

## Note

### Closer to Justice: Transferring Cases from the International Criminal Court

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The international community continues to struggle with how to bring some of the worst war criminals to justice.<sup>1</sup> One such challenge arises out of the jurisdictional question over who should prosecute the leaders of a brutal rebel group responsible for widespread displacement and killings in central Africa and the kidnapping of thousands of children for use as child soldiers.<sup>2</sup> On November 30, 2008, Joseph Kony, the leader of the Lord's Resistance Army (LRA), refused to sign yet another peace agreement with the government of Uganda, claiming it was a trick to have him arrested and transferred to the International Criminal Court (ICC).<sup>3</sup> Kony's refusal to sign the peace agreement prompted a military response against LRA camps, which in turn sparked another round of massacres by

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1. See, e.g., Helen Brady & Barbara Goy, *Current Developments at the Ad Hoc International Criminal Tribunals*, 6 J. INT'L CRIM. JUST. 569, 601–604 (July 2008) (noting issues faced by the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia in transferring cases to courts of national jurisdiction); Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343 (2008) (examining the challenges and limitations of international criminal prosecutions in Africa).

2. Alan Boswell, *Ugandan Rebel Group Motives Unclear as Terror Campaign Expands*, VOICE OF AMERICA, Aug. 27, 2009, <http://www.voanews.com/english/2009-08-27-voa35.cfm>; Rachel Irwin, *Uganda's Ability to Try Rebels Questioned*, INST. FOR WAR AND PEACE REPORTING, Nov. 21, 2008, [http://www.iwpr.net/?p=acr&s=f&o=347948&apc\\_state=henpacr](http://www.iwpr.net/?p=acr&s=f&o=347948&apc_state=henpacr).

3. Henry Owuorp, *Why Uganda's Kony Won't Sign Deal*, DAILY NATION (Kenya), Apr. 6, 2009, available at <http://www.nation.co.ke/News/africa/-/1066/557784/-/13pxnvyz/-/index.html>; *Uganda Rebel Negotiating Team Wants Peace Deal Revised*, AGENCE FRANCE-PRESSE, Aug. 28, 2009, <http://www.reliefweb.int/rwb.nsf/db900SID/SNAA-7VD9KN?OpenDocument>.

the LRA.<sup>4</sup> Kony continues to demand that arrest warrants issued by the ICC for the top leaders of the LRA be dropped, and he claims that the indictments are the only barrier to a peace deal.<sup>5</sup> Kony's demands and the continuing atrocities committed by the LRA have fueled debate over both the ICC's role in ongoing conflicts and how to address the potentially incompatible aims of bringing peace and achieving justice.<sup>6</sup>

Uganda and the ICC are searching for an alternative route to end the fighting without completely abandoning the LRA indictments. In response to a request from Uganda, the ICC plans to conduct a pre-trial hearing to determine if the cases against the LRA should be transferred from the ICC to the High Court of Uganda for trial.<sup>7</sup> These discussions have highlighted a missing piece to the statute which governs the ICC: it is not clear exactly how the ICC would actually transfer the indictments to the Ugandan courts if it chose to do so. There is no formal mechanism in the Rome Statute to allow the Court to transfer jurisdiction of a case. While the Court will probably be able to craft a Ugandan-shaped hole in the existing rules,<sup>8</sup> it should take the opportunity presented by the 2010 ICC Review Conference to adopt a more formal and structured solution. This Note will argue that the ICC should add a transfer mechanism to shift cases back to courts of national jurisdiction, modeled on a similar rule adopted by the International Criminal Tribunal for Rwanda (ICTR).

The government of Uganda has tried several different methods to end the conflict with the LRA since the rebel group's formation in 1988.<sup>9</sup> These efforts, however, have not prevented the LRA from continuing to terrorize northern Uganda and the

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4. *A Country Adrift, a President Amiss*, ECONOMIST, Feb. 12, 2009, at 57; *Attack 'Ends Uganda Peace Talks'*, BBC NEWS, Dec. 15, 2008, <http://news.bbc.co.uk/2/hi/africa/7783417.stm>; *Christmas Massacres 'Killed 400'*, BBC NEWS, Dec. 30, 2008, <http://news.bbc.co.uk/2/hi/africa/7804470.stm>.

5. Skye Wheeler, *Ugandan Rebel Kony Still Refuses to Sign Peace Deal*, REUTERS, Nov. 30, 2008, <http://www.alertnet.org/thenews/newsdesk/WAL063121.htm>.

6. TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY* 126–27 (2006).

7. Milton Olupot, *Pre-Trial of Kony Set*, NEW VISION (Uganda), Oct. 28, 2008, available at <http://www.newvision.co.ug/D/8/13/656873>.

8. See *infra* Part II.a.

9. The government of Uganda has tried large-scale military operations, negotiating with Sudan to stop providing support for the LRA, and multiple peace efforts, including a sweeping offer of amnesty. See, e.g., ALLEN, *supra* note 6, at 47–52; *Attack 'Ends Uganda Peace Talks'*, *supra* note 4; ALLEN, *supra* note 6, at 38 (discussing the formation of the LRA).

region.<sup>10</sup> In December 2003, the lack of progress led Uganda to become the first country to refer a case directly to the ICC when Yoweri Museveni, the President of Uganda, asked the ICC to investigate potential crimes committed by the LRA.<sup>11</sup> On July 8, 2005, a pre-trial chamber of the Court granted the Prosecutor's request for indictments against five leaders of the LRA.<sup>12</sup> The referral has not ended the conflict, but it has sparked a debate about whether or not the ICC indictments are a barrier to peace negotiations. The indicted leaders have repeatedly demanded the withdrawal of the ICC indictments as a prerequisite for signing any peace agreement.<sup>13</sup> The ICC and its supporters continue to argue that justice must not be sacrificed to the peace process and that the goals of justice and peace can work together.<sup>14</sup>

As the ICC considers whether to transfer the LRA

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10. See, e.g., *A Country Adrift, a President Amiss*, supra note 4; *DR Congo: Protect Civilians From Brutal Rebel Attacks: Killings, Abductions, and Pillaging by Lord's Resistance Army Continue*, HUMAN RIGHTS WATCH, Nov. 13, 2008, <http://hrw.org/english/docs/2008/11/12/congo20193.htm> (reporting renewed attacks and the abduction of children by the LRA and calling on the United Nations Security Council and national governments to increase the number of peacekeepers in the northern Congo to protect the civilian population).

11. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), available at <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2004/> (follow "3" hyperlink at the bottom of the page; then follow "President of Uganda" hyperlink); Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 410-11 (2005).

12. Situation in Uganda, Case No. ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (July 8, 2005) (this decision was originally issued under seal; unsealed pursuant to Decision No. ICC-02/04-01/05-52, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest (Oct. 13, 2005)). Since then, the proceedings against Raska Lukwiya were terminated on strong evidence that he had been killed. Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen, Case No. ICC-02/04-01/05-248, Decision to Terminate the Proceedings Against Raska Lukwiya (July 11, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc297945.pdf>.

13. Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1; *Uganda Rebels in Fresh Truce Call*, BBC NEWS, Jan. 12, 2009, <http://news.bbc.co.uk/2/hi/africa/7824084.stm>.

14. Press Release, Int'l Criminal Court, Statement by the Chief Prosecutor Luis Moreno-Ocampo (July 12, 2006) ("It is the view of the Office of the Prosecutor and the Government of Uganda that justice and peace have worked together thus far and can continue to work together."). Cf., Helena Cobban, *Think Again: International Courts*, 153 FOREIGN POLY 22, 24 (2006) (arguing that the ICC indictments have exacerbated the conflict in Uganda); *Uganda Aide Criticizes Court Over Warrants*, N.Y. TIMES, Oct. 9, 2005, at 20 (quoting a mediator in the conflict, "There is now no hope of getting [the LRA] to surrender.").

indictments to the Ugandan judiciary, the experiences of the International Criminal Tribunal for Rwanda provide valuable insight into one mechanism to facilitate such a transfer. As the ICTR approached the end of its mandate, it needed to reduce its caseload in order to finish on schedule. It adopted Rule 11 *bis*, which allows the Prosecutor or the Tribunal to request the transfer of cases from the ICTR to national courts.<sup>15</sup> Since its adoption, eight requests have been made to transfer cases, with varying degrees of success.<sup>16</sup> The transfer requests to move cases to Rwanda have been the most interesting in light of the ICTR's relationship with the country and the continuing impact of the potential transfer of cases on Rwandan law and the judiciary. The first Appeals Court decision on a motion to transfer a case to Rwanda was handed down on October 8, 2008. The decision and other subsequent requests provide a valuable backdrop to consider a similar mechanism for the ICC.<sup>17</sup>

Part I of this Note discusses the Rwandan genocide, the creation of the ICC, and the ongoing conflict with the LRA. Part I also provides a detailed look at the ICTR 11 *bis* decisions, focusing on the criteria employed and its impact on the Rwandan government. Part II explores the ICC and its response to the evolving situation with the LRA in Uganda. Part III analyzes the application of a transfer mechanism to the ICC and considers modifications that could further increase its effectiveness in that context. Finally, the addendum contains proposed language for the transfer mechanism.

This Note argues that adopting a transfer mechanism would be valuable to the ICC for at least five reasons. First, it would establish a clear framework for addressing Uganda's request to regain jurisdiction over the LRA cases. Second, it would further the development of specific guidelines and best practices, serving as both a benchmark of international legitimacy and a goal toward which national judicial systems can strive. It would also give the ICC leverage for improving national judiciaries in countries where it has ongoing cases. A third advantage stems from a growing body of scholarship

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15. Int'l Criminal Tribunal for Rwanda, *Amendments Adopted at the Plenary Session of the Judges*, 2-3, 15th Plenary Session, (May 15, 2005) (adopting Rule 11 *bis*).

16. See *infra* Part I.A.3.b.

17. Prosecutor v. Yussuf Muniyakazi, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (Oct. 8, 2008).

demonstrating that the impact of war crimes prosecutions increases when the accused is tried as close as possible to those most affected by the crimes.<sup>18</sup> A transfer mechanism would allow cases to be moved closer to victims, and could take into account improvements to the judicial system between the indictment and the actual trial. Fourth, it provides the ICC with a flexible tool for alleviating potential caseload concerns as the Court obtains jurisdiction over more crimes, gains credibility, and potentially draws more referrals from ongoing conflicts around the world. Finally, it could provide a layer of protection against the perception that indictments are politically motivated, adding another argument to convince major countries that have not ratified the Rome Statute to do so. At the very least, it could help bring such countries to the negotiating table at the ICC Review Conference, scheduled for 2010, in Kampala, Uganda.<sup>19</sup>

## I. BACKGROUND

### A. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

#### 1. *A Brief History of the Rwandan Genocide*

On April 6, 1994, the plane of J. Habyarimana, the President of Rwanda, was shot down as he returned from a meeting with African heads of state.<sup>20</sup> President Habyarimana and several other important figures died in the crash.<sup>21</sup> The incident triggered a wave of violence resulting in the slaughter of more than 800,000 people in a little over three months, with

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18. See, e.g., Jean-Marie Kamatali, *From the ICTR to ICC: Learning From the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 90–93 (2005) (arguing that trials are far more effective if they are organized in the country where the crimes occurred with more involvement from the local individuals and organizations).

