⁷¹

61. These revisions also formalized the practice relating to the admission of accomplice testimony at trial.⁷² Other legislation permitted the President of the High Court the discretion to allow foreign and international judges to sit on the panel of any referred case.⁷³

e. Review of Genocide Ideology Law

62. As part of its legislative reform and to address concerns that overly broad application of the Genocide Ideology Law could have a chilling effect on witnesses, Rwanda solicited the input of a broad range of stakeholders, including leading international human rights groups, on how best to improve the law.⁷⁴ The recommendations resulted in an amendments intended to: a) establish a more direct nexus between the law's legitimate purposes and its scope; b) clarify potentially vague or overbroad terminology; c) specifically identify prohibited conduct and impose an intent element; and d) reformulate the sentencing structure.⁷⁵

⁷¹ Organic Law No. 01/2012/OL of 2 May 2012 instituting the Penal Code, Official Gazette of the Republic of Rwanda, 14 June 2012 (Article 135) . *See also The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Brief for the Republic of Rwanda as *Amicus Curiae*, 19 January 2012 (*Munyagishari* Rwanda's Brief), paras. 6-10.

⁷² Under the prior version of the Rwandan Code of Criminal Procedure, Article 59 appeared to preclude the presentation of evidence from those suspected of involvement in an offence. The amended Code eliminated this provision.

⁷³ Organic Law No. 03/2012/OL of 13 June 2012 determining the organisation, functioning and jurisdiction of the Supreme Court, Official Gazette of the Republic of Rwanda, 9 July 2012 (Article 13). *See also Munyagishari* Rwanda's Brief, para. 5.

⁷⁴ Article 13 of the Constitution, which is commonly referred to as the Genocide Ideology Law, prohibits revisionism, negationism, and trivialization of genocide. Its provisions are comparable to Holocaust denial laws that exist in many countries. *See Gatete* (TC), para. 62; *Kanyarukiga* (TC), para. 71

⁷⁵ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2011-75-R11bis, Letter from Martin Ngoga, Prosecutor General, Republic of Rwanda, to Judge Khalida Rashid Khan, 19 August 2011, p. 3-9.

63. These proposed amendments narrowed the scope of the Genocide Ideology Law and, when coupled with the enhanced immunities provided under the amended Transfer Law, substantially reduced the likelihood that witnesses would be unwilling to travel to Rwanda to testify in referred cases.

2. Infrastructure Improvements

64. Rwanda complemented these legislative reforms with infrastructure improvements. First, it created a new witness protection unit (WPU) within the judiciary primarily to service those defence witnesses who might be disinclined to seek services from the Witness-Victims Services Unit (WVSU) located within the Prosecutor General's Office.⁷⁶ The new unit was not strictly necessary because the Appeals Chamber found that WVSU functioned adequately,⁷⁷ but Rwanda nevertheless acted to remove any lingering concerns.⁷⁸ With the new unit, witnesses were now able to access the support and protection services through either WVSU or WPU.

65. Second, Rwanda established state-of-the-art detention facilities, in compliance with the Transfer Law.⁷⁹ A new internationally-compliant detention center in Kigali and a prison in Mpanga were built. Convicted persons from the Special Court for Sierra Leone (SCSL) were the first to occupy the new prison.⁸⁰ Rwanda represented that the conditions of

⁷⁶ On 15 December 2008, the President of Rwanda's Supreme Court directed that a witness protection unit be created in the registries of the Supreme Court and High Courts to protect the private life and security of witnesses pursuant to Article 14 of the Transfer Law. Each unit is administered by one or more registrars under the direction of the Chief Registrar. *Ordonnance No. 001/2008 du 15 décembre 2008 Président de la Cour Suprême portant instruction relative à la protection des témoins dans le cadre du renvoi d'affaires à la République du Rwanda par Le Tribunal Pénal International Pour Le Rwanda (TPIR) et par d'autres Etats.*

⁷⁷ *Munyakazi* (AC), para. 38; *Kanyarukiga* (AC), para. 27.

⁷⁸ See *Munyakazi* (TC), para. 62; *Kayishema* (TC), para. 42; *Kanyarukiga* (TC), para. 70; *Gatete* (TC), para. 61; *Munyakazi* (AC), para. 38; *Kanyarukiga* (AC), para. 27.

⁷⁹ 2007 Transfer Law, Article 23; 2013 Transfer Law, Article 26. This provision prescribes that prisoners transferred by the ICTR 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.

⁸⁰ Memorandum of Understanding between the Special Court for Sierra Leone and the Government of the Republic of Rwanda, 2 October 2009.

detention applicable to SCSL prisoners would apply to prisoners in any cases referred by the Tribunal.⁸¹

66. Third, Rwanda increased its video-link capacity. It created seven fully operational video-link units which are available for use in the trial of any referred case.⁸² With the assistance of Germany and the ICTR, it acquired a new video-link unit and installed it in one of the Supreme Court's courtrooms.⁸³ Rwandan courts began using these units to transmit testimony from witnesses located in Rwanda to foreign courtrooms, as well as in its own domestic cases. The same technology would be available to allow a witness to testify from a foreign jurisdiction to Rwanda.⁸⁴

67. Lastly, Rwanda expanded its legal assistance programs by allowing more flexibility in the application of procedures for reciprocal admission. Foreign lawyers were thus better able to secure admission to the Rwandan bar and appear as defence counsel before domestic courts.

3. Knowledge Sharing

68. After the first round of referral applications, the ICTR OTP, registry, and chambers intensified sharing best practices with Rwandan counterparts on broad range of matters aimed at strengthening Rwanda's capacity.⁸⁵

69. The ICTR prosecutor conducted workshops on investigation and prosecution of cases, information technology to enhance evidence and records management, pleading practice, trial and appellate advocacy, and substantive law. The training programs took place in both Rwanda and Arusha and were aimed at sharing best practices.

⁸¹ *Munyagishari* Rwanda's Brief, para. 23.

⁸² This system was set up by the ICTR with support from Germany. *DIENG, A., l.c.*, p. 415.

⁸³ *Munyagishari* Rwanda's Brief, para. 17.

⁸⁴ *Munyagishari* Rwanda's Brief, paras. 17-19.

⁸⁵ UN Doc. S/2008/322, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 13 May 2008, para. 60, *see* <http://www.icttr.org/default.htm> (last visited 3 October 2014).

70. The ICTR chambers and registry trained the Rwandan judicial sector in areas such as ICTR jurisprudence, case management, witness protection, judgement drafting, electronic legal research, documentation techniques and archiving practices, detention and conditions of confinement.⁸⁶ Between 2007 and 2011, the Registry organized several workshops for members of the Rwandan Kigali Bar Association, with funding from the European Union.⁸⁷ These workshops were specifically organized to increase the knowledge of Rwandan lawyers about ICTR jurisprudence and to prepare them for future referrals.⁸⁸ The workshops focused on substantive principles of international law (including review of the Tribunal’s jurisprudence relating to the legal elements of offences, modes of liability, and standards of proof and evidence), obligations of defence counsel, mock trials, and written and oral advocacy.⁸⁹

4. Outreach Efforts

71. To share information about its cases, the ICTR, with the financial support of the European Union, created an information center and ten regional centers. The centers were commonly known as “umusanzu mu bwiyunge” or “contribution to reconciliation.”⁹⁰

72. In addition, judgements and other major events in ICTR cases were reported in local newspapers through the issuance of regular press releases.⁹¹ And, since October 2014, proceedings relating to the return of Appeals Chamber judgements were made available on YouTube so victims and other interested persons can see justice being delivered.

⁸⁶ *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor’s Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 4 November 2010, Annexure L; UN Doc. S/2008/322, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 13 May 2008, para. 60, *see* <http://www.ictor.org/default.htm> (last visited 3 October 2014); DIENG, A., *l.c.*, p. 409, 411-414.

⁸⁷ DIENG, A., *l.c.*, p. 409.

⁸⁸ *Ibid.*, p. 409.

⁸⁹ *Ibid.*, p. 409-410.

⁹⁰ *Ibid.*, p. 408-409.

⁹¹ *Ibid.*

5. Experience Transfer

73. Another aspect of enhancing Rwanda's capacity to provide fair trials was experience transfer. Over the years, many Rwandans worked at the ICTR as translators, interpreters, defence counsel, registry officials, chambers staff, and prosecutors. As the ICTR completion strategy progressed, many of these experienced staff members returned to Rwanda and assumed posts in national government. This experience transfer promoted further integration of international fair trial standards into national practice.

B. Risks and Impact on Domestic Law

74. Ironically Rwanda's legal reforms and capacity-building efforts generated a new form of criticism. Because some of the reforms, such as protections afforded by the Transfer Law, were directed only to referred or transferred cases, critics alleged that Rwanda was creating a "two-tiered legal system" for referred and domestic cases with different condition of detentions, penalties, and procedures.

