

The Impact of the ICTR 11*bis* Case Referrals on Rwanda's Legal Reforms, Extradition Requests, and Transfer Case Procedure

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Introduction

After numerous prior failed attempts at transferring cases to Rwanda through Rule 11*bis* of the ICTR Statute, the ICTR successfully transferred two case indictments and six fugitive files to Rwanda for domestic prosecution in 2011 to 2013. These transfer decisions were highly significant as they symbolised the international community's long-awaited vote of confidence in Rwanda's criminal justice system and triggered Rwanda's securance of extraditions from various national jurisdictions. After years of fluctuation in their levels of cooperation, the 2011-2013 ICTR transfer decisions led to a pinnacle in the rapport between Rwanda and the ICTR. This paper surveys the impact of the ICTR on Rwanda's criminal justice system through an analysis of the 11*bis* transfer process. After briefly setting out the background behind the successful 11*bis* referrals, Part I describes the most important legislative reforms undertaken by Rwanda to obtain these successful transfers. Part II discusses the particular impact of the 11*bis* referral process on extraditions to Rwanda. Finally, Part III analyses the ICTR's continuing impact on the first cases transferred or extradited to Rwanda for trial before the Special Chamber for International Crimes of the High Court of Rwanda. This analysis suggests that, not without its hurdles, the ICTR's 11*bis* litigation continues to positively impact Rwanda's justice system. The impact of the 11*bis* transfer process on Rwanda's criminal justice system could prove to be one of the ICTR's most important legacies.

Part I: Background and Legislative Reforms

A. Background²

In late 1994, the United Nations Security Council ("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."³

Article 8 of the ICTR Statute provides that the "[ICTR] and the national courts shall have concurrent jurisdiction to prosecute persons for serious violations of

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² For a more exhaustive treatment of the background of the ICTR Rule 11*bis* referral process *see*, ICTR, Complimentary in Action, Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial, 15 February 2015.

³ UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994.

international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.”⁴ It then notes that the ICTR has primacy over the national courts and can request “national courts to defer to its competence.”⁵

In 2002, the ICTR adopted Rule 11*bis* which allows the ICTR Prosecutor, or the chamber on its own initiative, to seek the referral of an ICTR indictment to any national jurisdiction that was “willing and adequately prepared to accept the case.”⁶ Applying Rule 11*bis*, a designated trial chamber (“Referral Chamber”) must consider whether the case’s intended recipient State has a legal framework that criminalizes the alleged conduct of the accused, provides an adequate penalty structure, does not impose the death penalty, and provides fair trial safeguards.⁷ As such Rule 11*bis* provides a limited complementarity exception to the ICTR’s primacy over national jurisdictions.

Further, starting in 2003, the Security Council encouraged the ICTR to develop a completion strategy for its remaining work including considering the referral of some of its pending indictments to competent national jurisdictions.⁸

In 2007, the Prosecutor of the ICTR filed applications for the referral of the cases of two ICTR fugitives, Bucyibaruta and Munyeshyaka, to France for trial after they were apprehended there.⁹ France expressed its willingness to accept these referrals and the Referral chambers were satisfied that France met the 11*bis* conditions, including that the accused would receive a fair trial and would not face the death penalty.¹⁰ Other than France, Rwanda was the only other State willing to accept ICTR indictment referrals. Although the Prosecutor of the ICTR began considering referring cases to Rwanda as

⁴ Article 8 of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994.

⁵ *Id.*

⁶ Rule 11*bis* was first adopted in July 2002 and subsequently amended in 2004, 2005, and 2011. 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.). 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.

⁷ *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.

⁸ UN Doc S/RES/1503, UN Security Council Resolution 1503, 28 August 2003, p. 2.

⁹ *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-05-85-I, Prosecutor’s Request for Referral of Laurent Bucyibaruta’s Indictment to France, ; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-05-87-I, Prosecutor’s Request for Referral of Wenceslas Munyeshyaka’s Indictment to France, X.