19. Int'l Criminal Tribunal for Rwanda [ICTR], *Venue of the Review Conference*, Res. ICC-ASP/7/Res.2, available at, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP7-Res-02-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP7-Res-02-ENG.pdf).

20. ALISON DES FORGES, HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 181–82 (1999) (noting that the party responsible for shooting down the plane remains a highly contested and largely uninvestigated issue); ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 220 (2003).

21. DES FORGES, *supra* note 20, at 181–82 (stating that Cyprien Ntaryamira, the President of Burundi, and General Nsabimana, the Chief of Staff of the Rwandan army also died in the crash).

most of the victims from the minority Tutsi population.<sup>22</sup> A brief discussion of the history leading up to the conflict provides a useful context to understand the current tensions surrounding the ICTR prosecutions and the issues raised by the potential transfer of cases to the Rwandan judiciary.

The ethnic categorization and subsequent hostility between the Hutu and Tutsi developed over the course of the twentieth century and significantly intensified when Belgium became the colonial power in the 1920s and 1930s.<sup>23</sup> The Belgians cemented growing separation between the two ethnic groups by decreeing that only Tutsi could be officials, giving them increased power over the Hutu.<sup>24</sup> The Belgians also registered the entire population and issued ethnic identity cards which all adult Rwandans were required to carry.<sup>25</sup> Domination by the minority Tutsi population, with the support of Belgium, continued until the end of the colonial era in the 1950s. The departure of the Belgians led to the ascendancy of the Hutu in elections in 1960, which was followed by the often violent expulsion of many Tutsi from regions that had previously been predominately Hutu.<sup>26</sup> Many of the Tutsi fled and became refugees on the margins of neighboring countries.<sup>27</sup>

A generation later, Tutsi who grew up as refugees formed the Rwandan Patriotic Front (RPF) with the goal of overthrowing President Habyarimana and establishing a new government.<sup>28</sup> In 1990, the RPF crossed the border and attacked Rwanda.<sup>29</sup> The RPF attack was followed by years of

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22. *Id.* at 15. For a detailed analysis of the genocide, see *id.*; DALLAIRE, *supra* note 20; PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

23. Prior to the Belgian colonization there was some fluidity between the Hutu and Tutsi groups which had generally split along occupational lines. DES FORGES, *supra* note 20, at 32–35. The Tutsi were pastoralists who also held more power and the Hutu cultivated the land, but the categories were not completely fixed. *Id.*

24. *Id.* at 35.

25. *Id.* at 36–38. After the registration, approximately 15% of the population identified as Tutsi, 84% as Hutu, and 1% as Twa (a distinct ethnic group). *Id.* at 37.

26. *Id.* at 38–40.

27. More than 300,000 Tutsi fled abroad. *Id.* at 39–40 (citing GÉRARD PUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* 62 (1995)). By the late 1980s, the population had grown to approximately 600,000. *Id.* at 48 (citing André Guichaoua, *Vers deux générations de réfugiés Rwandais?*, in *LES CRISES POLITIQUES AU BURUNDI ET AU RWANDA, 1993-1994: ANALYSES, FAITS ET DOCUMENTS*, 343 (1995)). Those Tutsi who ended up in Tanzania were the only refugees who were encouraged to integrate into the local population. *Id.* at 48.

28. *Id.* at 48.

29. *Id.* at 49. Many of the Tutsi in Uganda were part of Yoweri Museveni's

sporadic fighting between the two sides, with numerous cease-fire agreements signed and broken.<sup>30</sup> In 1994, as attempts to implement a peace agreement slowly unwound, the President's death set off a final round of violence.<sup>31</sup> The Hutu targeted and killed 800,000 Tutsi and moderate Hutu in what the ICTR later found to be "a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population"—the definition of genocide.<sup>32</sup> By the end of the conflict, the RPF had taken full control of the country and they have continued to dominate its politics since.<sup>33</sup> The RPF drove approximately two million Hutu refugees, including many of those who planned and committed the genocide, into neighboring countries.<sup>34</sup> Several thousand still remain in what is now the eastern part of the Democratic Republic of the Congo (DRC) as an extremist insurgency destabilizing the region.<sup>35</sup>

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National Resistance Army (NRA), which put him in power in Uganda in 1986, fueling much of the ethnic tension that led to the creation of the Lord's Resistance Army. Paul Kagame was the deputy head of military intelligence for the NRA. *Id.* at 48. *See also infra* Part I.C.

30. *E.g.*, DES FORGES, *supra* note 20 at 106, 109, 123, 180. This included the negotiation of the Arusha Peace Agreement with the goal of creating a broad based transitional government incorporating the RPF and numerous other political parties into the government. The Arusha Peace Agreement was the framework agreement the United Nations Assistance Mission for Rwanda (UNAMIR) was meant to help implement, established by S.C. Res. 872, U.N. Doc S/Res/872 (Oct. 5, 1993). *See also* DALLAIRE, *supra* note 20, at 96, 100–10.

31. *See, e.g.*, DALLAIRE, *supra* note 20, at 212, 221–62.

32. Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 35 (June 16, 2006) (recognizing that "[t]he fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge'."). *See also* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 art. 2, ¶ 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) (defining genocide).

33. *See supra* Part I.A.1. *See also*, DALLAIRE, *supra* note 20, at 474–76 (commenting on the RPF victory).

34. DALLAIRE, *supra* note 20, at 465, 488, 493–94, 518; HUMAN RIGHTS WATCH, RENEWED CRISIS IN NORTH KIVU 14 (Oct. 2007), available at <http://hrw.org/reports/2007/drc1007/drc1007webwcover.pdf>. Zaire was renamed the Democratic Republic of the Congo in 1997. CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>.

35. HUMAN RIGHTS WATCH, RENEWED CRISIS IN NORTH KIVU, *supra* note 34, at 14–15. Fighting in the Eastern DRC intensified in November and December 2008 which led to joint military operations by the Rwandan and DRC governments in an attempt to quell the fighting. Stephanie McCrummen, *Rwandan Troops Enter Congo to Find Hutu Militia Leaders*, WASH. POST, Jan. 21, 2009, at A3; Stephanie McCrummen, *Congo, Rwanda Call Joint Offensive a Success*, WASH. POST, Feb. 28, 2009, at A8. Many of the Hutu rebels were allowed to return to Rwanda in an amnesty program. Stephanie McCrummen, *For Rwandans, Fragile Acts of Faith:*

During the campaign, many international humanitarian law violations were committed by both sides.<sup>36</sup>

## 2. Structure of the ICTR and Rule 11 bis

Reports by the U.N. Special Rapporteur for Rwanda and a Commission of Experts established by the U.N. Security Council concluded that genocide occurred in Rwanda.<sup>37</sup> The reports led the Security Council to establish the ICTR on November 8, 1994, with Security Council Resolution 955.<sup>38</sup> The ICTR's mandate is to "prosecute 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."<sup>39</sup>

The Tribunal is located in Arusha, Tanzania and has three Trial Chambers where cases are heard by three-judge panels.<sup>40</sup> The first trial began in January 1997.<sup>41</sup> The Court's mandate has been extended four times, most recently in July 2009, and it is now expected to complete all cases at the trial level by the end of 2010.<sup>42</sup> As of May 2009, the Tribunal completed the trials of

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*Returning From Years in Congo's Bush, Hutu Rebels Seek Their Place in a Homeland Struggling to Forge a New Unity*, WASH. POST, Feb. 24, 2008, at A1. It is unclear how many rebels have actually returned to Rwanda and some militia groups are still active in the region. *35,000 Flee Renewed Clashes in Eastern DRC*, RADIO NETH. WORLDWIDE, July 25, 2009, <http://www.rnw.nl/int-justice/article/35000-flee-renewed-clashes-east-drcongo>.

36. DES FORGES, *supra* note 20, at 13–14, 301–02, 701–35; DALLAIRE, *supra* note 20, at 469.

37. The Special Rapporteur for Rwanda, *Report of the Special Rapporteur on the Situation of Human Rights in Rwanda*, Annex I and Annex II U.N. Doc. S/1994/1157, A/49/508, (Oct. 13, 1994). The Secretary General, *Preliminary Report by the Independent Commission of Experts*, U.N. Doc. S/1994/1125 (Oct. 4, 1994).

38. S.C. Res. 955, *supra* note 32; DES FORGES, *supra* note 20, at 737–78.

39. S.C. Res. 955, *supra* note 32, at art. 1.

40. *Id.* art. 11 (Composition of the Chambers); S.C. Res. 1512, U.N. Doc. S/RES/1512 (Oct. 27, 2003) (amending art. 11).

41. Erik Møse, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 920 (2005) (containing a detailed history of the accomplishments of the Tribunal divided into its separate mandates and describing some of the difficulties in establishing the Tribunal).

42. S.C. Res. 1878, U.N. Doc. S/RES/1878 (July 7, 2009). *See also* S.C. Res. 1824, U.N. Doc. S/RES/1824 (July 18, 2008). Even that deadline is questionable with the capture of Idelphonse Nizeyimana in October, 2009. Jeffrey Gettleman, *Major Suspect in Genocide of Rwandans is Captured*, N.Y. TIMES, Oct. 7, 2009, at A8.

forty-four accused, including six acquittals.<sup>43</sup> Fourteen other accused were awaiting judgments in five cases and ten were still involved in ongoing trials.<sup>44</sup> As part of its Completion Strategy to finish all of its initial trials, the Tribunal added the authority to transfer cases to competent national jurisdictions.<sup>45</sup> In May 2005, the Tribunal established Rule 11 *bis* in its Rules of Procedure and Evidence to facilitate these transfers.<sup>46</sup>

Under Rule 11 *bis*, a Trial Chamber may refer a case to a competent national jurisdiction on its own motion (*proprio motu*) or at the request of the Prosecutor.<sup>47</sup> The Prosecutor or the accused may appeal that decision.<sup>48</sup> However, discretion to transfer cases is not unlimited; the highest profile cases cannot be transferred to other courts.<sup>49</sup> Therefore, when considering a transfer request, the Prosecutor must first consider the status and extent of a defendant's alleged involvement in light of the ICTR's mandate to try those who were in positions of leadership and who bear the greatest responsibility for the genocide.<sup>50</sup>

Under Rule 11 *bis*, cases may be transferred to the country where the crime was committed, the country where the accused was arrested, or any other country with jurisdiction that is "willing and adequately prepared to accept such a case."<sup>51</sup> The final provision is a catchall allowing the Tribunal to consider transferring cases to countries that have adopted either universal jurisdiction laws or specific laws that provide jurisdiction to try crimes within the mandate of the ICTR and

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43. President of the Int'l Criminal Tribunal for Rwanda, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, Annex 1 (A), U.N. Doc. S/2009/247 (May 14, 2009) [hereinafter *Completion Strategy 2009*].