75. Rwanda has neutralized these concerns by expanding or promising to expand many of the reforms enacted for referred cases to domestic cases as well. For instance, the revisions of the Penal Code, Code of Criminal Procedure, and Genocide Ideology Law apply to all cases, not just referred cases. Similarly, the new witness protection services being provided by WPU along with increased capacity for video-link testimony are available in both domestic and referred cases.

76. Rwanda also plans to construct a new state-of-the-art detention facility that meets international standards for all prisoners, not only for the detention of prisoners in transferred cases.⁹² Moreover, the procedural safeguard put in place by the Transfer Law that referred cases could be heard in first instance by a bench consisting of three judges,⁹³ is now

⁹² *Munyagishari* Rwanda's Brief, paras. 21-23.

⁹³ 2007 Transfer Law, Article 2 (as amended in 2009); 2013 Transfer Law, Article 4. Although the Appeals Chamber, during the first round of referral applications, firmly rejected the concern that trial before a single judge in the High Court might violate an

available in complicated or novel domestic cases as well should the President of the High Court find it in the interests of justice to do so.

Key Lessons Learned

Capacity-building efforts require careful planning and coordination. The OTP's burden was somewhat lightened in this regard because Article 20 of the ICTR Statute identified the particular areas of national practice that needed to be assessed and evaluated. The first round of referral applications further sharpened the OTP's focus by identifying issues of particular concern. With this more targeted focus, the OTP and other ICTR sections could better plan outreach efforts, including the following:

- Formal training programs designed to meet targeted areas of need.
- Facilitating the transfer of knowledge to national authorities by recruiting national staff and extending internships to qualified applicants.
- When possible, further knowledge transfer could be gained through the use of embedded teams or co-locations whereby international and national staff work side-by-side.
- To make the changes sustainable, funding sources must be identified from the outset and national actors must seek appropriate budget allocations to implement the changes.
- Care should be exercised to avoid the perception of creating a two tiered justice system. While reforms may be motivated to respond to the needs of referred or transferred cases, national authorities should pursue any available avenues to extend the same reforms and infrastructure improvements to all domestic cases. Rwanda should serve as a model in this regard.

IV. Second Round of Referrals to Rwanda

77. With the legal reforms and improved infrastructure resulting from years of capacity-building efforts, the OTP was persuaded to launch a second round of referral applications in November 2010, starting with one accused in custody (Jean Uwinkindi), and two fugitives (Fulgence Kayishema and Charles Sikubwabo).⁹⁴ Five other referral applications

accused's right to be tried before an independent tribunal, Rwanda nevertheless put this additional procedural safeguard in place. *See Munyakazi* (AC), paras. 26, 50.

⁹⁴ *See The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-I, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11*bis* of

followed: Bernard Munyagishari, Ladislas Ntaganzwa, Ryandikayo, Aloys Ndimbati, Phénéas Munyarugarama.

78. A key lesson learned from the denial of the first round of referral applications was that reliance on Rwanda's legal framework alone was not sufficient. The OTP had to proactively counter defence arguments that, despite the reforms and infrastructure improvements that had taken place, Rwanda's legal framework was still insufficient to secure a fair trial. To do so, the OTP had to provide tangible proof that fair trial rights were available and honored in practice.

79. No developed precedent existed for how to assess fair trial rights. Because the jurisprudence of the other *ad hoc* tribunals had relied heavily on the existing legal framework of the forum country, there were no established methods for demonstrating that fair trial rights were available in practice.⁹⁵

80. The OTP recognized that any assessment of Rwanda's national capacity had to be flexible enough to account for different methods and means of achieving the desired result—a fair trial. Each jurisdiction follows its own approach to implementing internationally-recognized fair trial rights; the standards are broadly defined and few bright line rules exist.

81. The differences are perhaps most stark in the approaches followed by civil law jurisdictions and common law jurisdictions. Rwanda's civil law approach to criminal investigations, for instance, differed sharply from the largely common law approach followed by the ICTR. Under Rwandan law, the judicial police (subject to the control and supervision of the prosecution) are responsible for investigating alleged criminal offences. Investigations conducted by the Rwandan judicial police gather evidence both for and

the Tribunal's Rules of Procedure and Evidence, 4 November 2010; *The Prosecutor v. Charles Sikubwabo*, Case Nos. ICTR-95-1D-I & ICTR-96-10-I, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rule of Procedure and Evidence, 4 November 2010; *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

⁹⁵ See *supra*, para. 20.

against the accused, like in many other continental systems.⁹⁶ At the ICTR, in contrast, the prosecution gathered evidence against the accused, and the defence conducted its own investigation.⁹⁷ The OTP had to persuade the chambers that Rwanda's approach was adequate to protect fundamental fair trial rights recognized by international law, even though it did not reflect the wholesale incorporation of international laws and practices developed before international tribunals.

A. New Strategy for Referral

82. The OTP adopted several strategies for overcoming this challenge. First, it clarified the lens through which its applications would be evaluated by articulating a workable standard of review and burden of proof. Second, it adopted an evidence-based approach to proving Rwanda's national capacity. Third, it backstopped its submissions with a credible monitoring mechanism.

1. Workable Standard of Review and Burden of Proof

83. At the outset, the OTP had to address what standard of review and burden of proof should govern referral applications under Rule 11*bis*. The defence suggested that the ICTR judges had to be convinced "beyond reasonable doubt" that the accused's rights to a fair trial would be protected in Rwanda.⁹⁸ It claimed that it was incumbent on the prosecution to adduce sufficient evidence to exclude any real possibility that any of the accused's fair trial rights might be breached.⁹⁹

⁹⁶ See, e.g., *Uwinkindi* Rwanda's Brief, para. 27.

⁹⁷ See, e.g., ICTR Rules 39 (ii), 68 (A) (Rules of Procedure and Evidence).

⁹⁸ *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-Rule11bis, Prosecutor's Consolidated Response to: (1) Defence Response to the Prosecutor's Request for the Referral of the Case of Jean Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence; (2) *Amicus Curiae* Brief of Human Rights Watch in opposition to Rule 11*bis* Transfer; (3) *Amicus Curiae* Brief of the International Association of Democratic Lawyers (IADL) Pursuant to Rule 74 (Rules of Procedure and Evidence); and (4) International Criminal Defence Attorneys Association (ICDAA) *Amicus Curiae* Brief, 20 April 2011 (*Uwinkindi* Prosecution Response), paras. 14, 17-18.

⁹⁹ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Prosecutor's Response Brief, 28 September 2011 (*Uwinkindi* Prosecution Response (AC)), para. 11.

84. The OTP submitted that the standard for referral must be interpreted with reference to likelihoods or probabilities, not absolute certainties or proof beyond reasonable doubt.¹⁰⁰ This standard was reflected in the text of the rule itself, which provided that the “Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned.”¹⁰¹ By focusing on the fairness of a trial that has not yet occurred, the rule was based on predictions of what would happen if the indictment were referred. This assessment was necessarily prospective based on probabilities or likelihoods of what would happen in the future.

85. The standard of proof beyond reasonable doubt was thus inapplicable. It also made no practical sense. Proof beyond reasonable doubt is a trial standard. It can be meaningfully applied in a trial setting because the trier of fact is able to draw upon evidence relating to events that already have occurred. Rule 11*bis*, in contrast, looks forward to a trial that has not yet occurred. The rule could not expect omniscience on the part of referral chambers, particularly where, as in Rwanda, no prior cases had been referred for trial.

86. Most of Rwanda’s legal reforms and infrastructure improvements were new and, thus, largely untested. As noted above, these reforms primarily were applicable to referred or transferred cases, and no cases had yet been referred or transferred to Rwanda. Consequently, there was very little practice experience to draw upon in evaluating whether, if an indictment were referred, an accused would receive a fair trial in Rwanda. Under these circumstances, the OTP submitted—and the Chambers agreed—that it was entirely appropriate for a Chamber to focus on probabilities based on the protections afforded by Rwanda’s existing legal framework.¹⁰²

87. The other threshold challenge was clarifying the burden of proof under Rule 11*bis*. Overall, the prosecution accepted that the burden of proof

¹⁰⁰ *Uwinkindi* Prosecution Response, paras. 14-18.

¹⁰¹ Rule 11*bis* (C).

