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Capacity-Building Efforts of the ICTR: A Different Kind of Legacy

Adama Dieng*

I. INTRODUCTION

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) were the first international judicial bodies after Nuremberg to determine criminal responsibility for the most serious international crimes. Established on November 8, 1994, by the United Nations Security Council, the ICTR has a mandate to prosecute the persons most responsible for genocide and other serious violations of international humanitarian law committed in Rwanda and by Rwandan citizens in neighboring States, between January 1, 1994, and December 31, 1994. The Tribunal was the judicial response to the failure of the international community to prevent the mass atrocities and the genocide that occurred in Rwanda in 1994. By prosecuting those who committed genocide and other serious violations of international humanitarian law, the ICTR was set up to fight impunity by reestablishing the fundamental Rule of Law, under which the guilty are held accountable for their offenses. Beyond that, the U.N. Member States and the international community held the underlying hope that the work of the ICTR would contribute to the

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process of national reconciliation and restoration and the maintenance of peace.

Over the last 17 years, the ICTR has issued 92 indictments against persons accused of having committed genocide, crimes against humanity, and other crimes that shocked the world's conscience. It has condemned 67 persons and acquitted eight since its enactment. Many of these cases resulted in landmark decisions rendered by the ICTR's Chambers that have shaped international criminal justice as we know it and apply it today. The ICTR judges not only applied the 1948 Convention against Genocide for the first time, but they also enriched the definition of genocide by holding that rape, when perpetrated in a certain manner, could constitute a crime that forms part of a genocidal scheme. The Tribunal has also rendered many other important decisions, such as its opinion on the role of the media in encouraging atrocities in the context of war.

Regarding crimes against humanity, unlike the Nuremberg Charter and the ICTY Statute, the ICTR does not require that the Prosecutor link the crimes to an armed conflict. This position has prevailed and was adopted in the Statute of the International Criminal Court (ICC). The ICTR has also helped define the intermediate crimes by which crimes against humanity are committed. The ICTR has settled the issue of differentiating murder from extermination by showing that the difference lies in the number of victims; in doing so, it has also provided the relevant numerical threshold.

In a number of cases, ICTR judges have also determined whether civilians could be held accountable for war crimes. After

¹ The Convention declares genocide a crime under international law, regardless of whether it is committed in time of peace or in time of war. It provides a definition of this crime and declares it exempt from to the limitations of time and place. *Cf.* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

² Cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), http://unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

³ In the "media case" (Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Judgement and Sentence (Dec. 3, 2003), http://unictr.org/Portals/0/Case/English/Ngeze/judgement/Judg&sent.pdf), the tribunal established the principle that those who use the media for inciting the public to commit genocide can be punished for their communication that amounts to hate speech and persecution as a crime against humanity. It rendered the first contemporary judgment since the Nuremberg trial of Julius Streicher to examine the role of the media in the context of inciting the public to commit crimes.

some hesitation, the jurisprudence has now firmly established that civilians may be held accountable. The Appeals Chamber has specified that there is not even a need to establish that the civilian belongs to an insurgent group. It would suffice to prove that the accused person committed the forbidden acts in the context and in furtherance of the armed conflict. The ICTR has also defined and refined the important notion of command responsibility. According to the latest case law developments, to hold a superior responsible the Prosecutor must prove that he had effective control over his subordinates—de jure or de facto control, not merely an influential power—and that he failed to prevent or punish them for violations of international humanitarian law.

While the judicial legacy of the ICTR is widely acknowledged, there is a different kind of legacy that is less well-known beyond Arusha, the town in Northern Tanzania where the Tribunal is headquartered. This is a capacity-building legacy that consists of workshops, trainings, and the dissemination of public information.

This legacy, which will be explained in the following pages, has had an impact on the daily lives of many people: the Rwandans who follow the Tribunal's proceedings on the screens of the ICTR information centers, the prisoners in Benin who today receive two meals per day instead of one, and the witnesses who may be called to testify before the Supreme Court of Rwanda and who will soon be able to do so without any fear for their security because of the installation of a video-link facility.

While it may be too early to assess the full impact of the ICTR's work, the ICTR has never spared any effort to export its knowledge and act as a role model on a continent where much more remains to be done—not only in terms of replacing the existing culture of impunity with one of accountability, but also strengthening the reaffirmation of fundamental principles, such as the presumption of innocence, respect for the accused's rights, witness protection, and adherence to international detention standards.

This article aims to provide an overview of the main legal and judicial capacity-building initiatives in Rwanda and other African countries, which have been promoted by the ICTR over the past few years.