¹⁰ *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 Pursuant to Rule 11 bis of the Tribunal’s Rules of Procedure and Evidence, 12 June 2007, amended on 27 June 2007; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-05-87-I, Prosecutor’s Request for Referral of Wenceslas Munyeshyaka’s Indictment to France Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 12 June 2007, amended on 27 June 2007.

early as 2003, he did not seek such referrals until after Rwanda had enacted a series of significant legal reforms.¹¹

Consequently, the Prosecutor of the ICTR first formally requested the referral of five indictments to Rwanda in 2007; namely, those of Kayishema, Kanyarukiga, Munyakazi, Hategekimana, and Gatete.¹² The Referral Chambers rejected all five applications.¹³ Following appeals by the Prosecutor, the Appeals Chamber affirmed the Referral Chambers' rejections of the Kanyarukiga, Munyakazi, Hategekimana referral requests,¹⁴ following which the Prosecutor decided not to appeal those of Gatete and Kayishema. While Rwanda had enacted important legal reforms,¹⁵ the Referral Chambers were not convinced that, in practice, Rwanda's criminal justice system provided sufficient fair trial safeguards.

In 2010, following further legal reforms, the Prosecutor of the ICTR started a second round of referral applications in two phases. The first phase comprised applications for the referral of the indictments of one accused in custody, Uwinkindi, and two fugitives, Kayishema and Sikubwabo.¹⁶ The second phase comprised the applications

¹¹ UN Doc. S/2007/676, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 20 November 2007, para. 35. See *infra* Part I.B.

¹² *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. Ildephonse Hategekimana*, Case No. ICTR-00-55-I, Prosecutor's Request for the Referral of the Case of *Ildephonse 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.

¹³ *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; *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; *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; *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.

¹⁴ *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; *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; *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.

¹⁵ See *infra* Part I.B.

¹⁶ *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; *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

for the referral of the indictments of another accused in custody, Munyagishari, and of four fugitives, Ntaganzwa, Ryandikayo, Ndimbati and Munyarugarama.¹⁷ The second phase of referral applications was successful at both the Referral Chamber level and on appeals for those that were subsequently appealed.¹⁸ Consequently, the ICTR transferred two accused persons, Jean Uwinkindi and Bernard Munyagishari, and six fugitive files to Rwanda for domestic prosecution.

B. Significant Legislative Reforms

The 11*bis* referral process generated important legislative reforms to Rwanda's domestic criminal justice system. These reforms, arguably the most significant legacy of the referral process, began prior to the Prosecutor's first referral applications and continue to date. While some of these reforms are limited to transfer and extradition cases ("Transfer Cases"), the 11*bis* referral process also induced broader reforms impacting the

11*bis* of 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.

¹⁷ *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 9 November 2011; *Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11*bis*, Prosecutor's Request for the Referral of the Case of Ladislav Ntaganzwa to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 2 April 2012; *Prosecutor v. Ryandikayo*, Case No. ICTR-02-79- R11*bis*, Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Ryandikayoto Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 9 May 2012; *Prosecutor v. Aloys Ndimbati*, Case No. ICTR-02-79- R11*bis*, Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Aloys Ndimbati to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 9 May 2012; *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79- R11*bis*, Prosecutor's Request for Designation of a Trial Chamber and 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, 22 May 2012.

¹⁸ *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; *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-I, Decision on Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda, 22 February 2012; *The Prosecutor v. Charles Sikubwabo*, Case Nos. ICTR-95-1D-I, Decision on Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda, 26 March 2012; *Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9- R11*bis*, Decision on the Prosecutor's Request for the Referral of the Case of Ladislav Ntaganzwa to Rwanda, 8 May 2012; *Prosecutor v. Ryandikayo*, Case No. ICTR-02-79- R11*bis*, Decision Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of *Ryandikayo* to Rwanda Pursuant to Rule 11 *bis*, 20 June 2012; *Prosecutor v. Aloys Ndimbati*, Case No. ICTR-02-79- R11*bis*, Decision on Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Aloys Ndimbati to Rwanda, 25 June 2012; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-ARI4, Decision on Appeal against the Referral of Phénéas Munyarugarama's case to Rwanda and Prosecution Motion to Strike, 5 October 2012. *Bernard Munyagishari v. the Prosecutor*, Case No. ICTR-01-89-AR11*bis*, Decision on Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Referral under Rule 11 *bis*, 3 May 2013.

Rwandan justice system generally. While this sub-section will not detail each and every related legislative reform, it will outline the most relevant criminal justice reforms.