¹⁰² *Uwinkindi* (AC), paras. 37, 64.

of establishing that the trial of an accused in Rwanda would be fair rested with it as the moving party.¹⁰³

88. The burden of persuasion shifted depending on the issue at hand. The defence, at most, had a burden of persuasion to show that the prosecutor's submissions relating to Rwanda's ability to provide a fair trial should not be credited.¹⁰⁴ To discharge this burden, the prosecution submitted the defence had to provide *prima facie* support for any proposition. Rumor and innuendo were—in the OTP's view—not sufficient to refute the affidavits and other evidence the OTP presented in support of its applications.¹⁰⁵

89. To meet its burden, the OTP also invoked several well-established legal presumptions. Most significant was the presumption of judicial independence and impartiality that extends to all judges at the international and international levels. This presumption can only be overcome with tangible proof of partiality or bias.¹⁰⁶

90. In its submissions, Rwanda relied on the presumption that government officials discharge duties in good faith and with diligence.¹⁰⁷ Pursuant to this presumption, Rwanda submitted that it could not be lightly assumed that government officials would disregard their solemn obligations to enforce the law. Instead, good faith and diligence on the part of government officials in the discharge of legal obligations should be presumed.

91. Another presumption relied upon was that laws should be given a chance to operate before being declared inadequate.¹⁰⁸ In other words, a

¹⁰³ *Uwinkindi* Prosecution Response (AC), para. 10.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Uwinkindi* Prosecution Response, paras. 32-48 (defence sweeping allegations of political interference of the Rwandan judiciary).

¹⁰⁶ See, e.g., *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. the Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, paras. 28, 48, 77.

¹⁰⁷ *Uwinkindi* Rwanda's Brief, para. 54 (relating to alleged violation of the Transfer Law's immunity provisions by government officials).

¹⁰⁸ *Uwinkindi* Prosecution Response (AC), para. 15; *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 (*Uwinkindi* (TC)), para. 103 (regarding the alleged fears

law should not be declared invalid based on hypothetical scenarios that had not yet occurred. National judges should have the ability to address those scenarios when they arise and, if necessary, address any defects in existing legal provisions on a concrete not hypothetical factual record.

92. Application of each of these presumptions assisted the OTP in meeting its burden and refuting unsubstantiated defence contentions relating to the alleged bias or lack of independence of Rwanda's judges, as well as the alleged unwillingness of other government officials to enforce the law, particularly as relating to the immunity of defence teams and witnesses in referred cases. They also assisted the OTP in refuting imagined scenarios where a gap allegedly could exist in the application of Rwanda's existing legal framework.

2. Evidenced-Based Approach

93. After the first round of referral applications, the OTP learned that relying on the applicable legal framework was not alone sufficient to persuade the chambers that fair trial rights would be honored in practice. During the second round of referral applications, the defence and *amici* opposed to referral made clear that they would follow the same strategy as during the first round of applications: Rwanda's actual practice did not match its written laws.

94. The OTP needed to tackle these allegations head on. To do so, it needed to present objective evidence demonstrating Rwanda's practical ability to secure fair trial rights. This objective evidence was obtained primarily through interviews with responsible officials, review of records in domestic and other international cases, official interactions among Rwanda and other governments and the ICTR, and reports from third party observers and the media.

95. Prior to each interview, the OTP carefully reviewed the applicable legal framework for each fair trial right both as it existed under Rwanda's

of witnesses to testify and the amendment to Article 13 of the 2007 Transfer Law to include immunity for statements by witnesses at trial).

laws and as it had been interpreted by the ICTR and other international courts. It also reviewed decisions and arguments raised in the first round of referral applications to focus on the core concerns that had been identified relating to Rwanda's enforcement of each right. This thorough preparation proved essential to developing the comprehensive record necessary to address the concerns raised during the first round of applications and counter new objections raised by those still opposed to referral during the second round of applications.

96. All interviews were conducted in an open-ended manner. The goal was to learn more about Rwanda's practical experience and go beyond the written text of laws. For each right or legal provision, the OTP asked the responsible officials, who included senior and mid-level officials from all justice sectors (police, prosecution, judiciary, registry, defence, victim witness services, prisons) to provide examples drawn from actual cases or experiences.

97. The OTP also confronted responsible officials with criticisms that had been raised by the defence and others opposed the referral of cases. The goal was to better understand whether the criticisms were valid and, if not, how the OTP could demonstrate that the criticisms lacked merit.

98. All of the information gathered during these interviews was then cross-checked to confirm accuracy. Whenever possible, the OTP sought verification from case files or other records, site visits, or reputable media reports. For instance, case files from genocide cases prosecuted at the national level were reviewed to demonstrate the expertise of Rwanda's judiciary in trying genocide cases, as well as to show that accused were provided with appointed counsel and able to call witnesses in their defence. Site visits were conducted of Rwandan courtroom facilities, detention centers, prisons, and safe houses so an accurate assessment of capacity could be established. Media reports were used to put other allegations, such as those relating to so-called politically-motivated prosecutions, into proper context.

99. Statistical data gathered from objective sources, such as, third-party studies prepared by watchdog agencies or the Office of the Ombudsman provided additional confirmation. An independent corruption index prepared by Transparency International, for instance, revealed that Rwanda had the lowest level of public corruption in all of East Africa.¹⁰⁹ Other studies demonstrated a high level of public confidence and trust in the judiciary.¹¹⁰

100. Whenever possible, the OTP relied on diverse sources of information. It did not rely only on information provided by Rwandan government officials or agencies but also consulted NGOs, media, and other governments as well. Contemporaneously with the OTP's second round of referral applications, for instance, several European countries were seeking to extradite suspects to Rwanda. In connection with these proceedings, the Dutch presented reports from police investigators responsible for conducting numerous criminal investigations in Rwanda. These reports provided practical proof relating to the conduct of investigations in Rwanda, as well as Rwanda's cooperation with national authorities.¹¹¹ The Dutch experience also confirmed the availability and willingness of witnesses to testify for the defence.

101. In its final submissions, the OTP verified all of its factual submissions by providing the chambers with detailed affidavits signed by the responsible officials. It also attached all referenced documents and exhibits, including detailed statistical summaries to further support its submissions. The following examples illustrate how the OTP succeeded in persuading the referral chambers about Rwanda's practical ability to provide an accused with a fair trial:

¹⁰⁹ Transparency International, *East Africa Bribery Index 2010*, p. 73, available at <http://www.tkenya.org/documents/EABI-2010.pdf>.

¹¹⁰ See 2010 Joint Governance Assessment, Data Analysis Report, p. 32, 102.

¹¹¹ See Observations in Intervention of the Government of the Netherlands concerning Application No. 37075/79, para. 7, filed in the European Court of Human Rights, *Ahorugeze v. Sweden*, Application No. 37075/09 (27 July 2010).

a. Proving Presumption of Innocence and Judicial Independence

102. In refuting the allegation that the presumption of innocence would not be guaranteed and the Rwandan judiciary was not independent, the OTP first established that these rights were deeply engrained in Rwanda's legal framework, including Rwandan constitutional provisions.¹¹² It then provided tangible proof that the judges of the High Court and Supreme Court—the courts that would hear any trial and appeal in referred cases¹¹³—were in practice independent and impartial in adjudicating cases, and that they extended the presumption of innocence to accused.

103. This proof was established by review of judicial records. One reliable indicator was the rate of convictions and acquittals in trials before the High Court judges. Serious questions would be raised, for instance, if every accused who stood trial before the High Court were convicted. Statistics showed a healthy rate of acquittals in trial proceedings, thereby suggesting a well-functioning and independent judiciary.¹¹⁴

104. Another reliable indicator of judicial independence and impartiality was the rate of High Court judgements affirmed or reversed by the Supreme Court. Meaningful appellate review is one of the essential requirements of a functioning judicial system. Once again, statistics established a healthy rate of reversals in appeal proceedings. The Supreme Court had in fact reversed a significant percentage of High Court criminal convictions and granted defence acquittals.¹¹⁵

¹¹² *Uwinkindi* Rwanda's Brief, paras. 110-116 (with reference, *inter alia*, to Article 140 of Rwanda's constitution); *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-2002-79-I, Prosecutor's Request for the Referral of the Case of Phénéas Munyarugarama to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 13 June 2012 (*Munyarugarama* Request), paras. 42-43, 85-99.

¹¹³ 2013 Transfer Law, Articles 4 and 18; 2007 Transfer Law, Articles 2 and 16.

¹¹⁴ *Uwinkindi* Rwanda's Brief, para. 118.

¹¹⁵ *Ibid.*, para. 119.

b. Proving Right to Counsel

105. The right to legal representation was secured by Rwandan constitutional provisions and other laws.¹¹⁶ Although the defence acknowledged that Rwanda's legal framework guaranteed the right to counsel of his own choosing, it questioned whether the accused would have an effective defence.