44. *Id.* Annex 1 (B)–(D). An additional six accused are waiting for trial, one will be retried and thirteen fugitives remain at large; *id.* Annex 2–4. Full cases are available at [www.icttr.org/default](http://www.icttr.org/default) (follow "Cases" hyperlink).

45. President of the Int'l Criminal Tribunal for Rwanda, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶¶ 46–50, U.N. Doc. S/2008/322 (May 13, 2008) [hereinafter *Completion Strategy 2008*].

46. *Amendments Adopted at the Plenary Session of the Judges*, *supra* note 15, at 2–3.

47. ICTR R. P. EVID. 11 *bis*(B).

48. *Id.* at 11 *bis*(H).

49. *Completion Strategy 2008*, *supra* note 45, ¶ 46 ("In determining whether an individual should be tried at the Tribunal, the Prosecutor considers, among other things, the alleged status and extent of the participation of the individual during the genocide, the alleged connection that the individual may have had with other cases, the need to cover the major geographical areas of Rwanda, the availability of evidence with regard to the individual concerned and the availability of investigative material for transmission to a State for national prosecution.").

50. *Id.*

51. ICTR R. P. EVID. 11 *bis*(A)(iii).

other international tribunals.<sup>52</sup>

The analysis does not end with a determination that a country has jurisdiction to accept a case. Under Rule 11 *bis*, the Trial Chamber must also “satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”<sup>53</sup> In addition, if a case is transferred the Prosecutor can monitor the subsequent proceedings in the national court to ensure a fair trial and has the ability to revoke jurisdiction if necessary.<sup>54</sup> Rule 11 *bis* and its case law provide a comprehensive framework for analyzing transfer requests while ensuring that the accused receives a fair trial.

### 3. Transferring Cases from the ICTR in Practice

#### a. Transferring Cases to Europe

Since Rule 11 *bis* was adopted, the Prosecutor has requested the referral of eight cases to national jurisdictions.<sup>55</sup> Only two requests have been granted.<sup>56</sup> The two successful referrals, both to France, were in the cases against Wenceslas Munyeshyaka and Laurent Bucyibaruta.<sup>57</sup>

The transfer request to France was a very straightforward analysis. The Court found that France had jurisdiction over the cases on the basis of a French law specifically adopted to prosecute individuals for crimes within the mandate of the ICTR.<sup>58</sup> Jurisdiction was also confirmed by the French courts<sup>59</sup>

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52. *E.g.*, France has adopted such a provision; discussed in more detail in the transfer cases for Wenceslas Munyeshyaka and Laurent Bucyibaruta, *see infra* Part I.3.a.

53. ICTR R. P. EVID. 11 *bis*(C) (“In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”).

54. ICTR R. P. EVID. 11 *bis*(D)(iv), (F). For full text, *see infra* note 95.

55. *Completion Strategy 2009*, *supra* note 43, ¶ 29; *Completion Strategy 2008*, *supra* note 45, ¶ 50; President of the Int'l Criminal Tribunal for Rwanda, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶¶ 29–30, U.N. Doc. S/2007/676 (Nov. 20, 2007).

56. *Completion Strategy 2008*, *supra* note 45, ¶ 50.

57. Prosecutor v. Munyeshyaka, Case No. ICTR-2005-97-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007); Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on the Prosecutor's Request for the Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007).

58. Law No. 96-432 of May 22, 1996, arts. 1–2. *Journal officiel de la*

and the crime of genocide is recognized in the French Criminal Code.<sup>60</sup> After determining that France had jurisdiction over all of the crimes charged in the indictment, the Court examined the defendant's fair trial rights in France<sup>61</sup> and ensured that the death penalty would not be carried out.<sup>62</sup> Finally, France had an adequate witness protection scheme and would allow the ICTR to monitor proceedings pursuant to Rule 11 *bis*(D)(iv).<sup>63</sup>

The issue of jurisdiction has been much more difficult in attempts to transfer cases to other European countries. For example, the Prosecutor's first motion to transfer Michel Bagaragaza's case to Norway was denied at both the trial level<sup>64</sup> and on appeal.<sup>65</sup> Norway has adopted universal jurisdiction laws, but Norway's body of criminal law does not explicitly address the crime of genocide. Norwegian officials were going to prosecute the case under a homicide statute,<sup>66</sup> but neither the Trial Chamber nor the Appeals Chamber was willing to transfer the case to a jurisdiction that was unable to charge the crime as a serious violation of international humanitarian law.<sup>67</sup> The

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République française [J.O.] [Official Gazette of France], May 23, 1996, p. 7695 (Fr.). Universal jurisdiction is rooted in the idea that "every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned." James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 261–62 (2006) (quoting Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 384 (2001)).

59. *Munyeshyaka*, Case No. ICTR-2005-97-I ¶ 10.

60. CODE PÉNAL [C. PÉN.] art., Article 211-1 (Fr). To complete jurisdiction the accused also had to be in France; this requirement was met in both cases. *Munyeshyaka*, Case No. ICTR-2005-97-I ¶ 16.

61. *Munyeshyaka*, ICTR-2005-97-I ¶¶ 20–24. France has ratified numerous international instruments and has the guarantee of a fair trial in their domestic law. *Id.* 21–23.

62. *Id.* ¶ 18 (citing France's ratification of Protocol No. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which proscribes the death penalty in all circumstances and Article 66-1 of the French Constitution that was added in 2007 forbidding the death penalty).

63. ICTR R. P. EVID. 11 *bis*(D)(iv); *Munyeshyaka*, ICTR-2005-97-I ¶¶ 25–30.

64. Prosecutor v. Bagaragaza (Bagaragaza Trial Court), Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, ¶ 16 (May 19, 2006). Bagaragaza was charged with conspiracy to commit genocide, genocide, and, in the alternative, complicity in genocide. *Id.* ¶ 1.

65. Prosecutor v. Bagaragaza (Bagaragaza Appeal), Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11*bis* Appeal (Aug. 30, 2006).

66. *Bagaragaza Appeal*, ICTR-2005-86-AR11*bis* ¶¶ 13–14 (citing Amicus Curiae Brief filed by the Kingdom of Norway, 26 June 2006). The homicide statute also carried a maximum punishment of twenty-one years in jail, which the prosecution was willing to accept. *Bagaragaza Trial Court*, ICTR-2005-86-R11*bis* ¶ 14.

67. *Bagaragaza Appeal*, ICTR-2005-86-AR11*bis* ¶¶ 17–18; *Bagaragaza Trial*

Court held that the importance of seeking a conviction for genocide outweighed the fact that a significant jail sentence, in line with other ICTR convictions, could have been imposed.

In a second attempt to transfer Bagaragaza's case, the Prosecutor initially succeeded with a motion to transfer the case to the Netherlands.<sup>68</sup> The Netherlands had already successfully prosecuted, convicted, and sentenced three non-nationals for war crimes.<sup>69</sup> The Trial Chamber also found that the country would provide a fair trial, adequate witness protection, would not impose the death penalty, and would allow the proceedings to be monitored by the ICTR.<sup>70</sup> Less than three months later, however, a Dutch court rejected jurisdiction for a separate, but similar, genocide case involving a Rwandan because there were no Dutch victims.<sup>71</sup> Concluding that the Dutch court would not find jurisdiction for Bagaragaza either, the court granted the Prosecutor's request to cancel the transfer order.<sup>72</sup>

#### b. Transferring Cases to Rwanda

The Prosecutor faced an entirely different set of issues with the requests to transfer three cases to Rwanda in May and June

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*Court*, ICTR-2005-86-R11bis ¶ 16.

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

69. *Bagaragaza Netherlands*, ICTR-2005-86-11bis ¶ 13. The Netherlands claimed jurisdiction over the case through article 4a of the Dutch Criminal Code. *Id.* ¶ 17 ("[T]he Dutch criminal law is applicable to anyone against whom prosecution has been transferred from a foreign State to the Netherlands on the basis of a treaty from which the power of the Netherlands to prosecute follows.").

70. *Id.* ¶¶ 31–39.

71. District Court Intermediary Decision in the Case of J.M., The Court of the Hague, ¶ 24, (July 24, 2007), available at <http://www.haguejusticeportal.net/eCache/DEF/9/661.html>. See also, Prosecutor v. Bagaragaza (Bagaragaza Rule 11 Bis(F) & (G)), Case No. ICTR-2005-86-11bis, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11 Bis(F) & (G), ¶ 3, (Aug. 17, 2007). Joseph Mpambara was eventually found guilty of torture and sentenced to twenty years imprisonment by the District Court of the Hague. Rwandees wegens foltering veroordeeld tot 20 jaar gevangenisstraf (Mar. 23, 2009) (Dutch), available at <http://www.rechtspraak.nl/Actualiteiten/Rwandees+wegens+foltering+veroordeeld+tot+20+jaar+gevangenisstraf.htm>. See also, Mpambara, Joseph, the Hague Justice Portal, <http://www.haguejusticeportal.net/eCache/DEF/9/660.html>.

72. *Bagaragaza Rule 11 Bis(F) & (G)*, ICTR-2005-86-11bis ¶¶ 11–12. Bagaragaza eventually plead guilty to complicity in genocide. Press Release, Int'l Criminal Tribunal for Rwanda, Bagaragaza Pleads Guilty (Sept. 17, 2009), available at <http://www.ictor.org/ENGLISH/PRESSREL/2009/607.html>.

of 2008.<sup>73</sup> Each motion was denied by a separate Trial Chamber.<sup>74</sup> Two further transfer requests were denied at the end of 2008.<sup>75</sup> In denying all of the requests to transfer cases to Rwanda, the Tribunal set a high bar for fair trial rights and respect for accepted international standards of detention. The Appeals Chamber upheld the denial of transfer in the case of Yussuf Munyakazi and the decision is illustrative of the concerns voiced by all the Trial Chambers.<sup>76</sup>

Jurisdiction was not in dispute in any of the cases. Rwanda was the state in which the crimes were committed and the country recently abolished the death penalty.<sup>77</sup> Each of the transfer requests hinged on 11 *bis*(C): whether “the accused will receive a fair trial in the courts of the State concerned . . .”<sup>78</sup> Specifically, the chambers were concerned about the defendant’s

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73. Prosecutor v. Munyakazi (Munyakazi Trial Court), Case No. ICTR-97-36-R11*bis*, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda (May 28, 2008); Prosecutor v. Hategekimana (Hategekimana Trial Court), Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (June 19, 2008); Prosecutor v. Kanyarukiga (Kanyarukiga Trial Court), Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (June 6, 2008).