Abolition of Death Penalty and Solitary Confinement

In 2007, prior to the first round of referral applications, Rwanda abolished the death penalty.¹⁹ The law establishing the abolition of the death penalty, however, allowed for “life imprisonment with special provisions”, meaning life imprisonment under solitary confinement.²⁰

The 2007 Transfer Law provided that an accused being tried subject to the protections of the Transfer law would face a maximum penalty of life imprisonment.²¹ During the first round of referral applications, Referral Chambers were uncertain as to whether the “life imprisonment with special provisions” clause in the Abolition of Death Penalty Law could be applied to Transfer Cases.²² Referral Chambers were concerned that its vagueness may lead to a broad application of solitary confinement in contravention of established international law.²³

As a result, Rwanda modified the Abolition of Death Penalty Law to remove this ambiguity and explicitly exclude the applicability of life imprisonment with special provisions, such as solitary confinement, to Transfer Cases.²⁴ In relevant part the amendment provides: “[l]ife imprisonment with special provisions as provided for by paragraph one of this Article shall not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other States in accordance with the provisions of Organic Law n° 11/2007 of 16/03/2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States.”²⁵

While the abolition of the death penalty applies to convictions in all cases, the ban on life imprisonment under solitary confinement only applies to Transfer Case convictions.

¹⁹ Rwanda’s Organic Law No. 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty (“2007 Abolition of Death Penalty Law”), Article 1.

²⁰ 2007 Abolition of Death Penalty Law, Article 4.

²¹ 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”), Article 21.

²² *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. 15 (*Kanyarukiga* (AC)).

²³ *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. 15 (*Kanyarukiga* (AC)).

²⁴ 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.

²⁵ *Id.*, Article 1.

Changes to the Penal Code, Code of Criminal Procedure

Rwanda also enacted major changes to its Penal Code²⁶ and Code of Criminal Procedure²⁷, both of which are applicable to its criminal justice system as a whole, including Transfer Cases. For example, the Penal Code was amended to significantly reduce the sentences for various offences.²⁸ The Code of Criminal Procedure was amended to remove Article 59, which disallowed accomplices to testify as witnesses, and instead now provides that “[a]ny person who has participated in the commission of an offence may be heard as a witness.”²⁹

Transfer Law

In 2007, Rwanda’s National Assembly enacted the 2007 Transfer Law, further amended in 2009 and 2013.³⁰ As its name suggests, this law governs cases transferred to Rwanda from the ICTR, or its successor entity, the Mechanism for International Criminal Tribunals, as well as those transferred or extradited from other states. In the event of inconsistencies between the Transfer Law and any other ordinary laws, the provisions of the Transfer Law prevail.³¹

The Transfer Law incorporates certain procedural rules borrowed from the ICTR Rules of Procedure and Evidence into the existing framework provided by Rwanda’s Code of Criminal Procedure. These rules were adopted in order to address certain concerns raised by the defence parties challenging the transfer requests and accepted by the Referral Chambers in denying referrals in the first round of applications. These concerns included the fair trial rights of the accused, the availability of defence witnesses and the potential criminal liability they might face for providing testimony in favour of the accused, the impartiality and adequacy of the witness protection program, and detention conditions.

²⁶ Organic Law No. 01/2012/OL of 2 May 2012 instituting the Penal Code, Official Gazette of the Republic of Rwanda, 14 June 2012.

²⁷ Law No. 30/2013 of 24/5/2013 relating to the Code of Criminal Procedure, Official Gazette of the Republic of Rwanda, 8 July 2013.

²⁸ 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.

²⁹ Law No. 30/2013 of 24/5/2013 relating to the Code of Criminal Procedure, Official Gazette of the Republic of Rwanda, 8 July 2013, Article 57.

³⁰ 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 (“2009 Amendment”). 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), (together, the “Transfer Law”)

³¹ 2007 Transfer Law, Article 25; 2013 Transfer Law, Article 27.

Notably, in Transfer Law cases, witnesses are required to give testimony at trial. Article 8 of the 2013 Transfer Law provides that “[t]he High Court shall not convict a person solely on prior written statements of witnesses who did not give oral evidence during the trial.”³² This requirement to testify at trial is a significant shift from standard Rwandan trial practice, which traditionally follows a more civil law based approach in which witness statements can also be entered without testimony. The Transfer Law further provides an accused person with a cross-examination right, namely the right “to examine or have a person to examine on his/her behalf the witnesses against him/her.”³³

The Transfer Law also makes provisions for witnesses residing outside Rwanda who have good reason for being unable to physically appear before the High Court to testify via alternate forms either by way of deposition taken by a competent authority, *via* video-link, or by a judge sitting in a foreign jurisdiction for the purpose of recording such *viva voce* testimony.³⁴