106. To establish the capacity and experience of the Rwandan bar, and the availability of sufficient legal aid funds to ensure equality of arms between the parties, the OTP relied on detailed submissions from the Ministry of Justice and Kigali Bar Association (KBA).¹¹⁷ Those submissions established that Rwanda had a sufficient number of qualified lawyers available to represent the accused persons. The accused also could be represented by foreign lawyers admitted to practice before Rwandan courts under new provisions for reciprocal admission. The OTP cited recent admissions to practice that were extended to attorneys from the United States, France, Canada, Uganda, Cameroon, and Burundi.¹¹⁸

107. With regard to the availability of legal aid for indigent accused, the OTP relied on Rwanda's own detailed explanation of how the legal aid system worked, including provisions for funding in the Rwandan budget. The KBA bolstered this evidence in its *amicus curiae* briefs by providing specific examples of how the legal aid system functioned in practice and was being used in domestic cases.¹¹⁹

¹¹⁶ *Munyarugarama* Request, paras. 71-72, 79 (in particular Articles 18 and 19 of Rwanda's Constitution, and Articles 13(3), 13(6) and 13(10) of 2007 Transfer Law (2013 Transfer Law, Article 14(3), 13(6) and 13(10)).

¹¹⁷ See, e.g., *Munyarugarama* Request, paras. 72-73, 81. Those submissions relied upon the *amicus curiae* briefs filed by the KBA in *Uwinkindi* and *Munyagishari*, and affidavits issued by Maitre Emmanuel Rukangira, Acting President of the Kigali Bar Association, and Tharcisse Karugarama, Minister of Justice and Attorney General (see annexes S, T, U and X attached to the Request).

¹¹⁸ *The Prosecutor v. UWINKINDI Jean*, Case No. ICTR-2001-75-Rule 11bis, *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the Case of UWINKINDI Jean, 26 April 2011 (*Uwinkindi* KBA Brief), para. 18; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the Case of MUNYAGISHARI Bernard, 23 January 2011 (*Munyagishari* KBA Brief), para. 17.

¹¹⁹ *Uwinkindi* KBA Brief, paras. 23-26; *Munyagishari* KBA Brief, paras. 21-24.

c. Proving Equal Access to Evidence

108. During the first round of referral applications, ICTR referral and Appeals Chambers expressed concerns about the availability and protection of witnesses.¹²⁰ In the second round, the Prosecutor stressed that Rwanda's Transfer Law secured the right for the defence to obtain evidence on the same terms as the prosecution.¹²¹ These concerns, therefore, could no longer constitute an impediment to transfer of cases.¹²²

109. Rwanda also responded to allegations that potential witnesses would be unwilling to testify at trial by amending the Transfer Law to provide (a) immunity to defence witnesses and counsel for anything said or done at trial and (b) alternative means to allow witnesses to testify.¹²³ In light of these sources of immunity, any argument that defence counsel and witnesses allegedly feared arrest and prosecution for words or acts related to the investigation or trial of a referred case would be unfounded. Reluctant witnesses also could be compelled to present evidence for the defence.¹²⁴

110. Moreover, Rwanda concluded a number of mutual legal assistance agreements with other countries that would facilitate its own requests for assistance from other countries.¹²⁵ Statistics showed that, between 2006 and 2010, Rwanda processed over 100 requests for production of documents, access to detainees, and assistance in locating witnesses to be interviewed or provide evidence.¹²⁶ Over the years, Rwanda also accommodated numerous requests from other countries to facilitate the travel of witnesses and attorneys to and from Rwanda.¹²⁷ In a filing to the European Court of

¹²⁰ See *supra*, paras. 42, 54.

¹²¹ 2007 Transfer Law, Article 13(9)&(10); 2013 Transfer Law, Article 14(9)&(10).

¹²² See, e.g., *Munyarugarama* Request, para. 49; *supra*, paras. 55-58.

¹²³ See, e.g., *Munyarugarama* Request, paras. 44, 45, with reference to 2007 Transfer Law, Article 13 and 14bis (2013 Transfer Law, Articles 14 and 16).

¹²⁴ *Munyarugarama* Request, para. 68, with reference to Articles 54, 55 and 57 of the Code of Criminal Procedure.

¹²⁵ *Munyarugarama* Request, para. 65; *Uwinkindi* Rwanda's Brief, para. 41. The Appeals Chamber recognized this during the first round of referral applications, see *Munyakazi* (AC), para. 41; *Kanyarukiga* (AC), para. 32; *Hategekimana* (AC), para. 25.

¹²⁶ *Uwinkindi* Rwanda's Brief, para. 32-33, with reference to affidavit of Deputy Prosecutor General Alphonse Hitiyaremeye.

¹²⁷ *Uwinkindi* Rwanda's Brief, para. 42, with reference to affidavit of John-Bosco Siboyintore, Acting Head of NPPA's Genocide Fugitive Tracking Team.

Human Rights, the Dutch government attested that, on the basis of its years of experience in conducting investigations and trials in Rwanda, “the co-operation of the Rwandan judicial authorities has been found to be exemplary and there are no indications of interference with the investigating teams, nor witnesses for that matter.”¹²⁸

111. The president of the KBA confirmed that defence counsel in Rwanda had no difficulties in calling defence witnesses from abroad and within Rwanda at trial.¹²⁹ In support, the KBA cited its extensive experience in defending domestic genocide cases.

112. With regard to alleged fears of prosecution under Rwanda’s Genocide Ideology Law, the OTP established that there was not a single case reported where a witness was arrested or prosecuted for words or acts undertaken in connection with the defence of an accused.¹³⁰ Even if those fears existed, there were alternative means to present that testimony, including through the use of video-links.¹³¹

113. To establish the availability of video-links, the OTP presented evidence showing that Rwandan courts routinely used the units to transmit testimony from witnesses located in the rural provinces to courtrooms in Kigali. Rwanda also transmitted testimony from witnesses located in

¹²⁸ *Munyarugarama* Request, paras. 60, 77, with reference to Observations in Intervention of the Government of The Netherlands concerning Application No. 37075/09, 27 July 2010, filed in the European Court of Human Rights, *Ahorugeze v. Sweden*, Application No. 37075/09, para. 7 (attached to the Request as Annex O). *See also Ntaganzwa* (TC), para. 54, where the Trial Chamber observed that this record of cooperation has also been noted by the European Court of Human Rights.

¹²⁹ *Munyarugarama* Request, para. 62, with reference to Affidavit of Maitre Emmanuel Rukangira, Acting President of the Kigali Bar Association (“In practice, where defense counsel want to call a witness from abroad, they are also able to do it freely without any intervention from the authorities. In case the witness needs a visa, then counsel can contact the immigration authorities to facilitate the witness’ entry.”); *Munyarugarama* Request, para. 63, with reference to *Uwinkindi* KBA Brief, para. 49 (“Members of the KBA have dealt with numerous genocide and other criminal cases before lower courts, high courts and the Supreme Court. In their experience, accused persons are able to avail themselves of their right to present witnesses in their defence. They can attest that, in practice, the rights of accused persons ... to obtain attendance of and examine defence witnesses, are not infringed.”).

¹³⁰ *Uwinkindi* Rwanda’s Brief, paras. 49, 55; *Uwinkindi* Prosecution Response, paras. 89, 92; *Uwinkindi* Prosecution Response (AC), para. 62.

¹³¹ *See supra*, para. 66.

Rwanda to foreign courtrooms, including in Germany in connection with the *Rwabukombe* case.¹³²

114. All of this information was offered as tangible proof that Rwanda could provide equal access to evidence in practice.

3. Refuting Defense Allegations

115. In addition to building its own affirmative case, the OTP directly refuted defence allegations by tracking down rumors to their source; countering vague assertions with details based on actual practice; and putting reports of alleged past violations into proper context.

a. Confronting Rumors

116. One troubling rumor repeated by the defence involved the High Court Chief Justice, who allegedly made comments suggesting that there had been political interference with judicial decisions. According to the defence and its *amici*, the High Court Chief Justice allegedly told “at least two [unidentified] persons that judges in his court have been subjected to attempts by the executive to influence their decisions.”¹³³ The defence and its *amici* relied on this submission to support their sweeping assertion that the “political climate” in Rwanda rendered it unlikely that, if referral were allowed, the accused would receive a fair trial in Rwanda.¹³⁴

117. The OTP traced this rumor down to its alleged source by contacting the Chief Justice involved. The Chief Justice categorically denied making this statement or any similar statement.¹³⁵ He also provided a written statement refuting the allegation, which the OTP submitted to the chamber.

¹³² *Munyagishari* Rwanda’s Brief, paras. 17-20, with reference to affidavit of Fred Gashemeza, Director-General of ICT for the Supreme Court of Rwanda; *Uwinkindi* Prosecution Response (AC), para. 91, with reference to affidavit of Theoneste Karenzi, Coordinator of the Witness and Victim Protection and Assistance Unit (WVSU) attached to *Uwinkindi* Rwanda’s Brief (in the trial of *François Bazaramba*, the accused and his defence team remained in Finland to conduct cross-examination of witnesses in Rwanda *via* video-link; similarly, in the trial of *Desiré Munyaneza*, which took place in Canada, 14 prosecution witnesses and 7 defence witnesses testified from Rwanda *via* video-link).

¹³³ *Uwinkindi* Prosecution Response, para. 50.