74. *Munyakazi Trial Court*, ICTR-97-36-R11*bis* ¶ 67; *Hategekimana Trial Court*, ICTR-00-55B-R11*bis* ¶ 78; *Kanyarukiga Trial Court*, ICTR-2002-78-R11*bis* ¶ 104.

75. Prosecutor v. Gatete, Case No. ICTR-2000-61-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (Nov. 17, 2008); Prosecutor v. Kayishema, Case No. ICTR-01-67-R11*bis*, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda (Dec. 16, 2008).

76. Prosecutor v. Munyakazi (Munyakazi Appeal), Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis* (Oct. 8, 2008). The standard of review for 11 *bis* decisions is discernible error. *Id.* ¶ 5. The Appeals Chamber also confirmed the denial of transfer in the cases against Hategekimana and Kanyarukiga. Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis* (Dec. 4, 2008); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis* (Oct. 30, 2008). Additionally, the Trial Chamber in the case against Hategekimana was “not satisfied that Rwanda’s legal framework criminalizes command responsibility.” *Hategekimana Trial Court*, ICTR-00-55B-R11*bis* ¶ 78.

77. ICTR R. P. EVID. 11 *bis*(A)(i) (“If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) In whose territory the crime was committed; . . .”). See, e.g., *Munyakazi Trial Court*, ICTR-97-36-R11*bis* ¶¶ 15–16. Rwanda repealed the death penalty in Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty [Rwanda] 31/2007 (July 25, 2007), available at [www.unhcr.org/refworld/docid/46bada1c2.html](http://www.unhcr.org/refworld/docid/46bada1c2.html).

78. ICTR R. P. EVID. 11 *bis*(C).

access to witnesses, both within Rwanda and from outside the country, and the potential penalty of life in solitary confinement.<sup>79</sup>

In evaluating the chances that the accused would receive fair trials in Rwanda, the Tribunal was particularly concerned about equal access to witnesses for the prosecution and defense. All three Trial Chambers found that the potential disparity in access was grounds to deny the transfer.<sup>80</sup> The Tribunal credited reports from witnesses who had testified both in Rwanda and before the Tribunal, stating that defense witnesses “experienced threats, torture, arrests and detentions, and, in some instances, were killed.”<sup>81</sup> The Tribunal was concerned that defense witnesses would not travel to Rwanda because their safety could not be guaranteed. Not having equal access to witnesses would severely undermine the fair trial rights of the accused.

The RPF has remained in power since the end of the genocide and that political reality was a major factor in the fear expressed by potential defense witnesses.<sup>82</sup> Paul Kagame was the leader of the RPF forces during the civil war between 1990 and 1994, and he was reelected in 2003 to a second seven-year term as president with 95% of the vote.<sup>83</sup> His government has actively limited speech concerning the genocide and ethnic tensions.<sup>84</sup> In 2002, a broadly worded law was passed against “divisionism,” and in June 2008, another similar law was passed

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79. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶¶ 20, 50. The chambers view the detention conditions as part of the underlying fairness of the justice system. See, e.g., *Hategekimana Trial Court*, ICTR-00-55B-R11bis ¶ 75. See also, *Rwanda Killers to Face Solitary*, BBC NEWS, May 28, 2009, <http://news.bbc.co.uk/2/hi/africa/8070306.stm>.

80. *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶¶ 53–66; *Hategekimana Trial Court*, ICTR-00-55B-R11bis ¶¶ 61–71; *Prosecutor v. Kanyarukiga* (Kanyarukiga Trial Court), Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶¶ 63–81 (June 6, 2008). See also, *Munyakazi Appeal*, ICTR-97-36-R11bis ¶¶ 37–43 (upholding Trial Court’s ruling and reasoning).

81. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶ 37.

82. See *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶¶ 53–66; *Hategekimana Trial Court*, ICTR-00-55B-R11bis ¶¶ 61–71; *Kanyarukiga Trial Court*, Case No. ICTR-2002-78-R11bis ¶¶ 37–43.

83. CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>. The RPF political party received 78.8% of the vote in the legislative election. *Id.*

84. See HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA 34–43 (2008).

against spreading “genocide ideology.”<sup>85</sup> In addition to fears for their safety from the local community, witnesses for the defense have said that they are afraid testifying could lead to prosecution under either of these laws or before the *gacaca* courts.<sup>86</sup> Most of the defense witnesses reside outside of Rwanda and appear unwilling to travel to Rwanda to testify.<sup>87</sup>

All three Trial Chambers also found the potential sentence of life imprisonment in solitary confinement sufficient alternative grounds to deny transferring the cases.<sup>88</sup> The Rwandan government argued that the Transfer Law, specifically passed to handle cases from the ICTR, controlled in this situation and only allowed life imprisonment, absent the “special circumstances” that could lead to solitary confinement under other Rwandan law.<sup>89</sup> The Appeals Chamber was unconvinced and found the ambiguous legal situation sufficient to warrant denial of the transfer.<sup>90</sup>

Some of the Trial Chambers also articulated individual concerns unique to that chamber. For example, the Munyakazi Trial Chamber raised the issue of potential interference with the judiciary by the Rwandan government, based, in part, on an amicus brief submitted by Human Rights Watch.<sup>91</sup> The Appeals

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85. *Id.*

86. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶ 37; *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶¶ 53–66. The *gacaca* courts were local, informal courts created to deal with the large number of genocide charges within Rwanda. For more information, see HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA, *supra* note 84, at 17–19; Bert Ingelaere, *The gacaca Courts in Rwanda*, in TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT 32–58 (Institute for Democracy and Electoral Assistance ed., 2008).

87. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶¶ 40–41; *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶¶ 63–66. The Courts also dismissed the idea of having the majority of the defense witnesses testify by video-link. If the majority of the prosecution’s witnesses testify in person, they found that this difference violated the equality of arms. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶ 65; *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶ 42.

88. Prosecutor v. Hategekimana (Hategekimana Trial Court), Case No. ICTR-00-55B-R11bis, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, ¶ 25 (June 19, 2008); Prosecutor v. Kanyarukiga (Kanyarukiga Trial Court), Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda ¶¶ 95–96 (June 6, 2008); *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶ 22.

89. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶¶ 12–15; Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States [Rwanda], 11/2007 (Mar. 16, 2007), available at [www.unhcr.org/refworld/docid/476644652.html](http://www.unhcr.org/refworld/docid/476644652.html).

90. *Munyakazi Appeal*, ICTR-97-36-R11bis ¶ 20.

91. *Munyakazi Trial Court*, ICTR-97-36-R11bis ¶¶ 48–49, 67. For a detailed account of the issues raised by Human Rights Watch, see generally, HUMAN RIGHTS

Court was not convinced by the analysis, however, and overturned the trial court's finding.<sup>92</sup> The other two Trial Chambers acknowledged the concern of pressure on the judiciary, but were not persuaded that the issue rose to the level necessary to deny transfer.<sup>93</sup> The Appeals Chamber also noted that the monitoring and revocation safeguards built into Rule 11 *bis* would impact the availability and protection of witnesses.<sup>94</sup> These provisions explicitly allow for the Prosecutor to send observers to monitor the proceedings in the national court and to request that a Trial Chamber revoke the transfer if necessary.<sup>95</sup>

## B. CREATION AND STRUCTURE OF THE INTERNATIONAL CRIMINAL COURT

The concept of a permanent international tribunal goes back to at least the 1940s, where it was originally envisioned as a forum for trying people charged under the Genocide Convention.<sup>96</sup> At that time, draft structures for a court were even prepared by the United Nations.<sup>97</sup> The idea did not gain sufficient political traction to become a reality, however, until the 1990s. The Rome Statute of the International Criminal

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WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA, *supra* note 84.

92. *Munyakazi Appeal*, ICTR-97-36-R11*bis* ¶ 50.

93. *Id.* ¶¶ 26–31.

94. *Id.* ¶¶ 30, 44. No mention is made in Rule 11 *bis* of what would happen to these provisions in the likely event that the transfer cases would still be on going after the Tribunal's mandate expires. ICTR R. P. EVID. 11 *bis*(D)(iv), (F). The Appeals Chamber noted that the Prosecutor had arranged for the African Commission on Human and People's Rights to undertake the monitoring responsibility. *Munyakazi Appeal*, ICTR-97-36-R11*bis* ¶ 30.

95. Rule 11 *bis*(D)(iv) and (F) state:

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

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

ICTR R. P. Evid. 11 *bis*(D)(iv), (F).

96. Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

97. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 8–9 (2nd ed. 2004).

Court (ICC)<sup>98</sup> was signed by 120 states on July 17, 1998.<sup>99</sup> It was swiftly ratified by the required sixty states and entered into force on July 1, 2002.<sup>100</sup> As of July 2009, 110 countries had ratified the Statute.<sup>101</sup> By June 2003, the first judges of the Court and the first prosecutor, Luis Moreno-Ocampo, were sworn in, and the first trial began in January 2009.<sup>102</sup>

In order to hear a case, the ICC must have jurisdiction, the case must meet one of the three triggering mechanisms, and it must survive a determination of admissibility.<sup>103</sup> The manner in which cases find their way to the Court has a significant impact on how a transfer mechanism to a national judicial system would operate.

The Court's jurisdiction turns on subject matter, time, person, and location. The preamble of the Statute envisions the Court addressing "unimaginable atrocities that deeply shock the conscience of humanity," and "the most serious crimes of concern to the international community as a whole."<sup>104</sup> The Court's jurisdiction covers genocide, crimes against humanity, war crimes, and aggression.<sup>105</sup> Article 12 limits the Court's

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98. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S 90 [hereinafter Rome Statute] (entered into force July 1, 2002).

99. SCHABAS, *supra* note 97, at 18 (noting that twenty-one countries abstained and seven voted against, including the United States, Israel, and China).

100. *Id.* at 19–20.

101. International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Aug. 30, 2009) ("As of 21 July 2009, 110 countries are States Parties to the Rome Statute . . .").

102. See, e.g., HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS 4 (2008). Press Release, Int'l Criminal Court, Opening of the First Trial of the Court on Monday 26 January 2009: For the First Time in the History of International Law the Victims Will Fully Participate in the Proceedings (Jan. 23, 2009), available at <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/> (follow "6" hyperlink at the bottom of the page; then follow "Opening of the First Trial of the Court" hyperlink). For more on the history and creation of the Court, see generally, M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443 (1999); Adriaan Bos, *From the International Law Commission to the Rome Conference (1994-1998)*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 35–65 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones, eds., 2002); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 1999); SCHABAS, *supra* note 97, at 1–25.