The Transfer Law affords provisions for the right to an Accused’s effective defence, namely adequate time and facilities for the preparation of the defence;³⁵ the right to defend himself through the counsel of his choice; and legal funding if the accused is indigent.³⁶ The law also provides defence counsel and witnesses with immunity from search, seizure, arrest or detention in the performance of their legal duties.³⁷ More generally, the Transfer Law states 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”.³⁸ Of note, the genocide ideology law which criminalises statements amounting to genocide denial or minimisation was also reformed, first in 2008 and again in 2013- reforms that narrowed both its scope and its applicability.³⁹

Finally, the Transfer Law also guarantees that Transfer Case indictees “shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.”⁴⁰ Indeed, Rwanda’s Kigali Prison known as “1930” and Mpanga prison each

³² 2007 Transfer Law, Article 7; 2013 Transfer Law, Article 8. The same Article provides for an exception of this general rule in the case of solely corroborative witnesses. It provides: “However, the High Court may convict a person on the probative value of a prior written statement if it is corroborated by other witnesses.”

³³ 2007 Transfer Law, Article 13(8); 2013 Transfer Law, Article 14(9).

³⁴ 2009 Amendment, Article 3; 2013 Transfer Law, Article 16.

³⁵ 2007 Transfer Law, Article 13(4); 2013 Transfer Law, Article 14(4).

³⁶ 2007 Transfer Law, Article 13(6); 2013 Transfer Law, Article 14(6).

³⁷ 2007 Transfer Law, Articles 14 & 15; 2013 Transfer Law, Articles 15 & 17.

³⁸ 2009 Amendment, Article 2; 2013 Transfer Law, Articles 14.

³⁹ Law No. 33bis/2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, art. 9, Official Gazette of Rwanda, Nov. 1, 2003. Law No. 18/2008, Relating to the Punishment of the Crime of Genocide Ideology, Official Gazette of Rwanda, Oct. 15, 2008. Law No 84/2013, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, Official Gazette of Rwanda, 11 Sept. 2013.

⁴⁰ 2007 Transfer Law, Article 23; 2013 Transfer Law, Article 26.

contain an internationally compliant wing used to house Transfer Case indictees as well as Special Court of Sierra Leone (“SCSL”) convicted persons.⁴¹

Witness Protection Unit

In December 2008, aware of the ICTR’s concerns that the only available witness protection service available in Rwanda was the Witness-Victims Services Unit created in 2006 and falling within the National Public Prosecution Authority (“NPPA”), the President of the Supreme Court of Rwanda created the Witness Protection Unit as a subsection of the registry of the judiciary available for witness protection issues affecting witnesses testifying in Transfer Cases.⁴²

Part II: Impact on Extradition Cases

The ICTR 11*bis* case referral process has had an impact not only on Rwanda’s ability to obtain extraditions but also on the procedural law applicable to these cases. Notably, the legislative reforms that led to the successful ICTR transfers, particularly Rwanda’s enactment of the Transfer Law, improved the legitimacy of its requests for extraditions from national jurisdictions while also altering the procedure applicable to these extradition cases.

A. A Shift in Extradition Requests

As the first ICTR successful referral to Rwanda, the *Uwinkindi* transfer decision⁴³ precipitated a shift in many countries’ positions on extraditions to Rwanda. Prior to this, extradition requests from Rwanda had been denied. However, in October 2011, the European Court of Human Rights (“ECHR”) confirmed the Supreme Court of Sweden’s decision to extradite Sylvère Ahorugeze, a Rwandan genocide suspect arrested in Sweden, to Rwanda.⁴⁴ The 2011 ICTR and ECHR seminal decisions have been repeatedly cited in latter extradition decisions.

⁴¹ Memorandum of Understanding between the Special Court for Sierra Leone and the Government of the Republic of Rwanda, 2 October 2009. Notably ex-Liberian President Charles Taylor, the only SCSL convicted person not ordered to serve his sentence at Rwanda’s Mpanga Prison facility recently requested to be transferred there for the remainder of his sentence, a request which the Trial Chamber rejected.

⁴² Ordinance No. 001/2008 of 15 December 2008.

⁴³ *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, confirmed by *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.