¹³⁴ *Ibid.*, para. 32.

¹³⁵ Letter from High Court Justice Johnston Busingye to Chief Justice, p. 1 (attached to *Uwinkindi* Prosecution Response as Exhibit K).

118. The prosecution’s submission was bolstered by constitutional provisions on judicial independence and anti-corruption laws. The OTP underscored that Rwanda’s legal framework provided for an independent judiciary that was separate from the other branches of government, and enjoyed financial and administrative autonomy.¹³⁶ According to this legal framework, judges had life tenure and matters relating to judicial appointment, discipline, and removal were reserved to the judiciary itself.¹³⁷ Rwanda’s judiciary also was governed by a code of ethics that was policed by its own inspector general.¹³⁸

119. Moreover, the OTP offered data from past judicial discipline cases to demonstrate that the judiciary’s ethical rules were not empty formalisms.¹³⁹ These data showed that the incidents of official misconduct within the judiciary—while always serious—were committed by only a few rogue officials (4.6% of all registrars and 1.4% of all judges). More importantly, none of the registrars or judges implicated in official misconduct was a member of the High Court or Supreme Court—the courts designated to hear trials and appeals in referred cases.

b. Confronting Vague Allegations

120. With regard to allegations that victim and witness services in Rwanda were ineffective, the prosecution refuted these vague allegations with details based on actual practice. Data was presented showing the number of staff available, records of training, access to resources, and volume of services delivered.¹⁴⁰

¹³⁶ *Munyarugarama* Request, paras. 86-87 (with reference to Article 142 of the Constitution).

¹³⁷ *Munyarugarama* Request, paras. 88-89 (relying upon Article 8 of the Rwandan Law on Supreme Court, Articles 157-158 of the Constitution, Articles 12, 21-28 of the Law on High Council of the Judiciary, Articles 30-46, 70-78 of the Law on Statutes for Judges and Other Judicial Personnel).

¹³⁸ The Code was promulgated pursuant to Law No. 09/2004 of 29 April 2004 relating to the Code of Ethics for the Judiciary.

¹³⁹ *See, e.g., Munyarugarama* Request, para. 90. These data were attested to in the affidavit of François Régis Rukundakuvuga, Inspector General of the Supreme Court of Rwanda (attached to Request as Annex Y).

¹⁴⁰ *Uwinkindi* Rwanda’s Brief, paras. 69-81 (WVSU, relying upon affidavit of Theoneste Karenzi, Coordinator of WVSU (attached to Brief as Exhibit F)), 82-85 (WPU, based upon

121. Additionally, the OTP cited specific instances where Rwanda's victim and witness services facilitated testimony in international cases, including before the ICTR and foreign governments. Rwanda pointed out that the ICTR utilized Rwanda's witness protection service programs to assist in ICTR own cases; this was "perhaps the most concrete evidence establishing the practical effectiveness of Rwanda's witness protection services."¹⁴¹

122. Rwanda also indicated that WVSU had continued to provide services to victims and witnesses in both domestic and international cases. During 2011, WVSU responded to 73 incidents involving witness safety and provided assistance to the International Criminal Court and domestic courts in several countries that sought to obtain evidence from witnesses located in Rwanda.¹⁴²

123. It also highlighted improvements in infrastructure, including the creation of WPU as a new witness protection unit within the judiciary. In that way, Rwanda met the concerns expressed by referral and Appeals Chambers in previous Rule 11*bis* applications that witnesses, especially defence witnesses, might be reluctant to avail themselves of the WVSU because it is administered by the Rwandan Prosecutor General.¹⁴³

124. To respond to defence arguments that the WPU was not yet fully operational, the OTP submitted evidence establishing that WPU's services were not yet required because no cases had been referred to Rwanda. Following the ICTR's decision to transfer cases to Rwanda for trial, Rwanda's Chief Justice directed the immediate activation of the WPU.¹⁴⁴

affidavit of Oliver Rukundakuvuga, Chief Registrar of the Supreme Court (attached to Brief as Exhibit G)); *Munyagishari* Rwanda's Brief, paras. 11-13 (WPU, relying upon affidavit of Theoneste Kareenzi, Coordinator of WVSU, attached to Brief as Exhibit F).

¹⁴¹ *Uwinkindi* Rwanda's Brief, para. 86, *see also* para. 87, relying upon affidavit of Theoneste Kareenzi, Coordinator of WVSU (attached to Brief as Exhibit F).

¹⁴² *Munyagishari* Rwanda's Brief, paras. 14-16, relying upon Affidavit of Theoneste Kareenzi, Coordinator of WVSU (attached to Brief as Exhibit F).

¹⁴³ *Munyakazi* (TC), para. 62; *Kayishema* (TC), para. 42; *Kanyarukiga* (TC), para. 70; *Gatete* (TC), para. 61; *Munyakazi* (AC), para. 38; *Kanyarukiga* (AC), para. 27.

¹⁴⁴ *Munyagishari* Rwanda's Brief, paras. 11-13, with reference to Affidavit of Anne Gahongayire, Secretary General of the Supreme Court of Rwanda (attached as Exhibit D to Brief); *Munyarugarama* Request, para. 53.

c. Confronting Alleged Past Violations

125. The OTP also put situations where past fair trial violations allegedly occurred into context or distinguished them from the current situation. Fair trial violations allegedly committed in *Gacaca* proceedings, for example, were distinguished because these proceedings were largely based on traditional—not formal—justice procedures. And none of them was subject to the protections afforded under Rwanda’s transfer law, or the monitoring and revocation provisions available under Rule 11*bis*.¹⁴⁵

126. Alleged politically-motivated prosecutions of opposition leaders were confronted by showing the legitimacy of the charges under Rwandan law. The OTP examined the judgments returned in those cases, and established that the prosecutions were not politically motivated but grounded, instead, on serious violations of Rwandan law.¹⁴⁶

127. The OTP also pointed out that the focus of the Rule 11*bis* inquiry was on fair trial rights as applied to a particular category of cases, i.e., those referred by the ICTR. An overall assessment of Rwanda’s domestic political situation or its handling of domestic cases that were not subject to the same legal protections was beyond the rule’s scope.

128. In fact, as the OTP noted, the so-called political cases on which the defence relied involved entirely different issues than the referred cases and most of were not even pending in the High Court or Supreme Court.¹⁴⁷ In any event, many of these cases resulted in full or partial acquittals. A

¹⁴⁵ See, e.g., *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11*bis*, Prosecutor’s Response to Uwinkindi’s Motion for Stay of Uwinkindi’s Transfer and Request for Time to File Motion for Reconsideration, 18 April 2012, para. 10, with reference to *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011 (*Uwinkindi* (TC)), para. 196; *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 22 February 2012 (2012 *Kayishema* (TC)), para. 142; *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11*bis*, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 26 March 2012, para. 140.

¹⁴⁶ *Uwinkindi* Prosecution Response, paras. 40-46.

¹⁴⁷ *Ibid.*, para. 39.

result, the OTP submitted, that belied the defence's allegations of political interference in judicial decision-making.¹⁴⁸

4. Site Visit

129. To remove any lingering doubts about Rwanda's capacity to ensure a fair trial, the OTP suggested that Rwanda invite the chambers to conduct a site visit. During the site visit, the chambers would have the opportunity to observe the courtrooms where the trials would take place, including available facilities for simultaneous translation and video-link testimony. The chamber also could inspect detention facilities where the accused would be housed during trial and—if convicted—during any period of incarceration, as well as safe houses for protected witnesses.¹⁴⁹ In addition, a site visit could include meetings with Rwandan officials most responsible for ensuring the accused's right to a fair trial, including the Chief Justice of the High Court and Prosecutor General.¹⁵⁰

130. The chambers, however, declined Rwanda's invitation, finding it unnecessary in light of the information already presented. Nevertheless, the possibility of site visit was one practical suggestion for demonstrating Rwanda's national capacity first hand.

B. Limitations on ICTR's Assessment of National Capacity

131. Although the approach the ICTR followed in testing national capacity to support fair trial rights proved effective, it relied heavily on adversarial litigation. The chambers, of course, were free to consider any information available to them in making this assessment. Nevertheless, the primary sources of information were the arguments and submissions of the parties and *amici*. As advocates, each side argued their particular point of view, and the chamber was left to resolve these often diametrically opposed views. This adversarial process sometimes invited the chambers

¹⁴⁸ *Ibid.*, para. 48.

¹⁴⁹ *Ibid.*, para. 134.

¹⁵⁰ *Ibid.*, para. 135.

to intrude into matters far afield from the core issue of ensuring fair trial rights in the national courts.

1. Alternatives to Adversarial Process

132. A less adversarial process may have resulted in a more objective assessment of national capacity. It also likely would have avoided the prolonged litigation that characterized the ICTR's referral process. As noted below, the *Uwinkindi* referral litigation took approximately two years to complete from filing through appeal. It also continues to trigger ongoing litigation relating to the proceedings in Rwanda.