II. THE CAPACITY-BUILDING MANDATE OF THE ICTR

In Resolution 955, which established the ICTR, the U.N. Security Council did not include capacity-building in the mandate of the Tribunal. Instead, it encouraged Member States to enhance cooperation in order to strengthen the courts and judicial system of Rwanda. However, with time, the international community realized that Rwanda was in need of capacity-building and that the Tribunal could offer a strong contribution to those efforts.

Security Council Resolution 1503 of August 28, 2003, urged the ICTR to "formalize a detailed strategy, modeled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda."5 To this end, the Resolution called on the international community "to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach [programs]."⁶ Following the adoption of this Resolution, the Tribunal acquired the additional mandate to engage in capacity-building activities. The Security Council again stressed the urge to transfer cases to competent national jurisdictions in Resolution 1534 of March 26, 2004. The General Assembly reiterated the mandate in Resolutions 60/241 and 65/252, requesting the Tribunal to increase its capacitybuilding and outreach activities. The Secretary-General in his 2009 report to the Security Council—which laid the foundations for Security Council Resolution 1966 of December 22, 2010, establishing the International Residual Mechanism for the Criminal Tribunals—acknowledged capacity-building as a key element of the International Tribunals' mandates and an important legacy. He recognized that such programs would assist the efforts to send additional cases to national jurisdictions, but also acknowledged that their success largely depends on their adequate funding.⁹

⁷ S.C. Res. 1534, ¶ 4, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

⁴ S.C. Res. 955, ¶ 9, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁵ S.C. Res. 1503, ¶ 8, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

⁶ *Id*. at ¶ 13.

⁸ G.A. Res. 60/641, ¶ 9-10, U.N. Doc. A/RES/60/241 (Feb. 15, 2006); G.A. Res. 65/252, ¶ 11, U.N. Doc. A/RES/65/252 (Mar. 2, 2011).

⁹ U.N. Secretary-General, Report of the Secretary-General on the administrative

Regrettably, the extension of the mandate to include capacity-building activities was not echoed in an increase in the Tribunal's budget. Capacity-building initiatives rely solely on voluntary contributions by Member States and creative thinking on the part of the Registry to maximize such activities within the existing budget constraints.

III. THE ICTR'S CAPACITY-BUILDING ACTIVITIES

A. Access to information as a catalyst for the Rule of Law

Since its early days, the ICTR understood that its message of challenging the impunity of the powerful would contribute to the reconciliation process in Rwanda only if it extended past the courtrooms in Arusha, and was heard in the hills of Rwanda and the shores of the Great Lakes of Central Africa. In order for the Tribunal to implement the mandate conferred by the international community, it was essential that the Rwandan people, their political leaders and shapers of public opinion, such as the media and non-governmental organizations (NGOs), had a profound understanding of, and confidence in, the work of the Tribunal.

The Tribunal therefore decided to establish an Outreach Program designed to reach all corners of Rwandan society, the Great Lakes region, and the rest of the world. It targets an audience ranging from persons with little education and no access to modern forms of communication to government representatives, members of the judiciary, academics and legal practitioners. Furthermore, the Program strives to provide more than a simple dissemination of information by fostering a deeper awareness of the work of the Tribunal and by promoting capacity-building.

One of the most effective outreach techniques has been the use of mass media in and beyond Rwanda. The ICTR has always made media relations a priority and has established a wide network of media contacts. As a result, several regional and international media outlets report on the work of the Tribunal. Some, including the local newspaper, *The Arusha Times*, dedicate a page to the

and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, ¶ 86, U.N. Doc. S/2009/258 (May 21, 2009).

Tribunal's news. The Tribunal has also facilitated the placement of a *Radio Rwanda* journalist in Arusha and the establishment of the *Hirondelle News* Agency. These outlets issue news bulletins on the work of the ICTR on a daily basis in English, French, Kinyarwanda and Swahili.

The Tribunal organizes quarterly Press Conferences and Media Briefings in Dar es Salaam, Kigali, and Nairobi for the regional and international press. The ICTR also brings groups of Rwandan journalists to Arusha where they gather first-hand information and report directly on important events. Additionally, every Tribunal's judgment is broadcast live worldwide, and news from the Tribunal and other updates are posted daily on the ICTR website, which attracts tens of millions of hits every year.

Notwithstanding the strong ICTR presence in the media, the Tribunal has also realized the importance of personal contact with the immediate beneficiaries of its work. In 2000, the ICTR opened an Information and Documentation Center in Kigali, commonly known as "umusanzu mu bwiyunge" or "contribution to reconciliation." The Center's main goal is to bridge the information gap between the Tribunal and the Rwandan population. The Center, which is freely accessible to everyone, is a popular venue for students and researchers that make use of its well-stocked library, free internet access and online legal research facilities. Nonetheless, the Center is not just a simple library; with an estimated 1,600 to 2,000 visitors each month, the Center offers educational workshops and training seminars for Rwandan journalists, lawyers, and judges.