⁴⁴ ECtHR, *Ahorugeze v. Sweden*, Judgement, App. No. 37075/09, 27 October 2011. By the time the ECHR ruling was issued, however, Sweden had released Ahorugeze who returned to Denmark where his family resides. As such the extradition proceedings had to be reinitiated with Denmark and are ongoing.

Following these decisions, courts in Canada, Norway, Denmark and The Netherlands⁴⁵ have suit and approved extraditions to Rwanda and other countries are in the process of ongoing extradition proceedings.⁴⁶ Some decisions granting Rwandan extradition requests have been fully implemented, including the physical transfer of suspects to Rwanda to await trial, while others are pending appeal at the domestic or regional level. At the time of writing, in addition to the two ICTR 11*bis* Transfer Cases, Uwinkindi and Munyagishari, three other accused persons – Mugesera, Bandora, and Mbarushimana – extradited from Canada, Norway, and Denmark, respectively, are currently being tried in Rwanda under the Transfer Law.

B. First Cases from National Jurisdictions Applying the Transfer Law

The scope of the Transfer Law is defined in its Article 1, which states: “[t]his Organic law shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda.”⁴⁷ As such, the adoption of the Transfer Law applies not only to ICTR referrals but also to any related extraditions. Electively, the Transfer Law can also be applied to deportation cases.

Mugesera – A Deportation Case applying the Transfer Law

On 24 January 2012, after a legal battle of almost two decades, Canada deported Leon Mugesera back to Rwanda. The deportation was litigated and appealed up to the Supreme Court of Canada,⁴⁸ but following legislative reforms including Rwanda’s abolition of the death penalty as well as additional diplomatic assurances given to Canada that Mugesera would be tried under the procedural safeguards of the Transfer Law, Canada deported him to Rwanda where his trial is currently ongoing.

Mugesera is charged with a number of counts based on an inflammatory anti-Tutsi speech he gave in 1992. The speech by the former academic and government official was considered a key propaganda tool publicly inciting ethnic hatred and violence against the Tutsi population in the period leading up to the genocide. Mugesera was wanted in Rwanda as of late 1992 and immigrated to Canada as a refugee in 1993. He is being tried before the Special Chamber for International Crimes of the High Court under the Transfer Law.

Given that Mugesera was deported and not extradited, the Transfer Law would normally not be applicable to his case. However, following the 2005 Supreme Court decision, the government of Canada expressed certain concerns surrounding Mr. Mugesera’s removal. In the course of subsequent communications, the Prosecutor-

<http://www.trial-ch.org/en/resources/trial-watch/trialwatch/profiles/profile/476/action/show/controller/Profile/tab/legal-procedure.html>

⁴⁵ See *infra* Part II.B.

⁴⁶ See e.g., ongoing UK extradition proceedings against Vincent Bajinya, Celestin Ugirashebuja, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Mutabaruka

⁴⁷ 2007 Transfer Law, Article 1; 2013 Transfer Law, Article 1.

⁴⁸ *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40.

General of Rwanda (“PG”), Martin Ngoga, through the Ministry of Foreign Affairs and Cooperation of Rwanda, addressed certain Canadian queries through a *Note Verbale*. In this response, PG Ngoga provided Canada with a number of diplomatic assurances including that “any deportation to Rwanda of Mugesera Leon by the Canadian Government will be treated as a case rec[ei]ved from a foreign jurisdiction and therefore treated as a transferred case”, namely that the procedural safeguards of the Transfer Law would be applicable to his case.⁴⁹

In opting to apply the Transfer Law to a deportation case, Rwanda extended the reach of the Transfer Law beyond its normal scope. As such, albeit on an *ad hoc* basis, the impact of the Transfer Law’s procedural reforms enacted as part of the 11*bis* referral process now extend even further than strictly defined Transfer Cases.

Bandora – The First Extradition to Rwanda

On 10 March 2013, the first-ever extradition to Rwanda was completed. Charles Bandora, a Rwandan national, was extradited from Norway to stand trial in Rwanda. The extradition was the result of a 2008 Rwandan request and a resulting Interpol international arrest warrant dated 16 April 2009. Bandora was first arrested and released in Malawi where he was living and doing business. He was then arrested and released in Belgium before being arrested again in Norway. The Oslo District Court initially ordered his extradition on 11 July 2011,⁵⁰ a decision Mr. Bandora appealed. Working his way through the available appellate options, Bandora exhausted all avenues of appeal available in Norway including its highest court, the King’s Court, as well as the European Court of Human Rights, all of which rejected his claim that he would not receive a fair trial in Rwanda.⁵¹ As such, they approved his extradition and physical transfer to Rwanda.⁵²

Charles Bandora is alleged to have participated in the organization and implementation of the genocide against the Tutsi in 1994, particularly the killings of hundreds of Tutsi that had taken refuge at Ruhuha Church in Ngenda Commune in what is now Bugesera District in the Eastern Province. At the time, he was a businessman and the Vice-President of the MRND, the ruling party during the genocide.⁵³ He is charged with genocide, extermination, conspiracy to commit killing, formation of a criminal organisation and murder as a crime against humanity.