133. One alternative that could be used in future cases would be to appoint an expert panel or distinguished *amicus curiae* to independently investigate and report to the chamber on national capacity. This approach could develop a more neutral record for the chamber to assess. The ultimate decision on whether to refer a case would, of course, remain with the chamber but an outside expert could help reduce the areas in dispute and perhaps expedite the referral process.

134. On the other hand, the back-and-forth that characterized the ICTR's adversarial process resulted in close scrutiny of virtually all allegations. Access to information also was facilitated by the OTP's years of engagement with national authorities. It is unlikely that many outside experts would be able to secure comparable levels of access and factual scrutiny.

2. Avoiding Intrusion into Sovereign Interests

135. Another limitation in the ICTR's assessment of national capacity was the tendency of the adversarial process to invite the chambers to examine issues unrelated to fair trial rights. This aspect was concerning because it intruded too far on the sovereign interests of the referral state and could, if allowed, deter other states from accepting future referrals.

136. Referral chambers, of course, retain broad discretion in deciding whether to refer a case to a national jurisdiction. Implicit in this discretion is a referral chamber's authority to impose reasonable conditions on referral. But this discretion is not unlimited. The condition should, at a

minimum, be relevant or reasonably related to the fundamental objective of ensuring that, if referral is allowed, the trial in the referral state will be fair.¹⁵¹

137. Every national jurisdiction willing to accept referred cases should remain free to interpret and apply their domestic laws in a manner they see fit. Assessment of national capacity should be limited to determining whether national laws are adequate to safeguard fair trial rights as recognized by international law. Once satisfied that national laws are adequate to safeguard fair trial rights, referral chambers should not attempt any further assessment or interpretation how national laws may be applied in the future.

138. Matters unrelated to fair trial rights as recognized by international law should not be grounds for rejecting referral or transfer. In the *Munyagishari* referral proceedings, the OTP successfully challenged the referral chamber's imposition of two conditions on referral that were unrelated to fair trial rights and, thus, beyond the chamber's authority to impose.¹⁵²

139. The first condition imposed by the *Munyagishari* referral chamber, which the OTP successfully challenged on appeal, related to the qualifications of counsel appointed to represent transferred accused. The referral chamber conditions referral on Rwanda's assurance that appointed counsel would have prior experience in defending international criminal cases, including use of video-link technology.¹⁵³ No international legal instrument imposed any similar requirement, nor did the rules of any international tribunal.¹⁵⁴ This condition thus intruded too far into the

¹⁵¹ *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, Prosecutor's Appellant's Brief, 29 June 2012 (*Munyagishari* Prosecution Appeal), para. 11, with reference to *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005, para. 51 ("under Rule 11bis of the Rules, the judges have inherent authority to issue orders which are reasonably related to the task before them, i.e., satisfy themselves that the accused will receive a fair trial of his case is referred").

¹⁵² *Ibid.*

¹⁵³ *Munyagishari* (AC), para. 109.

¹⁵⁴ *Munyagishari* Prosecution Appeal, paras. 3, 18-20.

internal domestic affairs of the referral state and did so in a manner that was not reasonably related to furthering any fair trial right recognized under international law. Having determined that the right of the transferred accused to appointed counsel was secure, the referral chamber could not impose the further requirement that appointed counsel possess previous international experience in eliciting testimony from witnesses abroad or *via* video-link technology.

140. The second condition successfully challenged related to the interpretation and application of Rwanda's laws for compelled witness testimony. The referral chamber conditioned referral on a written assurance from Rwanda's Prosecutor General that Rwanda's laws providing for compelled witness testimony would not be interpreted or applied to force a witness who testified in the referred case to subsequently provide testimony in a domestic case, unless the Prosecutor General agreed to extend the Transfer Law's immunity provisions to the domestic case. This requirement also was set aside because the situation was entirely hypothetical. To require a state to concede how its laws might be applied to hypothetical situations that have not occurred goes too far, and is not necessary to ensure the transferred accused's fair trial rights.¹⁵⁵

141. In sum, any assessment of national capacity should be based on objectively verifiable facts that have a demonstrable nexus to ensuring that any trial in the referral state will be fair.

¹⁵⁵ *Munyagishari* Prosecution Appeal, paras. 32-38; *Munyagishari* (AC), paras. 117-119.

Key Lessons Learned

Based on the prosecution's experience in proving capacity during the second round of referral applications, the following best practices can be shared:

- Legal framework alone may not be sufficient to establish the capacity of a national judicial system to safeguard fair trial rights in cases referred by the Tribunal.
- Investigations must be undertaken to locate objective evidence demonstrating compliance with fair trial rights.
- The adversary process is one way to establish national capacity but, since it might be time consuming and not always objective, consideration should be given to other methods such as use of impartial expert panels or *amicus* reports from independent experts.
- Site visits should be conducted to fairly assess conditions.

To avoid intruding too far on national interests, assessments should be limited to safeguarding internationally recognized fair trial rights in referred or transferred cases.

V. Monitoring and Revocation

142. Rule 11*bis* established two critical safeguards to fair trial rights for cases referred to national jurisdictions: monitoring and revocation. The 2011 amendments to Rule 11*bis* strengthened these provisions by expanding the referral chamber's authority *proprio motu* to appoint monitors and initiate revocation.¹⁵⁶ Unlike earlier versions of the rule, the prosecutor no longer had sole discretion to send monitors to the referral state or to initiate revocation proceedings; the chambers may exercise that discretion as well.

143. The accused also may trigger operation of these safeguards by raising any complaints with the referral chamber and asking it to exercise its authority *proprio motu*.¹⁵⁷ Once the revocation process is started, the accused also may be heard, *suo motu*, by the chamber.

¹⁵⁶ Rule 11*bis* D(iv) and Rule 11*bis* (F) (amendments adopted during the 23rd ICTR Plenary of 1 April 2011).

¹⁵⁷ *Uwinkindi* (AC), para. 85.

144. The safeguards of monitoring and revocation were only intended to safeguard the delivery of fair rights; they were not substitutes for those rights. Thus, a referral chamber first had to satisfy itself based on the parties' submissions that the accused's fair trial rights will be adequately secured in the referral state.¹⁵⁸ It then had the discretion to craft a comprehensive monitoring mechanism to safeguard those rights, reserving for itself the ultimate power to revoke referral should any fundamental violation occur.

145. Recognizing that the ICTR's closure could leave a gap in enforcement of the monitoring and revocation remedies, the Security Council directed the MICT to continue to monitor all indictments referred by the ICTR to national courts and authorized it to revoke any ICTR referral order, either at the request of the prosecutor or *proprio motu*.¹⁵⁹ Thus, the cases referred by ICTR to France and Rwanda are now being monitored by the MICT.¹⁶⁰

A. Monitoring

146. The ICTR recognized that "it is important that any system of monitoring the fairness of the trial should be cognizant of and responsive to genuine concerns raised by the Defence, as well as by the Prosecution."¹⁶¹ In other words, any monitor appointed by the tribunal or court should be neutral and objective.¹⁶²

147. Monitors also "should have broad experience in identifying and combating abuses of human rights on the continent, and should be trustworthy and capable of making a credible application through the Registrar to the President for revocation of the case, if warranted."¹⁶³ Monitors, therefore, must be experienced and knowledgeable about human rights, particularly in the region where the crimes occurred (e.g., Rwanda).

¹⁵⁸ *Ibid.*, para. 83.

¹⁵⁹ See Articles 6.5 and 6.6 of the MICT Statute, S/RES/1966 (2010).

¹⁶⁰ See also *supra*, para. 37.

¹⁶¹ *Uwinkindi* (TC), para. 208; 2012 *Kayeshima* (TC), para. 148.

¹⁶² See International Commission of Jurists, Trial Observation Manual, June 2002, p. 5, available at <http://www.icj.org/dwn/database/FinalElectronicDistributionPGNNo5.pdf>.

¹⁶³ 2012 *Kayeshima* (TC), para. 159.

148. Additionally, monitors must profess sufficient professional stature, credibility, and independence so that their observations garner respect both before the tribunal and international community.¹⁶⁴ In this regard, it is important that any monitor not only be independent in fact but also be perceived to be independent.¹⁶⁵

149. Prior to the second round of referrals, the prosecutor secured the agreement of a well-recognized regional commission that possessed all of these attributes to serve as the OTP's monitor in any referred cases.¹⁶⁶ The referral chambers agreed and selected the same organization to serve as the Tribunal's monitor.¹⁶⁷

150. Considering that an independent monitor could not serve both the prosecutor and chambers at the same time, the prosecutor thereafter decided to appoint a respected national judge, with substantial criminal law experience in the region, as his own monitor.