103. See SCHABAS, *supra* note 97, at 68.

104. Rome Statute, *supra* note 98, pmbl.

105. *Id.* art. 5. Articles 6, 7, and 8 further define genocide, crimes against humanity, and war crimes respectively. Jurisdiction and a definition of the crime of aggression have not yet been adopted and will not be considered until a review conference to be held in 2010. See *id.* arts. 121, 123; SCHABAS, *supra* note 97, at 31–

jurisdiction to crimes committed in the territory of a state party to the Statute or to nationals of those states who commit crimes in other countries.<sup>106</sup> Temporally, the ICC cannot hear any cases that occurred before the Statute entered into force for the particular country.<sup>107</sup>

In addition to meeting these requirements, the ICC's jurisdiction can only be triggered in one of three ways: voluntary referral by a state party to the Statute, referral by the Security Council, or through a *proprio motu* examination by the Prosecutor and approved by a pre-trial chamber of the Court.<sup>108</sup> As of August 2009, the ICC had three open investigations referred from States, including the situation in Uganda, and one investigation referred by the Security Council.<sup>109</sup>

Finally, the Court must make an admissibility determination in which the Prosecutor looks at the gravity of the allegations and the complementarity of prosecution with national courts.<sup>110</sup> To assess the gravity of a situation, the

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34. For several proposed options, see *id.*

106. Rome Statute, *supra* note 98, art. 12. States which are not party to the Statute may also accept the jurisdiction of the Court on an ad hoc basis with respect to a specific crime by lodging a declaration with the Registrar. *Id.* art. 12(3). This method has been followed by Côte d'Ivoire with respect to crimes committed on its territory since September 19, 2002, though the text of the request was not disclosed. Press Release, Int'l Criminal Court, Registrar Confirms that the Republic of Côte d'Ivoire has Accepted the Jurisdiction of the Court, (Feb. 15, 2005), *available at* <http://www.icc-cpi.int/NR/exeres/FA0D49A0-69D4-4676-9E77-567B25321CBA.htm>.

107. For the original sixty states, this occurred when the last ratification was deposited on July 1, 2002. See Rome Statute, *supra* note 98, arts. 11, 24, 126(1). For subsequent states, the Statute comes into force about two months after their ratification of the Statute.

For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Rome Statute, *supra* note 98, art. 126(2). See also SCHABAS, *supra* note 97, at 69.

108. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS, *supra* note 102, at 37–38. *Ex proprio motu* (Latin for “of one’s own accord”) is a motion initiated by the Prosecutor. *Id.* at 37; BLACK’S LAW DICTIONARY (8th ed. 2004).

109. The other two state referrals are from to the Democratic Republic of the Congo and the Central African Republic. The Security Council referred the situation in Darfur, Sudan. Int'l Criminal Court: Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Aug. 30, 2009). Under Article 16, the Security Council also has the ability to defer investigation or prosecution for up to twelve months with unlimited renewal. Rome Statute, *supra* note 98, art. 16. See also SCHABAS, *supra* note 97, at 82–85.

110. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK

Prosecutor “considers the scale, nature, manner of commission, and impact of the crimes”<sup>111</sup> to ensure that a particular case justifies the Court’s attention.<sup>112</sup> The admissibility determination occurs at two separate stages, once when the Prosecutor makes the decision to open an investigation and again when the Prosecutor asks for a specific indictment from a pre-trial chamber.<sup>113</sup>

Complementarity is based on whether a “State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>114</sup> Unwillingness is determined by examining whether the State’s actions are meant to shield a person from criminal responsibility, whether there is an unjustifiable delay, whether the proceedings are impartial, and whether they are “inconsistent with an intent to bring the person concerned to justice.”<sup>115</sup> Inability to prosecute a case is determined by considering “whether, due to a total or substantial collapse or unavailability of its national judicial system the State” is able to proceed with the case.<sup>116</sup>

### C. UGANDA AND THE LORD’S RESISTANCE ARMY

The unrest caused in northern Uganda by the Lord’s Resistance Army (LRA) has deep roots in the history of the country and the region as a whole. Parts of the problem can be

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INTERNATIONAL CRIMINAL COURT’S FIRST YEARS, *supra* note 102, at 38. The concept of ‘complementarity’ is drawn from articles 1 and 10 of the preamble to the Rome Statute. SCHABAS, *supra* note 97, at 85. See, e.g., *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, ICC-02/04-01/05 (Sept. 27, 2005) (Public Redacted Version), available at <http://www2.iccpi.int/iccdocs/doc/doc97185.pdf>.

111. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT’S FIRST YEARS, *supra* note 102, at 38 (citing Office of the Prosecutor, Criteria for Selection of Situations and Cases 5 (June 2006) (draft policy paper on file with Human Rights Watch)).

112. Rome Statute, *supra* note 98, art. 17(1)(d) (“[T]he Court shall determine that a case is inadmissible where . . . (d) The case is not of sufficient gravity to justify further action by the Court.”).

113. *Id.* arts. 17, 53(1)(b). See also, William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 J. INT’L CRIM. JUST. 257, 260–61 (2009).

114. Rome Statute, *supra* note 98, art. 17(1)(a); see also SCHABAS, *supra* note 97, at 86 (“The terms ‘unwilling’ and ‘unable’ are explained in some detail in Article 17, although the enigmatic adjective ‘genuinely’ is left entirely to the appreciation of the Court.”).

115. Rome Statute, *supra* note 98, art. 17(2)(a)–(c).

116. *Id.* art. 17(3).

traced back to the artificial creation of the border between Uganda and Sudan by the British, dividing the population of the Acholi people.<sup>117</sup> More recently, in 1980, the elections after the overthrow of Idi Amin returned Milton Obote to power, but were widely viewed to be fraudulent.<sup>118</sup> This led Yoweri Museveni, who had helped in the overthrow of Amin, to form the National Resistance Army (NRA) and begin an insurgency in the country.<sup>119</sup> Six years later, Acholi soldiers within the Ugandan army revolted, deposed Obote, and signed a peace agreement with the NRA.<sup>120</sup> However, the NRA ignored the agreement and seized the capital, driving the Acholi soldiers back north, with Museveni becoming President.<sup>121</sup> Many of the Acholi crossed the border and sought safety with their ethnic kin in southern Sudan.<sup>122</sup> The cycle of state persecution and the subsequent formation of resistance groups continued, this time in the north with Acholi and other groups that had supported the previous government.<sup>123</sup>

In 1988 President Museveni's government signed a peace agreement with the largest resistance group.<sup>124</sup> Those unwilling to surrender joined a minor rebel group led by Joseph Kony.<sup>125</sup> By 1990, he led the only significant armed group still fighting in the North, which came to be called the Lord's Resistance

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117. Tim Allen relates how the border between Uganda and Sudan was created:

The formation and classification of "tribes" to some extent pre-dated the process of finally deciding where the border between Sudan and Uganda should be located. But this did not stop the boundary being constructed in such a way as to divide close related populations. Some "Acholi" groups were in fact deliberately included in Sudan, because the British officer from the Sudan administration who helped demarcate the boundary line thought their chiefs were quite "progressive" and he wanted to have some in "his" territory, whereas the Ugandan official just wanted to go on leave, so he did not care one way or the other.

ALLEN, *supra* note 6, at 26–27 (2006).

118. *Id.* at 28–29.

119. *Id.*

120. *Id.* at 29–30.

121. *Id.*

122. *Id.* at 30. Many of the Acholi soldiers in southern Sudan then joined a militia that was supplied by the Sudanese government because they were fighting against the Sudan People's Liberation Army (SPLA), which controlled south Sudan.

*Id.*

123. *Id.* at 30–31.

124. *Id.* at 36, 38 (The rebel group that surrendered was the Uganda People's Democratic Army (UPDA)).

125. *Id.*

Army.<sup>126</sup> Since then, the LRA has continued to destabilize the region, abducting or killing thousands of people and causing mass displacement.<sup>127</sup> Over the years, Museveni's government has attempted several military campaigns and peace negotiations, including an offer of amnesty in 1999 for any LRA rebels who laid down their arms.<sup>128</sup> Some rebels accepted the amnesty offer, but none of the attempts to end the insurrection, through peace or conflict, have succeeded. In December 2003, President Museveni officially referred the situation involving the LRA to the International Criminal Court.<sup>129</sup> In conjunction with the referral, Museveni excluded the leadership of the LRA from the previous amnesty offer.<sup>130</sup>

LRA leaders have now cited the ICC indictments as the only major barrier to continued peace negotiations.<sup>131</sup> However, Uganda does not have control over the ICC indictments, so even if a peace agreement were signed, the top leaders would still be subject to the ICC arrest warrants. This impasse has led the Ugandan government to form a special war crimes chamber in their judiciary and consider asking the ICC to transfer the LRA indictments to that court.<sup>132</sup> The government of Uganda hopes that the potential to hold trials in the country, and therefore provide the rebel leaders with the chance to present their case to the Ugandan people, will bring the rebels back to peace negotiations.<sup>133</sup>

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126. *Id.* at 39.

127. *Id.* at 53–71. See Stephanie McCrummen, *Ugandan Rebels Kill 189 People in 3 Days in NE Congo, U.N. Says*, WASH. POST, Dec. 30, 2008, at A10.

128. *E.g.*, ALLEN, *supra* note 6, 47–49, 72–82. There are also several potential reasons that the war could be useful to Museveni, including cementing his political base in the southern part of the country and providing a useful, barbaric opponent to limit opposition. During this time the LRA also began to get considerable support from the government in Sudan in order to fight against groups in south Sudan and in retaliation for Museveni's support of them. *Id.* The African Union also authorized renewed military action against the LRA in a special summit held August 31, 2009. Special Session of the Assembly of the Union on the Consideration and Resolution of Conflicts in Africa, Aug. 31, 2009, *Plan of Action*, ¶ 8(ix), SP/Assembly/PS/Plan(I), available at [http://www.africa-union.org/root/ar/index/Special\\_Summit/Plan%20of%20Action-%20Final%20\\_Eng%20\\_.pdf](http://www.africa-union.org/root/ar/index/Special_Summit/Plan%20of%20Action-%20Final%20_Eng%20_.pdf).

129. President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, *supra* note 11.

130. *Id.*

131. Wheeler, *supra* note 5.

132. *Uganda Sets Up War Crimes Court*, BBC NEWS, May 26, 2008, <http://news.bbc.co.uk/2/hi/africa/7420461.stm>.

133. *Uganda Rebels in Fresh Truce Call*, *supra* note 13. *But cf.* Joel Ogwang, *Kony Must be Tried at the ICC, Says Judge*, NEW VISION (Uganda), May 12, 2009, available at <http://www.newvision.co.ug/D/8/13/681108>.