Mr. Bandora’s physical transfer was the first such extradition decision to be carried out and Mr. Bandora’s trial was the first case tried under the Transfer Law to

⁴⁹ Ministry of Foreign Affairs and Cooperation, Republic of Rwanda to Canadian High Commission, Nairobi, Kenya, Note Verbale No c230/09.01/CABMIN/2010, Kigali, 13 January 2010.

⁵⁰ *NCIS Norway v. Charles Bandora*, File No. 11-050224ENE-OTIR/01, Oslo District Court, 11 July 2011.

⁵¹ The Norwegian Supreme Court dismissed Bandora’s appeal on 22 November 2012 and the ECHR rejected his appeal in March 2013.

⁵² NPPA Press Statement: Extradition of Charles Bandora Complete, 10 March 2013.

⁵³ NPPA Press Statement: Extradition of Charles Bandora Complete, 10 March 2013.

conclude.⁵⁴ He opted not to challenge as many procedural issues surrounding the Transfer Law as the other indictees who are currently being tried in Transfer Cases, resulting in a faster pace of proceedings. At the time of writing, the accused awaits judgment at the first instance level.⁵⁵ In accordance with the law, Mr. Bandora cross-examined prosecution witnesses and called a number of defence witnesses to testify on his behalf.

Mbarushimana – The Second Extradition to Rwanda

On 3 July 2014, Mr. Emmanuel Mbarushimana was the second Rwandan extradited to Rwanda. Following a February 2012 Rwandan extradition request, the Danish Supreme Court ruled in November 2013 that he must be extradited to Rwanda to stand trial. Mr. Mbarushimana lodged an appeal with the ECHR who declined to consider it, thereby upholding the extradition decision.⁵⁶

Mbarushimana was a school inspector in 1994. He is alleged to have organised and participated in the killings of the Tutsi in the area currently known as Gisagara District in the Southern Province. He faces charges of genocide, complicity in genocide, conspiracy to commit genocide, murder and extermination, crimes allegedly committed in location formerly known as Muganza Commune in Butare Prefecture.

Mr. Mbarushimana's trial began on 25 March 2015.⁵⁷ As an extradition case, his trial is being conducted under the Transfer law.

Other

Currently, lower courts have approved the extraditions of Jean Baptiste Mugimba and Jean-Clause Iyamuremye from the Netherlands, and Eugene Nkuranyabahizi from Norway. Their physical extradition awaits the completion of all domestic appellate avenues.⁵⁸ Once extradited to Rwanda for trial, they will be afforded the protections of the Transfer Law.

⁵⁴ Information provided by Mr. Jean Bosco Mutanganga, National Prosecutor/ Head International Crimes Unit, NPPA, Rwanda, 26 April 2015.

⁵⁵ Information provided by Mr. Jean Bosco Mutanganga, National Prosecutor/ Head International Crimes Unit, NPPA, Rwanda, 26 April 2015.

⁵⁶ <http://www.internationalcrimesdatabase.org/Case/819/T/>; <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/3743/action/show/controller/Profile.html>; <http://allafrica.com/stories/201401130057.html>.

⁵⁷ Information provided by Mr. Jean Bosco Mutanganga, National Prosecutor/ Head International Crimes Unit, NPPA, Rwanda, 26 April 2015.

⁵⁸ Information provided by Mr. Jean Bosco Siboyintore, Head Genocide Fugitive Tracking Unit, NPPA, Rwanda, 26 April 2015.

Part III – Continuing Impact on Transfer Case Procedure: Practice & Monitoring

The impact of the 11*bis* application and referral process was also apparent in the early procedure of the first Transfer Cases. This section will touch upon two aspects of this impact: reliance on ICTR practice and the ICTR monitoring system.