151. The regional commission was intended to undertake monitoring for the chambers, but that arrangement quickly ran into administrative difficulties. The Registry submitted that it did not have funds available to pay for monitoring.¹⁶⁸ It proposed that efforts be made to secure the services of a monitor on a *pro bono* basis.

¹⁶⁴ See Office of the High Commissioner of Human Rights, Training Manual on Human Rights Monitoring, 2001, Chapter XIII, p. 287, available at <http://www.ohchr.org/Documents/Publications/training7part1315en.pdf> (last visited 22 January 2015).

¹⁶⁵ See Organization for Security and Co-operation in Europe, Trial Monitoring: A Reference Manual for Practitioners, 2008, p. 51, available at <http://www.osce.org/odihr/31636> (last visited 22 January 2015).

¹⁶⁶ See, e.g., *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 4 November 2010, para. 113.

¹⁶⁷ *Uwinkindi* (TC), paras. 208-213.

¹⁶⁸ See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Registrar's Submissions regarding the Transfer of the Accused to the Custody of the Republic of Rwanda, 19 January 2012. The Registrar's failure to ensure that sufficient funds would be available to implement the Tribunal's likely monitoring of the *Uwinkindi* case was all the more surprising given that the Prosecutor included provision for appointment of his own monitor in his budget submissions and the Tribunal amended Rule 11bis to specifically allow the Chamber to appoint its own monitor in addition to the Prosecutor's monitor. See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11bis, Prosecutor's

152. This lack of dedicated funding resulted in substantial delay in the transfer of the accused, and prolonged litigation.¹⁶⁹ The impasse eventually was resolved through the appointment of ICTR staff as interim monitors,¹⁷⁰ while a lengthy process was undertaken to find *pro bono* monitoring services for the Tribunal.

153. Additional problems arose in connection with the interim monitoring mechanism. Initial reports from the interim monitors revealed confusion over the scope of responsibility and limitations imposed on monitoring national proceedings. As a result, the ICTR President issued formal Guidelines for Monitors.¹⁷¹ These guidelines, which are summarized in the table below, clarified the role of the ICTR staff monitors as observing and not interfering. Additionally, the guidelines stressed that monitors should remain neutral and solicit input from both sides to ensure balanced reporting.

Response to Registrar's Submissions regarding the Transfer of the Accused to the Republic of Rwanda, 18 January 2012, para. 4.

¹⁶⁹ The delay in the Registry's implementation of the referral orders delayed the transfer of the accused, and inevitably delayed the start of the trial proceedings in Rwanda as well. On 23 February 2012, the Appeals Chamber expressed its expectation that Uwinkindi would not be transferred until a monitoring mechanism would be in place. (*See Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, para. 17.) On 19 April 2012, the Appeals Chamber found that there was no longer any basis for staying the transfer of Uwinkindi to Rwanda, in light of the ICTR President's decision of 5 April 2012 to assign two legal officers from the Tribunal's Registry or Chambers as interim monitors. (*Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Motion for a Stay of his Transfer to Rwanda and for Time to File a Request for Reconsideration, 19 April 2012, p. 3.)

¹⁷⁰ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on the Monitoring Arrangement for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012.

¹⁷¹ ICTR-01-75-R11bis, Guidelines on Monitoring Trials Referred to National Jurisdictions under Rule 11bis by ICTR Staff Monitors, 29 June 2012, based on the principles of non-intervention in the judicial process, objectivity and harmonisation. Also interesting to note is the MICT *President's Decision on Registrar's Submission regarding the Monitoring Mechanisms in the Uwinkindi and Munyagishari Cases* issued upon the Registrar's request to seek certain modifications concerning the terms of reference of the monitors in the cases of *Uwinkindi* and *Munyagishari* in relation to reporting, revocation, and detention matters, especially in light of certain differences regarding the scope of monitoring and role of monitors in these cases. *See Prosecutor v. Jean Uwinkindi & Prosecutor v. Bernard Munyagishari*, Case Nos. MICT-12-25 & MICT-12-20, Decision on Registrar's Submissions regarding the Monitoring Mechanisms in the *Uwinkindi* and *Munyagishari* Cases, 15 November 2013.

154. Confusion also existed in the treatment of monitoring reports. The prosecutor always intended the OTP monitor's reports to be confidential because the reports were intended to provide not only objective factual information related to the conduct of proceedings but also subjective analysis and opinion related to the effectiveness of the prosecution.

155. At first, the reports prepared by the Tribunal's monitors also were regarded as confidential submissions to the President. Over time however public versions of the reports, which were sanitized to remove confidential information, were released and posted on the Tribunal's website.

156. By making the Tribunal reports public, the ICTR promoted transparency, but it carried a price as well. Public reports often became fodder for repeated defence attempts to revoke referral orders—a point discussed in the next section.

157. At a minimum, any trial monitoring reports should include the following basic information:

- the specific dates of the reporting period;
- identification of all motions filed during the reporting period;
- identification of all decisions filed during the reporting period;
- any additional information the parties wish to have included in the report or notice that, after consultation, a party has chosen not to provide any input for the reporting period; and
- any other information the monitor deems relevant to the fair trial rights of the accused.¹⁷²

¹⁷² *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, para. 33; *see also* *The Prosecutor v. Jean Uwinkindi and Bernard Munyagishari*, Case Nos. MICT-12-25 and MICT-12-20, Decision on Registrar's Submission Regarding the Monitoring Mechanisms in the *Uwinkindi* and *Munyagishari* Cases, 15 November 2013, para. 33 (The President of the mechanism "consider that the requirement to include in the monitoring reports all information provided by the parties in Rwanda should not be construed so as to suggest that the monitors are obligated to include all information provided without limitation and without regard to the pertinence or nature of the information").

158. To minimize administrative difficulties, consideration should be given to establishing a standing panel of experts who could be called upon to provide monitoring services in any referred case. The terms of reference, including financial compensation, should be worked out in advance so the delays experienced by the ICTR in deploying the Tribunal's monitors are not repeated.

Key Lessons Learned

The OTP's experience with the monitoring mechanism provided several valuable lessons for other practitioners. Adequate resources must be provided in advance for any monitoring mechanisms. The prosecutor, for instance, included funding for the OTP monitor in his budget submissions. The Registry did not, apparently because it believed services could be arranged on a *pro bono* basis. This expectation proved difficult to fulfill, particularly when the chambers required that monitoring would be conducted by two staff on a full-time basis.

Additionally, there should be consensus on the qualifications of the monitor. The OTP, for instance, suggested that any monitor should have substantial experience with the conduct of criminal proceedings in the region and be of sufficient stature or professional standing to ensure that the monitoring reports carried sufficient weight and credibility. To ensure independence and impartiality, it also recommended against appointing the Tribunal's own staff members as monitors.

A decision also should be made in advance whether reports should be public or private. Reports from ICTR monitors were submitted confidentially. After review to excise any confidential information, public versions of the monitoring reports were released and available on the MICT website.

B. Revocation

159. Referral chambers and parties can seek revocation of the referral to national jurisdiction if a violation of fair trial rights was committed in the concerned national jurisdiction. Although there is no express provision in the MICT Rules granting an accused in a referred case the right to initiate proceedings seeking revocation of a referral order,¹⁷³ referral chambers have recognized the right of an accused to bring perceived violations to the

¹⁷³ MICT Rules of Procedure and Evidence, Article 14.

attention of the chambers and seek appropriate orders, including revocation.¹⁷⁴

160. Referral chambers emphasized, though, that revocation of a referral order must be treated as “a remedy of last resort,” given the substantial delays that would inevitably result were an order referring a case to a national jurisdiction revoked.¹⁷⁵ Revocation is not a panacea intended to be invoked for any perceived violation of rights in the referral state.¹⁷⁶ Rather, consideration must necessarily be given to the nature and degree of the alleged violation and whether it amounts to a fundamental deprivation of fair trial rights secured by international law.¹⁷⁷

161. Indeed, a too liberal interpretation of the revocation process could frustrate both the referral process and achievement of fair trial rights. The referral process is frustrated because revocation proceedings necessarily involve the tribunal that referred the case to national authorities in ongoing litigation. The aim of referral is to transfer responsibility for the case to national authorities. If litigation aimed at securing the revocation of referral orders is not restricted to fundamental violations of rights, it threatens to prolong the referring court’s involvement in the case and undermine the authority of national courts to resolve fair trial issues in the first instance.

162. Additionally, protracted post-referral litigation could result in undue delay in bringing cases to trial and interfere with proceedings in national jurisdictions. Pursuant to Article 20(iv)(c) of the ICTR Statute,¹⁷⁸ an accused has the right to be tried without undue delay. The delay in

¹⁷⁴ See, e.g., *Uwinkindi* (AC), paras. 79, 85 (citing *Uwinkindi* (TC), p. 59); *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 6 June 2012 (*Munyagishari* (TC)), p. 56.