The success of the *umusanzu* in Kigali prompted the ICTR to move even closer to the grassroots population and reproduce that same model on a reduced scale at the provincial level. With the financial support of the European Union, the ICTR opened ten "mini" information and documentation centers scattered across all provinces of Rwanda. The provincial *umusanzu* are all equipped with internet access and television screens where the Districts' residents may follow ICTR court proceedings. The Centers have thus far proved to be an efficient means of disseminating information about the Tribunal's activities into rural areas and facilitating access to the jurisprudence of the ICTR and other legal materials for members of the Rwandan judiciary working in the courts outside the capital.

Following the completion of the Tribunal's mandate, the Centers will not close their doors. Pursuant to the agreement that

established them, the U.N. will hand the Centers over to the Government of Rwanda with the goal of ensuring that the true and accurate reality of the ICTR's historical judicial output continues to be preserved and communicated beyond the closure of the Tribunal.

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B. ICTR capacity-building activities in Rwanda and Arusha

Since 2005, one of the cornerstones of the ICTR's Outreach Program has been the training of jurists, advocates, and human rights activists from Rwanda on a variety of legal topics and skills. The ICTR has organized several workshops including one workshop addressing Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTR¹⁰ concerning the referral of cases to national jurisdictions. Other workshops include: training in information and evidence management to strengthen the capacity of personnel in the Rwandan Office of the Prosecutor General and Rwandan courts' registrars, briefings for librarians of the Rwandan Supreme Court and the Justice Department on documentation techniques and archiving matters, and an online legal research course for members of the judiciary.

With funding from the European Union, the Registry organized four training sessions for members of the Rwandan Bar Association in Kigali between 2007 and 2011, with the main goal of enhancing Rwandan lawyers' knowledge of the ICTR jurisprudence and further preparing them for the possibility of referrals of ICTR cases to Rwanda. The trainings, which benefited almost 150 lawyers, were organized in a workshop format. The first workshop introduced the lawyers to international criminal law and explained the rights and duties of the Defense. The second focused on the elements of crimes under the ICTR Statute and elucidated the different stages of the proceedings. Following an explanation of the system of legal aid, the beneficiaries were taught factual and legal argumentation techniques, as well as standards of proof and evidence. In order to facilitate the learning process, the trainers of the third workshop introduced a mock trial that was extremely well received by the participants. This workshop also offered discussions on the fundamental principles of criminal justice and the interaction between human rights and

¹⁰ Rules of Procedure and Evidence, U.N. International Criminal Tribunal for Rwanda (June 29, 1995), *available at* http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf.

criminal law. It further touched upon victims' rights, the ICC and the different forms of victims' participation in the proceedings. The fourth workshop was preceded by a written competition and included an oral argument competition. The workshops' discussions were illustrated by examples and concentrated on referrals, the ICC, complementarity, and universal jurisdiction. All participants considered the training sessions a beneficial learning tool, and some suggested that the program should be integrated into the obligatory training for Rwandan lawyers. The ICTR remains available to provide the Rwandan Bar Association with further training and would be ready to extend its training workshops to related fields, including human rights protection.

The Tribunal maintains strong ties with various institutions of higher education in Rwanda. Every year the ICTR provides a number of promising young lawyers with hands-on experience in the core legal functions of the Tribunal. As interns and legal researchers, they assist the Prosecution, Defense, and Chambers in conducting legal research and working alongside the Tribunal's legal officers. The ICTR awards research fellowships to law students of the National University of Rwanda. Each year, up to eight qualified students spend eight weeks at the Tribunal conducting research for their theses on topics related to the mandate of the ICTR. Staff members from various sections at the ICTR serve as supervisors for the students' research and as advisors for the preparation and defense of their academic theses.

The ICTR has also established close relations with NGOs and civil rights organizations in Rwanda. These organizations are invited to attend seminars and conferences organized by the ICTR, both in Rwanda and in Arusha, where they are briefed on the status of the Tribunal's work and its achievements. These organizations include "IBUKA - Mémoire & Justice," "AVEGA AGAHOZO - Association des Veuves du Genocide," and "CLADHO Rwanda - Collectif des Ligues et Associations de Defense des Droits de l'Homme au Rwanda."

Lastly, every year the Tribunal receives hundreds of visitors from all walks of life, including academics, journalists, students, tourists, members of the military, clergymen, legal practitioners, and other professionals. People visiting the ICTR Headquarters may attend court proceedings, request meetings with Tribunal officers and receive custom-tailored briefings on topics of interest.