## II. FROM THE ICC WITH LOVE

It is theoretically possible for the ICC to transfer the LRA indictments to Uganda. A brief look at the current options available, however, demonstrates the utility of a specific, formal transfer mechanism. Currently, there is not a clear method for the ICC to divest itself of cases. This section explores how the ICC could transfer the LRA indictments to Uganda under the current rules and then considers how a rule modeled on the ICTR's 11 *bis* motions could be crafted as a more effective route to shift cases back to national jurisdictions if necessary.

### A. CURRENT FRAMEWORK TO TRANSFER CASES FROM THE ICC

There are several ways that Uganda could attempt to have the indictments transferred to its judiciary. The most obvious method would be to challenge the jurisdiction of the Court under Article 19 of the Rome Statute.<sup>134</sup> Article 19 allows a state to challenge the admissibility or jurisdiction of the ICC if that state has jurisdiction and is investigating or prosecuting the case.<sup>135</sup> A request by Uganda to prosecute the LRA indictments in its own judicial system potentially negates the admissibility of the cases to the ICC under Article 17, which requires the ICC to “determine a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it . . . .”<sup>136</sup> For this challenge to work, Uganda would also need

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134. Rome Statute, *supra* note 98, art. 19.

135. *Id.*

136. Rome Statute, *supra* note 98, art. 17. See also Int'l Criminal Court, *Paper on Some Policy Issues before the Office of the Prosecutor* 4 (Sept. 2003), available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

With regard to paragraph 10 of the preamble and Article 1, the Court shall determine that a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

The case is not of sufficient gravity to justify further action by the Court.

to prove that it is willing and genuinely able to carry out the prosecutions.<sup>137</sup>

The ICC, however, has several coherent arguments it could use to deny transfer. Cases of self-referral from a state party were not generally contemplated when the Rome Statute was drafted.<sup>138</sup> Uganda specifically requested that the ICC take jurisdiction over the LRA cases in the first instance, and the legality and consequences of a request to challenge admissibility after such a referral are not clear. The ICC could simply claim that Uganda is not genuinely able to prosecute the cases. This determination was presumably made when the ICC originally accepted the cases.<sup>139</sup> The ICC could find the proposed war crimes chamber of the High Court of Uganda inadequate to overturn the previous finding of an inability to prosecute. A decision along those lines, however, is a very blunt instrument and risks undermining domestic support for a war crimes chamber and for the ICC.<sup>140</sup>

The language of Articles 17 and 19 does not make the concept of transferring cases back to national jurisdictions a simple legal question. William W. Burke-White and Scott Kaplan note that under the language of Article 19(4)–(5) it is possible that there is actually no procedural mechanism for Uganda to challenge admissibility before the ICC at this stage in the process.<sup>141</sup> Article 19 states in part: “The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State . . . . A State . . . shall make a challenge at the earliest opportunity.”<sup>142</sup> Almost five years have

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Rome Statute, *supra* note 98, art. 17.

137. *Id.*

138. Burke-White & Kaplan, *supra* note 113, at 259.

139. The hearing regarding the request for the transmission of warrants was in closed session and is under seal. See, Transcript of Procedural Matters Hearing, Prosecutor v. Joseph Kony, Case No. ICC 02/04, (June 16, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc238384.pdf>; Prosecutor v. Joseph Kony, Case No. ICC 02/04, Decision to Hold a Hearing on the Request Under Rule 176 Made in the Prosecutor’s Application for Warrants of Arrest Under Article 58, ICC-02/04 (June 9, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc271809.pdf>.

140. See *infra* Section II.B.1.

141. Burke-White & Kaplan, *supra* note 113. See Rome Statute, *supra* note 98, art. 17.

142. Article 19 (4)–(5) states:

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of

passed since Uganda originally referred the case to the ICC and the referral itself can be seen as an admission that Uganda was not able to try the case. Uganda could argue that circumstances have changed and that only now is it able to effectively prosecute the cases. But the success of such an argument is far from guaranteed and there is no clear reason why Uganda could not have created a special chamber to try the cases at the time of the initial referral.

Burke-White and Kaplan also explore several other legal arguments that the ICC could make in order to refuse a transfer request by Uganda. One would use Article 17 to claim that, by requesting transfer, Uganda is attempting to shield the accused from prosecution.<sup>143</sup> They also make a more general estoppel argument, stating that the ICC relied on Uganda's self-referral in proceeding with an investigation.<sup>144</sup> These potential methods to transfer the indictments back to Uganda, however, are inferior options behind a more specific mechanism to handle transfer requests. Such a rule would be beneficial to the Court and the international community as a whole; its advantages will be explored in the next section.

#### B. ASSESSING THE POTENTIAL TRANSFER MECHANISM FOR THE ICC

The ICTR's Rule 11 *bis* provides an excellent template to consider a similar rule for the ICC. This section will examine how the basic outline of Rule 11 *bis*, with some modifications, would provide a much more comprehensive approach to address the legal and fair trial issues surrounding the transfer of a case from the ICC to a national jurisdiction. It will also look at some of the potential issues raised by the addition of a transfer mechanism to the ICC.

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the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

Rome Statute, *supra* note 98, art. 19 (4)–(5).

143. Burke-White & Kaplan, *supra* note 113, at 262.

144. *Id.* Their article then lays out three separate ways to view the admissibility requirement: "a fundamental right of the accused, a means to protect state sovereignty, or a basic limitation on the power of the Court." *Id.* The article goes on to evaluate the prospects of a challenge by Uganda under each viewpoint. *Id.* at 263–68.

### *1. A Clear Framework for Addressing Country Concerns*

Adopting a transfer mechanism provides a clear framework to address concerns about whether or not a case should actually be tried at the ICC. The Uganda situation is an excellent example of how ongoing conflicts continue to evolve, even after indictments have been handed down.<sup>145</sup> The Ugandan government, or a subsequent administration, could change its stance on the efficacy of ICC indictments in light of evolving peace negotiations with the LRA or changes in public sentiment. Arguably, the ICC indictments are now the only major barrier to the peace process. A transfer mechanism would channel those concerns into a formal process and allow the ICC to address them directly. Even if the Trial Chamber eventually finds that the indictments should not be transferred to the country in question, the rule allows the state to be heard and make its case for such a transfer.

In order to promote better communication between the ICC and requesting countries, the countries themselves should be able to request the transfer of cases; under the current rule for the ICTR, only the Prosecutor and Trial Chamber may do so. Transfer request hearings add another layer of accountability to the ICC in exchange for the small increased burden of holding them at the request of States. While such a motion could provide political cover for a government to shift negative public attitudes about trials to the Court, that risk exists even without the proposed rule. Under the current rules it could actually be easier to shift blame to the ICC because the State could legitimately argue that its hands have been tied, whereas with the new rule a country would actually have to go through the motions of attempting to retrieve the case, running the risk of getting what it asks for.

It is important for the Court to keep open communication with the countries it works with, especially as it strives to increase its legitimacy in the eyes of the international community. The ICC's reputation would be damaged if it was seen as either unaccountable or insensitive to the concerns of partner countries. A state is more likely to cooperate with the ICC if it feels more like an equal partner.

States also have vast potential to improve the condition of the country following the conclusion of a conflict. Rwanda is a

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145. The indictment of the President of Sudan, Omar al-Bashir, by the ICC is another example of an indictment in the middle of an ongoing conflict.

great example, especially given the state of the country and its judiciary in the wake of the genocide.<sup>146</sup> International investigations and indictments might be necessary to keep the judicial process moving forward while a country begins to recover, but as a country emerges from crisis and begins to develop its judiciary, a time could come when the state feels ready to take on its own trials. If a country's judicial system reaches that point, bringing the trials closer to the people affected by the crimes has a much greater impact on the people and the recovery of the country, and can assist in developing the capacity of the state's judiciary.<sup>147</sup>

Transfer requests, however, also bring increased scrutiny to a country, which can severely damage its reputation in the international community. While Rwanda's recent history is unique, many of the issues facing it are not. Still, these issues are disproportionately highlighted in a country like Rwanda. Rwanda has had increased attention focused on its judicial system by the transfer requests and the history of the West's involvement with the genocide.<sup>148</sup> Along with the media and NGO focus comes the risk of portraying Rwanda's issues as unusual on the international stage when many of the problems are relatively commonplace in the region.<sup>149</sup> Rwanda continues to compete with its neighbors and the rest of the world for

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146. HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA, *supra* note 84, at 12 (noting that the number of available judges fell from around 600 to 237 in August of 1994, with only 53 sitting in courts with jurisdiction over serious crimes. "Similar losses had thinned the ranks of prosecutors, judicial officers, police officers, clerks, and lawyers.").

147. See U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST-CONFLICT STATES: PROSECUTION INITIATIVES 30 (2006), available at <http://www.unhcr.org/refworld/docid/46cebb6c2.html>. See also, Jane E. Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT'L L. 415, 422-23 (2009); Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 265-67 (2007). The same concept can also be seen in the Sixth Amendment of the United States Constitution insuring "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI (emphasis added).

148. See, e.g., HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS, *supra* note 102.

149. See, e.g., AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS IN 2008, at 19 (2008) ("At least 362 people were known to have been sentenced to death in 19 African countries"). Rwanda was ranked 102 in Transparency International's 2008 Corruption Perception Index; tied with Tanzania and above the rest of its neighbors (DRC (171), Burundi (158), Uganda (126)). Transparency International, CPI 2008 Table, [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008/cpi\\_2008\\_table](http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table) (last visited Sept. 27, 2009).

foreign direct investment and is trying to become the regional hub for services.<sup>150</sup> Increased attention on the negative aspects of society can place the country at a serious disadvantage. While much of the criticism is warranted, such as condemning the potential of life in prison in solitary confinement, the sudden attention on one aspect of a country that might not otherwise come to light seriously hindered efforts to improve its overall image in comparison with less reported on countries in the region.

## 2. Assists in the Development of Domestic Judicial Systems

Decisions on transfer motions can also serve as vehicles for feedback to states on the condition of their judicial systems in relation to international norms. Transfer motions would create a dialogue between countries and the ICC that could drive improvements in national judiciaries. The motions would also help facilitate the development of international standards and best practices towards which other countries could strive. The possibility of trying a high profile case in a domestic court could be a powerful incentive to make necessary improvements to the national judicial system. Failing to allow cases to be transferred would completely forego this valuable motivation.<sup>151</sup>

The interplay between the ICTR and the Rwandan government is a great example. In 2007, Rwanda eliminated the death penalty, and it is now building a new prison to house accused transferred from the ICTR.<sup>152</sup> Both of these actions were in direct response to the potential to accept transfer

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150. *The Genocide in Rwanda: The Difficulty of Trying to Stop it from Ever Happening Again*, ECONOMIST, Apr. 11, 2009, at 45; Fareed Zakaria, *Africa's New Path: Paul Kagame Charts a Way Forward*, NEWSWEEK, July 27, 2009, at 55; *An East African Federation: Big Ambitions, Big Question-Marks*, ECONOMIST, Sept. 5, 2009, at 52.