¹⁷⁵ *Uwinkindi* (TC), para. 217; *Munyagishari* (TC), para. 216.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Munyagishari* (AC), paras. 106-108 (noting that conditions imposed on referral must be reasonably related to the objective of securing a fair trial consistent with standards recognized by international law).

¹⁷⁸ MICT Statute, Article 19 (4)(c).

proceedings brought about by referring cases to national jurisdictions unavoidably impacts the accused's right to an expeditious trial.

163. While the proceedings for the referral of cases to France took only a few months,¹⁷⁹ those cases have not yet been concluded—over seven years after referral was allowed.¹⁸⁰ The proceedings for the referral of cases to Rwanda took a substantially longer time. The first round of referral applications in 2007 took over four years on average to complete from filing to appeal.¹⁸¹ The second round of referral applications with respect to in custody cases (Uwinkindi, Munyagishari) took two years from filing to appeal.¹⁸² Also, post-referral litigation in both cases was substantial even after the referral orders were affirmed on appeal.¹⁸³

164. Too liberal an interpretation of the remedy of revocation could result in even more delays. And, if allowed, require proceedings to start afresh in the referral court.

165. To avoid this prospect, international courts cannot function as “super” courts of appeal reviewing every stage of trial in a referred case. Revocation should indeed be a remedy of last resort. If a fundamental violation can be established, an international court should consider whether the situation is capable of being remedied by means short of revocation, including, for instance, enhanced monitoring efforts or resort to remedies available in the referral state.¹⁸⁴

166. The referral state should be given an opportunity to be heard on any revocation application. The referral state is often in the best position to indicate whether any violation has been established and, if so, what steps

¹⁷⁹ The Prosecutor's referral applications vis-à-vis France in *Bucyibaruta* and *Munyeshyaka* were both filed on 12 June 2007, and decisions granting these referral applications were issued on 20 November 2007. *See supra*, paras. 36-37.

¹⁸⁰ *See supra*, para. 37.

¹⁸¹ *See supra*, para. 39, 47, 77.

¹⁸² *See supra*, para. 77.

¹⁸³ *See, e.g., supra*, paras. 152, 156.

¹⁸⁴ *See In the Matter of Jean Uwinkindi*, Case No. MICT-12-25, Prosecutor's Opposition to Jean Uwinkindi's Motion for Revocation of Referral Order, 25 September 2013 (Prosecutor's Opposition), para. 6.

are being taken to address the violation. Revocation should be available only when a fundamental violation of fair trial rights is established and the violation cannot be adequately remedied through resort to established procedures under national law.¹⁸⁵

167. Only when the violation of fair trial rights is fundamental and incapable of being adequately remedied through resort to available domestic laws or procedures should the chamber take the drastic step of revoking the referral of a case from a national jurisdiction. Anything less would render the referral process grossly inefficient and ineffective as every perceived violation of rights—no matter how insubstantial or ephemeral—could be used to trigger revocation and, thus, unravel the often lengthy proceedings leading to the referral order and derail proceedings in the referral state.¹⁸⁶

Key Lessons Learned

The following best practices are recommended with respect to revocation of referral orders:

- the revocation mechanism should be reserved only for fundamental violations of fair trial rights that national authorities are unable or unwilling to remedy;
- allegations based on violations still capable of being remedied by resort to national authorities should be summarily dismissed; and
- national authorities should be given opportunity to be heard prior to any revocation to establish willingness and capacity to cure any fundamental violation.

¹⁸⁵ This is also the approach adopted by the MICT President in deciding requests for revocation. See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda, 12 March 2014; *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda, 13 March 2014; *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Decision on Second Request for Revocation of an Order Referring a Case to the Republic of Rwanda, 26 June 2014.

¹⁸⁶ Prosecutor's Opposition, para. 7.

VI. Concluding Thoughts

168. While the ICTR's referral of cases to national jurisdictions was successful, important concerns remain relating to encouraging more national jurisdictions to assume the financial and other burdens associated with prosecuting international crimes committed in other jurisdictions. Preference should be given to referring cases to the jurisdictions where the crimes were committed.

169. In conflict or post-conflict regions, this may require both financial and technical support for capacity-building efforts. Whenever possible, consideration should be given to ensuring that capacity-building efforts are directed at the entire domestic justice system, not just a small category of international cases. A gradual approach to capacity building is however one effective way of building support for wholesale legal reform and infrastructure improvements.

170. Efforts also should be undertaken to reduce delays associated with proving national capacity. Consideration should be given to the use of an expert commission or distinguished amici curiae to advise the chamber in an objective manner. While the adversarial process may reach the correct result, it is not always a fast process as the ICTR's heavily-litigated applications for referral to Rwanda showed.

171. Substantial improvements also could be made to the monitoring and revocation process. The terms of reference for any monitor should be clear from the outset. Financial arrangements also need to be in place as monitors should not be expected to provide expert services free of charge. Consideration also should be given to the use of a standing body of experts who could be available to monitor fair trial rights in national courts.

172. Lastly, the process for revocation of cases should be restricted to addressing only those instances where a fundamental violation of fair trial rights has been established and the referral state has declined or refused to provide an adequate remedy. Otherwise, referral courts risk undermining the authority of national courts to resolve in the first instance any disputes

relating to the conduct of trial. Revocation, in short, should remain a remedy of last resort so national authorities remain empowered to discharge their primary responsibility for ensuring a fair trial.

Summary of Key Lessons Learned

Finding Willing and Able States

- The OTP's experience in identifying national jurisdictions willing to accept the referral of international criminal cases demonstrates that financial incentives may be necessary to help offset or reduce the costs for states willing to accept referred cases.
- Additionally, where national capacity is lacking or in doubt, strong partnerships with Member States, international and regional authorities, and NGOs are necessary to help restore capacity, particularly in conflict or post-conflict regions.

Capacity-Building Efforts

- Capacity-building efforts require careful planning and coordination. The OTP's burden was somewhat lightened in this regard because Article 20 of the ICTR Statute identified the particular areas of national practice that needed to be assessed and evaluated. The first round of referral applications further sharpened the OTP's focus by identifying issues of particular concern. With this more targeted focus, the OTP and other ICTR sections could better plan outreach efforts, particularly training programs to address areas of need. In addition to formal training programs, the OTP was able to facilitate the transfer of knowledge to national authorities by recruiting national staff and extending internships to qualified applicants.
- When possible, further knowledge transfer could be gained through the use of embedded teams or co-locations whereby international and national staff work side-by-side. To make the changes sustainable, funding sources must be identified from the outset and national actors must seek appropriate budget allocations to implement the changes.
- Care should be exercised to avoid the perception of creating a two-tiered justice system. While reforms may be motivated to respond to the needs of referred or transferred cases, national authorities should pursue any available avenues to extend the same reforms and infrastructure improvements to all domestic cases. Rwanda should serve as a model in this regard.

Establishing National Capacity

- Legal framework alone may not be sufficient to establish the capacity of a national judicial system to safeguard fair trial rights in cases referred by the Tribunal.
- Investigations must be undertaken to locate objective evidence demonstrating compliance with fair trial rights.
- The adversary process is one way to establish national capacity but, since it might be time consuming and not always objective, consideration should be given to other methods such as use of impartial expert panels or amicus reports from independent experts.
- Site visits should be conducted to fairly assess conditions.
- To avoid intruding too far on national interests, assessments should be limited to those necessary for safeguarding internationally-recognized fair trial rights in referred cases.

Monitoring

- The OTP's experience with the monitoring mechanism provided several valuable lessons for other practitioners. Adequate resources must be provided in advance for any monitoring mechanisms. The prosecutor, for instance, included funding for the OTP monitor in his budget submissions. The Registry did not, apparently because it believed services could be arranged on a pro bono basis. This expectation proved difficult to fulfill, particularly when the chambers expected that monitoring would be conducted by two staff on a full time basis.
- Additionally, there should be consensus on the qualifications of the monitor. Any monitor should have substantial experience with the conduct of criminal proceedings in the region and be of sufficient stature or professional standing to ensure that the monitoring reports carried sufficient weight and credibility. To ensure independence and impartiality, the use of internal monitors from the referring tribunal should be discouraged or used only on a limited basis.
- A decision also should be made in advance whether reports should be public or private. Reports from ICTR monitors were submitted confidentially. After review to excise any confidential information, public versions of the reports were released and available on the MICT website.
- Lastly, consideration should be given to establishing a standing expert panel to provide fair trial monitoring services in all referred cases.

Revocation

- The revocation mechanism should be reserved only for fundamental violations of fair trial rights that national authorities are unable or unwilling to remedy.
 - Allegations based on violations still capable of being remedied by resort to national authorities should be summarily dismissed.
 - National authorities should be given opportunity to be heard prior to any revocation to establish willingness and capacity to cure any fundamental violation.
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