A. Reliance on ICTR Practice

The influence of the ICTR procedure on Transfer Case procedure is evident both in the text of the Transfer law and in a review of practice to date.

Transfer Law

The Transfer Law allows the Special Court for International Crimes of the High Court of Rwanda to admit certain ICTR evidence: i) judicially noticed facts;⁵⁹ ii) witness testimony before the ICTR;⁶⁰ iii) expert statements before the ICTR;⁶¹ iv) witness statements taken by ICTR investigators;⁶² and v) documentary and forensic evidence collected by the ICTR.⁶³

The articles of the Transfer Law, adopted as part of the 11*bis* referral process, demonstrate a clear willingness to admit evidence in Rwandan proceedings that was deemed admissible in ICTR proceedings or collected in the course of ICTR investigations. Such practice could assist in expediting proceedings in Rwanda.

Case Law

Pre-trial litigation in Transfer Cases being adjudicated in Rwanda also demonstrates reliance on ICTR practice. Given that the Transfer Law procedure emanates directly from the ICTR Rules of Procedure and Evidence, such reliance could prove valuable. However, misinterpretation of ICTR practice could cause great delay. To date, certain filings mimicking ICTR practice but misapplying its jurisprudence have slowed down the pre-trial procedure.

One such example⁶⁴ occurred in the pre-trial phase of the Mugesera case during which the accused requested that the proceedings in his trial be conducted in French as opposed to Kinyarwanda. In support of his request, the accused cited various ICTR decisions ordering translation of filings. However, in contrast to the ICTR cases to which he referred, which concerned situations where the accused persons did not understand the language of the proceedings, Mugesera's claim was not that he did not understand Kinyarwanda but rather, that given that he had spent the last 20 years abroad, he was no

⁵⁹ 2007 Transfer Law, Article 8.

⁶⁰ 2007 Transfer Law, Article 9.

⁶¹ 2007 Transfer Law, Article 10.

⁶² 2007 Transfer Law, Article 11.

⁶³ 2007 Transfer Law, Article 12.

⁶⁴ Information obtained by author while serving as Senior Legal Adviser to the PG of Rwanda in the International Crimes Unit, 2012-2013.

longer familiar with Kinyarwanda judicial terms. He also stated that the international members of his defence team preferred that the proceedings be conducted in French. The Prosecution responded that Mr. Mugesera is natively fluent in Kinyarwanda and distinguished the existing ICTR language jurisprudence. On appeal, the Supreme Court held that while Rwandan laws guarantee that proceedings be conducted in a language the accused understands, Mr. Mugesera is fully fluent in Kinyarwanda.⁶⁵ Of significance, the hate speech he delivered in Kigali in 1992 for which he is being tried was delivered in Kinyarwanda. Although the issue was ultimately resolved, months were spent on its litigation.

Reliance on ICTR Practice could prove beneficial in Transfer Cases both in further developing the reliance on judicial precedents and in expediting proceedings. However, caution must be exercised to avoid importing frivolous litigious practices in a system that is relatively free of such delaying tactics. While these are expected hurdles in a new system facing novel challenges, they nonetheless burden the proceedings and slow down their pace just as they did in the initial cases tried at the ICTR.

B. Monitoring

The 11*bis* referrals were accompanied by an ICTR monitoring system. While that arrangement is now fully understood, accepted and successful, the relationship between Rwanda and the ICTR in this regard was not without its early difficulties. These emerged from: (i) confusion as to the entity responsible for monitoring; (ii) concerns as to the independence of monitors; and (iii) lack of clarity as to the scope of the role.

Rule 11*bis*, as amended in 2011 provides Referral Chambers with *proprio motu* authority to appoint monitors to or order the revocation of referred cases.⁶⁶ Prior versions of the rules only allowed the Prosecutor to appoint monitors. Rule 14(A)(4) of the MICT Rules also captures this expansion.⁶⁷ Given the ICTR's closure, the Security Council passed the responsibility to continue the monitoring activities on all indictments referred by the ICTR to national jurisdictions to the MICT.⁶⁸

Initially both the Uwinkindi and Munyagishari Referral Chambers respectively selected and expressed preference for the ACHPR, an independent organ established under the African Charter on Human and Peoples' Rights, to undertake monitoring duties in the referred cases.⁶⁹ However, funding was unavailable and negotiations collapsed

⁶⁵ The Supreme Court decision was rendered on 27 April 2012.