151. One counter-argument could be raised from the relationship between Rwanda and the ICTR. Rwanda is still working on improving their judicial system to address the concerns of the ICTR even after the Tribunal initially denied transferring any cases to Rwanda. Gashegu Muramira, *Rwanda: Parliament to Discuss ICTR Concerns*, NEW TIMES (Rwanda), Nov. 4, 2008, available at <http://allafrica.com/stories/200811040076.html>. The main concerns of the ICTR, however, are easier to address than the assertion that the government is completely unable to prosecute the case or is trying to shield the accused from prosecution.

152. *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the Above Case to Rwanda Pursuant to Rule 11bis, ¶¶ 31, 59 (Dec. 21, 2007) (on file with author).

cases.<sup>153</sup> The Rwandan parliament is now considering further changes in light of the Appeals Chamber's denial of the transfer request of the case against Munyakazi.<sup>154</sup>

The potential of trying cases pending before the ICTR has brought issues with the Rwandan judiciary to the fore and fueled the political will to address them. A positive effect of this international attention is that it applies further pressure to institute improvements to the judicial system.<sup>155</sup>

On the other hand, a request to transfer jurisdiction to a national court could also have a negative impact on the ICC and the country involved. Transfer requests could add more stress to already strained relations with African countries, and could potentially spread the feelings of discontent and colonialism to anywhere else the ICC might bring cases. Denying the transfer after significant progress and work is put into improving the judiciary (and even creating a separate venue, as in the case of Uganda) would be deeply insulting to the country and could spark significant feelings of animosity towards the Court. If the ICC does not grant a transfer request, it is essentially condemning a country's judiciary as not adequate or up to international standards. It does not help that the current indictments are also only in African countries.<sup>156</sup> At the same time, the current situation does not allow a country to request the transfer of cases back to their own soil. Instead, countries must resign themselves to letting the international court try the cases at The Hague.

The indictment of Omar al-Bashir, the President of Sudan, provides another example of potential backlash to a decision by the ICC. At its annual meeting the African Union passed a resolution stating that the members would not cooperate with the ICC regarding the arrest of President Bashir.<sup>157</sup> South

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153. *Id.*

154. Muramira, *supra* note 151.

155. *See, e.g.*, HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA, *supra* note 84.

156. The ICC is investigating or is involved in proceedings in connection to alleged war crimes in the Democratic Republic of the Congo, Uganda, the Central African Republic, and Sudan. *See* Int'l Criminal Court, Situations and Cases, <http://www2.icc-cpi.int/Menu/ICC/Situations+and+Cases/>.

157. Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), ¶ 10, Doc. Assembly/AU/13(XIII) (July 3, 2009), [http://www.africa-union.org/root/AU/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20\(XIII\)%20\\_E.pdf](http://www.africa-union.org/root/AU/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.pdf); *African Union in Rift with Court*, BBC NEWS, July 3, 2009, <http://news.bbc.co.uk/2/hi/africa/8133925.stm>.

Africa is the only AU member to state that they would arrest Bashir if he came to the country.<sup>158</sup> One-hundred and sixty-four African human rights and civil society organizations also issued a statement calling on African states party to the ICC to reaffirm their commitment and obligation to cooperate with the Court.<sup>159</sup> Still, a majority of the African Union countries supported the resolution, and open defiance of the Court significantly damages its legitimacy and ability to enforce its indictments.

### 3. *Safeguards for Proper Jurisdiction*

The proposed rule also has significant safeguards to ensure that a competent court receives the case. The three options for jurisdiction found in Rule 11 *bis* would be equally valuable to the ICC to determine which countries could initially be considered for transfer. The ability to transfer cases to countries where the crime was committed would encompass situations such as Uganda's, where the national government now considers itself able to prosecute the cases.<sup>160</sup> These countries also have the most significant stake in the outcome of the prosecutions and there are advantages to keeping justice as close to the affected people as possible.<sup>161</sup> The second jurisdictional hook allows countries where the accused was arrested to prosecute the case. This increases the number of countries to which a case could be moved, and takes advantage of national legislation adopted specifically for that purpose.<sup>162</sup> Finally, the third catchall provision (countries that have

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158. *SA Will Enforce Bashir Warrant*, TIMES (South Africa), July 31, 2009, available at <http://www.timeslive.co.za/news/article222.ece>.

159. *African Civil Society Urges African States Parties to the Rome Statute to Reaffirm Their Commitment to the ICC*, HUMAN RIGHTS WATCH, July 30, 2009, available at <http://www.hrw.org/en/news/2009/07/30/african-civil-society-urges-african-states-parties-rome-statute-reaffirm-their-commi>.

The African Union responded to the organizations with a press release reminding them how the Union decision making body operates and that the decision was made by consensus (with one reservation). Press Release, African Union, Decision on the Meeting of African States Parties to the Rome Statute of the Int'l Criminal Court (July 14, 2009), available at <http://www.africa-union.org/root/au/Conferences/2009/july/Press%20Release%20-%20ICC.doc>.

160. Following the jurisdiction given in ICTR R. P. EVID. 11 *bis*(A)(i).

161. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, *supra* note 147, at 260–61.

162. *E.g.*, Prosecutor v. Munyeshyaka, Case No. ICTR-2005-97-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007).

jurisdiction and are “willing and adequately prepared to accept such a case”<sup>163</sup>) allows the ICC to transfer cases to countries that have universal jurisdiction laws. In the context of the ICC it would also be important to limit jurisdiction to countries that have ratified the Rome Statute and therefore have recognized the ICC’s jurisdiction.

All of these options increase the ICC’s ability to adjust to individual circumstances in order to best meet the Court’s goal of trying “the most serious crimes of concern to the international community” while insuring that the affected communities also achieve a sense of justice.<sup>164</sup> The ability to share the caseload of international crimes will become increasingly important as more cases fall under the Court’s temporal and geographic jurisdiction. In the ICTR’s experience, this flexibility has been important as it tries to reduce its caseload.

#### 4. *Limits on the Transfer of Cases*

Simply having jurisdiction to accept a case and request a hearing does not mean that the case would be transferred. In line with Rule 11 *bis* and the Rome Statute, the proposed rule would require the ICC to make sure that the accused would receive a fair trial and that the death penalty would not be imposed.<sup>165</sup> Ensuring a fair trial in transfer cases helps to maintain the legitimacy of international justice and provides an important check for the ICC on where and if cases are ultimately transferred. The ICTR 11 *bis* cases not only demonstrate that a high bar can be set for transferring cases—they provide a detailed examination of some of the factors necessary to ensure a fair trial. Similar considerations could be developed by the ICC, drawing on ICTR jurisprudence and many other international sources for fair trial standards.<sup>166</sup>

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163. ICTR R. P. EVID. 11 *bis*(A)(iii).

164. Rome Statute, *supra* note 98, pmbl.

165. The prohibition on the death penalty appears to be in accord with the Rome Statute from the negative inference that death is not one of the sanctioned penalties under Article 77. *Id.* art. 77.

166. See, e.g., International Covenant on Civil and Political Rights (ICCPR), art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 85 (entered into force Mar. 23, 1976). U.N. Comm’n on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Final Report*, United Nations, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3 1994) (*prepared by* Stanislav Chernichenko and William Treat); ANDREW GROTRIAN, ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE RIGHT TO A FAIR TRIAL (1994); LAWYERS COMMITTEE FOR

The ICC can also deny transfer under its mandate to address “unimaginable atrocities that deeply shock the conscience of humanity” and to try the most important cases to the international community.<sup>167</sup> Many cases referred to the ICC will be too important to the international community for them to be transferred to national courts. The ICC also lends a high profile to cases, which in turn can help to end cultures of impunity while increasing the legitimacy of international law. The decision not to transfer Bagaragaza to Norway is a good example. The ICTR Appeals Chamber denied the transfer mainly because they were unwilling to have Bagaragaza face trial for the lesser charge of homicide instead of genocide, even with the ability to provide a comparable sentence if convicted. The Tribunal recognized the importance of the gravity of the specific charge filed.

A determination based on importance could be quick and decisive, limiting the burden on the Court of multiple requests for the transfer of a case to other courts. The ICC also faces much less pressure to transfer cases than the ICTR does due to the permanent nature of the institution. This rule opens up the flexibility to move cases, but it keeps control of the docket firmly in the hands of the ICC.

At the same time, any legal battle between the ICC and a country requesting jurisdiction would slow the already glacial pace of international proceedings. International prosecution, by its nature, evolves more slowly. Working with multiple countries to investigate the crimes and apprehend the accused adds layers of difficulty and time. Moreover, trials tend to involve large numbers of witnesses and last for months as serious and often complicated charges are prosecuted.<sup>168</sup> Settling jurisdictional questions could insert years of jail time between the charges and an actual trial on the merits. After the accused has been arrested, they are highly likely to be held in pre-trial detention. A pre-trial chamber can confirm charges if the accused cannot be found or waives the right to be present, but the Rome Statute does not allow a person to be tried in

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HUMAN RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE (2000).

167. Rome Statute, *supra* note 98, pmbl.

168. For example, the Butare case, involving six accused, lasted for a total of 726 trial days. U.N. SCOR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 12, S/2009/247 (May 14, 2009). Trials with only one defendant also take considerable time. For example, the trial of Tharcisse Renzaho lasted forty-nine trial days. *Id.* ¶ 10.

absentia.<sup>169</sup> Further, the question of whether a country has developed their judiciary enough to accept jurisdiction over a case will only become ripe after the accused has been arrested and a trial is possible. Any jurisdictional litigation would increase the amount of time an accused remains in pre-trial detention.

The international tribunals have already demonstrated a significant tolerance for prolonged pre-trial detention. The courts have found that the gravity of the charges and importance of the cases outweigh many violations of the rights of the accused. Two cases from the ICTR provide excellent examples. Juvénal Kajelijeli and Barayagwiza were both detained without charge for significant periods of time before being transferred to the ICTR and before their first appearances. Barayagwiza was detained in Cameroon for 19 months without being indicted, and another 96 days passed between his transfer to the ICTR and his first appearance.<sup>170</sup> The Appeals Chamber initially ruled that he should be released and the charges against him dismissed.<sup>171</sup> But in a petition for rehearing, the Chamber reversed its ruling after the Prosecutor presented evidence that the delays were, in part, not in his control, and held that Barayagwiza's sentence should be reduced if found guilty.<sup>172</sup> In its decision, the Appeals Chamber noted the gravity of the charges warranted some departure for the international standards on pre-trial detention.<sup>173</sup>

Kajelijeli was detained in Benin for 85 days without being charged and experienced further delays before his initial

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169. Rome Statute, *supra* note 98, art. 63 ("The accused shall be present during the trial."); *Id.* art. 61, cl. 2.

170. Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Appeals Chamber, Decision ¶¶ 2–3 (Nov. 3, 1999).

171. *Id.* ¶ 113.

172. The government of Rwanda was also furious and applied political pressure, including stopping cooperation with the Tribunal and delaying numerous trials. Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, Prosecutor's Request for Review or Reconsideration, ¶ 24 (Mar. 31, 2000). Barayagwiza's sentence was eventually reduced from life to thirty-five years in prison by the trial court. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Case No. ICTR-99-52-T, Trial Chamber, Judgment and Sentence ¶¶ 1106–07 (Dec. 3, 2003).

173. Barayagwiza v. Prosecutor, Appeals Chamber, Decision, ¶ 62 (Nov. 3, 1999), ("The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted . . .").

appearance to assign him representation.<sup>174</sup> While the Chamber found violations of Kajelijeli's rights, it only proscribed the reduction of his sentence if he was found guilty at trial.<sup>175</sup> In reaching its decision, the chamber stated, "[It] is mindful that it must maintain the correct balance between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."<sup>176</sup> Both of these serious delays without charge only resulted in a reduction in sentence.

Cases heard by the ICC will be of similar gravity to the cases against Kajelijeli and Barayagwiza.<sup>177</sup> The nature of the crimes involved mitigate any concerns over a prolonged pre-trial detention at the ICC in the same fashion as at the ICTR. At the same time, a lengthy pre-trial delay, followed by a potential change in jurisdiction, also raises double jeopardy issues if a transfer is requested after substantive pre-trial rulings have occurred. A national court can still provide a fair trial while operating under slightly different rules of procedure. The national court could be tempted to reconsider previous rulings under local law after a case is transferred, especially given the highly charged nature of these prosecutions. Adverse motion rulings could also incentivize transfer requests to the national jurisdiction in an attempt to gain a more favorable ruling. Double jeopardy concerns are also compounded in situations like Uganda's where the country is currently developing the court they wish to try the cases in. Rules could still potentially change and evolve, disrupting the ability of the defense to prepare for trial.

Concerns over the length of delay and any double jeopardy issues could be addressed by limiting the period of time where a transfer request could be brought or requiring the acceptance of pre-trial decisions made before transfers. One option would be to establish a fixed window of time between when the indictment was filed and when a transfer request could be

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174. *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, Appeals Chamber, ¶¶ 231, 237 (23 May 2005).

175. *Id.* ¶¶ 251, 255.

176. *Id.* ¶¶ 206, 255 (quoting *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶ 30 (June 5, 2003) (internal quotation marks omitted)).

177. The seriousness of cases to be accepted by the Court is clearly stated in the preamble to the Rome Statute and reflected in the Court's current docket. Rome Statute, *supra* note 98, pmbl.

made.<sup>178</sup> A more nebulous time frame could also be set by precluding requests after pre-defined substantive rulings were made. A time frame for filing, however, would reduce the chances that a war-torn country could rehabilitate its judiciary quickly enough to prove it could provide a fair trial. Requiring a national court to accept previous decisions could raise sovereignty issues and backlash in the country and could be difficult to enforce. The only remedy available to the ICC if a national court overturned a decision would be to take back jurisdiction of the case.

### 5. *Monitoring Transferred Cases*

The final aspect of a transfer mechanism requires a country to allow the Prosecutor to monitor the proceedings of the national court and revoke the transfer of jurisdiction if necessary.<sup>179</sup> Monitoring is an important final check on countries that have cases transferred to them from the ICC. Monitoring cases in the context of the ICC also has significantly more teeth than it does for the ICTR because the ICC is a permanent body and will exist for the duration of the trials in the national courts, unlike the ICTR, which is set to complete all cases at the trial level by the end of 2010.<sup>180</sup> Monitoring trials could also contribute to further cooperation between the international community and national judiciaries through increased access to and attention on the national courts. Monitors and international attention could continue to pressure the judicial system to make as many improvements as possible.

### 6. *Unique Advantages to the ICC*

On top of the increased interaction with national judiciaries, a transfer mechanism could become an important tool to allow the ICC greater control over its docket as the ICC gains legitimacy and begins to take on more cases. The ability to share the caseload from large-scale atrocities could

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178. If the indictment was sealed, the window of time could start when the government of the country where the crimes occurred was notified of the charges. The country could be notified in secret and file a request under seal. This route would preclude third countries from requesting jurisdiction, but they also hold less compelling claims to want to try a particular case. The time limit could also start after the indictment becomes public.

179. ICTR R. P. EVID. 11 *bis*(D)(iv), (F), *supra* note 95 for full text.

180. S.C. Res. 1878, ¶ 3 U.N. Doc. S/RES/1878 (July 7, 2009).

dramatically increase the ability of courts to try those most responsible for war crimes and crimes against humanity. Depending on the specifics of a conflict and the capacity of the national courts in the country affected, the ICC could retain the trials of the most senior accused and share a second echelon of perpetrators with countries that have universal jurisdiction laws and are willing to take the cases. Working in conjunction with national courts, a case-by-case sliding scale approach could be developed to determine what level of culpability each court would address.

Rwanda provides one example of such a relationship. While the ICTR is trying those bearing the greatest responsibility, Rwanda has been addressing a second tier of perpetrators through the national judiciary and ad-hoc, community-led *gacaca* courts.<sup>181</sup> The increased prosecution of war crimes and crimes against humanity would be a distinct improvement over not trying the cases at all. Even if the trial occurred in the less desirable context of a distant third country, it would still further the goal of ending impunity by bringing war criminals to justice.

This Note is not advocating for a dramatic expansion of international criminal prosecutions. National jurisdictions have not been clamoring to take even the limited number of cases that the ICTR has attempted to transfer. It is questionable whether the ICC could currently handle as many trials as the ICTR on top of the four situations it is investigating and intends to prosecute.<sup>182</sup> The ICTR has charged seventy-seven people in connection with the genocide in Rwanda and has caught seventy-five of them.<sup>183</sup> The ICC has limited time and resources, and the ability to address more cases related to a specific conflict through transferring some of them to other courts would improve the impact of criminal prosecutions.

Further alleviating the ICC's burden, the proposed rule could help convince some of the large countries not currently party to the Rome Statute to ratify the treaty, or at least to participate in the ICC Review Conference scheduled for 2010. Increased accountability measures for the ICC in the form of a

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181. For more on the *gacaca* courts see *supra* note 86. While the national prosecutions have been called into serious question in the case of Rwanda, the idea of sharing the burden of trials and healing the country to move beyond the atrocities is still important. The international community is not equipped to handle the vast number of low-level cases that arise out of such conflicts.

182. Int'l Criminal Court, Situations and Cases, *supra* note 156.

183. U.N. SCOR, *Thirteenth Annual Report of the International Criminal Tribunal for Rwanda*, 3, U.N. Doc. A/63/209-S/2008/514 (Aug. 4, 2008).

transfer mechanism could help to allay fears of political prosecutions and provide space for countries to raise concerns regarding individual cases. In the event of high profile indictments against political figures, the ability to transfer the case to the state party concerned over the matter is a middle-ground position that could be palatable to the international community while still pursuing justice. This method could work especially for Russia, the United States, and Israel, which have all officially signed the Rome Statute, but have not yet ratified it.<sup>184</sup> Their status as signatories could be leveraged to allow them to attend the conference and participate in the negotiations on changes to the Statute. The more these countries buy into the process and shaping of the Court, the greater chance they will ratify the treaty and increase the legitimacy of the ICC.

### III. CONCLUSION

When the Rome Statute was drafted, the idea that the majority of the Court's cases would come from referrals from State parties was never conceived.<sup>185</sup> Issues with confidential information provided to the Prosecutor by the U.N. mission in the Democratic Republic of the Congo almost derailed the trial of Thomas Lubanga Dyilo.<sup>186</sup> New challenges will continue to arise from the first trial that started in January 2009 and as the ICC continues to break new ground in international criminal law. The realization that the ICC needed improvement was part of the impetus for setting the 2010 Review Conference. One of the lessons learned since the treaty was first signed is that the ICC needs further procedural rules to be as effective and flexible as possible in the constantly evolving landscape of

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184. Israel and the United States have expressly stated that they do not intend to ratify the treaty. Press Release, U.S. Dept. of State, International Criminal Court: Letter to Kofi Annan (May 6, 2002), *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>; Office of the Legal Adviser to the Ministry of Foreign Affairs (Israel), Israel and the International Criminal Court (June 2002), *available at* [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court).

185. Burke-White & Kaplan, *supra* note 113, at 259.

186. Press Release, Int'l Criminal Court, Stay of Proceedings in the Lubanga Case is Lifted—Trial Provisionally Scheduled for 26 January 2009, ICC-CPI-200081118-PR372 (Nov. 18, 2008), *available at* [http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+\(2008\)/](http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+(2008)/) (follow "Stay of Proceedings in the Lubanga Case is Lifted" hyperlink).

international criminal law. A rule styled on the ICTR's Rule 11 *bis*, smoothing requests and the potential transfer of cases to national courts, is one such procedural rule, and should be adopted to strengthen this important international institution.

## Appendix\*

### DRAFT AMENDMENT

#### *Transfer of the Indictment to States Party to the Rome Statute*

- (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Court, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State Party to the Rome Statute:
- (i) in whose territory the crime was committed; or
  - (ii) in which the accused was arrested; or
  - (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
- (B) The Trial Chamber may order such referral *proprio motu*, at the request of the Prosecutor, or at the request of a State Party, after having given the Prosecutor, the State Party, and, where the accused is in the custody of the Court, the accused, the opportunity to be heard.
- (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State

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\* The appendix contains proposed language for a transfer mechanism for the ICC. The language of the proposed rule closely parallels Rule 11 *bis* from the ICTR. The rule change could be implemented in one of two ways. It could be added by either directly amending the Rome Statute or by amending the ICC Rules of Procedure and Evidence. Amending either requires a two-thirds majority of States Parties. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, arts. 51(2), 123(3) (entered into force July 1, 2002). The most logical place to insert a transfer mechanism in the Rome Statute would be in Part II "Jurisdiction, Admissibility and Applicable Law." In the Rules of Procedure and Evidence it could be inserted in section three of the chapter on jurisdiction and admissibility: "Challenges and preliminary rulings under articles 17, 18 and 19." ICC R. P. EVID. Ch. 3, § 3. There have not been any amendments to the Rules of Procedure and Evidence to date and it is not clear if the Court would re-number the rules after an amendment or follow the ICTR method (e.g. 11 *bis*).

concerned and that the death penalty will not be imposed or carried out.

- (D) Where an order is issued pursuant to this Rule:
- (i) the accused, if in the custody of the Court, shall be handed over to the authorities of the State concerned;
  - (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
  - (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
  - (iv) the State Party shall accept all pre-trial rulings made by the ICC prior to the transfer;
  - (v) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf.
- (E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.