⁶⁶ Rule 11*bis* D(iv) and Rule 11*bis* (F) (amendments adopted during the 23rd ICTR Plenary of 1 April 2011).

⁶⁷ MICT RPE (14)(A)(4).

⁶⁸ See Articles 6.5 and 6.6 of the MICT Statute, S/RES/1966(2010).

⁶⁹ *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, paras. 208-213; *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Decision on Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 6 June 2012; para. 210

leaving the ICTR to make interim monitoring arrangements while trying to reach a more permanent solution.

From the Rwandan perspective, although the 11*bis* referral decisions represented the height of cooperation between the ICTR and Rwanda, the monitoring arrangements in the initial pre-trial period of the Uwinkindi and Muniyagishari cases seemed problematic. First, the failed negotiations with ACHPR caused a multi-month delay in Uwinkindi's physical transfer.⁷⁰ Next, the collapse of negotiations with the ICTR and the decision to appoint its own interim monitors⁷¹ caused concern. Rwanda was of the view that if monitors had pre-existing views on whether cases should have been transferred to Rwanda they could knowingly or unwittingly influence the monitoring reports and any eventual revocation of the case. This was exacerbated by the fact that Rwanda was unclear as to the exact scope of monitors' roles. Indeed, while monitoring guidelines were quickly adopted,⁷² the variety in style and coverage of the early monitoring reports exposes an initial lack of clarity as to the exact scope and role of the monitors.⁷³ Moreover, the fact that the ICTR sent a number of different monitors during the first six months of monitoring of Transfer Cases made it more difficult for any single monitor to quickly establish a rapport with continuity.⁷⁴ Finally, it was also difficult for Rwanda to understand the discrepancy between the scrutiny on the cases transferred to Rwanda versus those that had been transferred to France in 2007 and, seven years later, were still in the investigative pre-trial phases. The French cases were making slow progress but were not being monitored by any Referral Chamber-appointed monitor. However, under the version of Rule 11*bis* applicable in 2007, only the Prosecutor could appoint monitors to observe the proceedings.⁷⁵ The rule was amended in 2011 and the cases transferred to France are being monitored in the same manner as those in Rwanda since 2013.⁷⁶

Nonetheless, despite some early growing pains, the monitoring arrangement quickly stabilised. The issuance of monitoring guidelines, the continuity of assigned monitors, and the normalisation of the monitoring between France and Rwanda all assisted in creating the good working relationship between the monitors and the Rwandan authorities in existence today.

⁷⁰ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, 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.

⁷¹ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on the Monitoring Arrangement for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012.

⁷² ICTR-01-75-R11*bis*, Guidelines on Monitoring Trials Referred to National Jurisdictions under Rule 11*bis* by ICTR Staff Monitors, 29 June 2012.

⁷³ See, Uwinkindi Jean MICT 12-25, Reports of the Court Monitor, June- December 2012, available at <http://www.unmict.org/en/cases/mict-12-25>.

⁷⁴ For example, the Uwinkindi monitors between June and December 2012 were Ms. Carolyn Buff, Mr. Anees Ahmed and Mr. Constant Hometowu. See, Uwinkindi Jean MICT 12-25, Reports of the Court Monitor, June- December 2012, available at <http://www.unmict.org/en/cases/mict-12-25>.

⁷⁵ ICTR RPE, Rule 11 *bis* (D)(iv).

⁷⁶ See e.g., Bacyibarata Laurent, MICT 13-44, Initial monitoring report on the Bucyibaruta case, 12 July 2013 available at <http://www.unmict.org/en/cases/mict-12-25>.

Conclusion

The *11bis* case referral process has had a profound impact on Rwanda's criminal justice system. The resulting Rwandan legislative reforms are arguably the ICTR's single greatest legacy. The *11bis* process led to Rwanda's first-ever successful extradition request as well as continued success in securing extraditions since. Finally, ICTR practice continues to impact Transfer Case procedure on the ground in Rwanda.

As a result of the reforms undertaken, the *11bis* success, and the accompanying favourable extradition decisions, Rwanda is emerging at the forefront of domestic prosecution of international crimes. Few other countries have litigated as many such cases in their domestic systems. Regionally, Rwanda's East African neighbours now look to Rwanda for guidance on how to set up specialized International Crime Units in their Prosecution Services and Judiciary. In the span of two decades, Rwanda has systematically rebuilt its criminal justice system to one that has garnered the trust of the international community.