These initiatives have been warmly embraced by Rwandans, who demonstrate an increasing level of interest and participation. The Outreach Program has enabled the people of Rwanda to have a better understanding of the genocide and has boosted their confidence in the work of the ICTR. This in turn, has fostered the development of good relations between the Tribunal and the Rwandan population.

Many of the Outreach Program's activities would not have been possible without the unwavering cooperation of the Rwandan Government and the financial support of donors, which include the European Union and the Group of Friends of the ICTR. ¹¹ It is crucial for the Rwandan national reconciliation process that this financial and political support be maintained and consolidated beyond the completion of the work of the Tribunal.

IV. A ROLE MODEL IN UPHOLDING UNIVERSALLY RECOGNIZED PRINCIPLES OF THE RULE OF LAW

A. Promotion of witness protection

The protection of witnesses in international criminal trials depends on functioning national witness protection systems. Promoting witness protection and sharing lessons from the ICTR are all the more remarkable and vital in a region that does not yet have a well-established culture of protecting witnesses.

The legal framework for the protection of ICTR witnesses, as set out in the Tribunal's Statute, envisages a balance between the rights of the accused and the physical and psychological well-being of the witnesses. The Tribunal offers a program to support and protect witnesses through the Witnesses and Victims Support Services (WVSS). WVSS serves both the Prosecution and Defense, and is characterized by its neutrality. The protection offered by WVSS extends before, during, and following any given testimony. One of the key features of the protection offered by the program is the maintenance of the highest confidentiality of the identity of the witnesses.

¹¹ "Friends of the ICTR" is an informal group of countries, which provides support to the Tribunal and is represented by diplomats posted in Dar es Salaam, Kigali, and Nairobi. The membership at the moment includes Belgium, Canada, France, Germany, Italy, The United States of America, and The Netherlands.

According to United Nations Office on Drugs and Crime (UNODC) Report on Good Practices for the Protection of Witnesses in Criminal Proceedings involving organized crime of 2008:

The organization, practice and jurisprudence of those courts[, ICTR,] in the protection of the victims and witnesses of such horrific crimes have been ground-breaking and are largely reflected in the witness protection provisions of the Rome Statute establishing the International Criminal Court. They have also influenced similar tribunals established in agreement with the United Nations, such as the Special Court for Sierra Leone. ¹²

WVSS representatives have been invited to expert meetings in European, American, and African countries to share lessons learned and to export its best practices. Since 2006, the ICTR has supported Rwanda in the establishment and strengthening of its national Witness Protection Unit by providing training and advice. WVSS conducted its first training of Rwandan officials immediately after the establishment of the Rwandan National Unit. In 2009, Rwandan officials visited the ICTR in Arusha for a first-hand experience of the protection program of the ICTR. In 2010, WVSS organized a workshop in Rwanda at the invitation of the Rwandan Government. This training session involved a wide range of participants, including judges, court registrars, and law enforcement officers. Additional workshops have been planned for the near future.

WVSS has also shared its knowledge beyond the borders of Rwanda and has positively impacted other East African countries. For example, in 2010, WVSS trained Tanzanian police officers in view of the creation of the Tanzanian protection program. When Kenya initiated its witness protection program, it also sent officials to the ICTR for briefings.

¹²Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, U.N. OFFICE ON DRUGS AND CRIME, at 16 (Jan. 2008), *available at* http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

These positive experiences showcase the ICTR's contribution to the solid establishment of effective witness protection programs on the African continent.

B. Promotion of the rights of detainees and prisoners

The ICTR fully ensures the respect for the fundamental human rights of its detainees and prisoners. By requesting that local prison officers strictly adhere to international standards while dealing with the Tribunal's inmates, the ICTR also promotes a culture of protection toward detainees and prisoners' rights, where such culture may not necessarily have existed previously.

The United Nations Detention Facility (UNDF) in Arusha serves as a remand center for persons accused by the Tribunal who are in trial or are awaiting trial. The UNDF is located on the premises of a local Tanzanian prison, and UNDF security officers are assisted by local police. This establishment is extremely conducive to the adoption of best practices by Tanzanian authorities. For example, Tanzanian prison officers are assigned to the UNDF on a rotational basis for periods ranging from six months to one year. Most of the Tanzanian prison officers who resume their duties in the local prisons following their service at the UNDF are entrusted with greater responsibilities and are likely to be promoted more quickly. This is to recognize the knowledge and skills they acquired during their tour of duty at the UNDF.

Following the completion of the proceedings against them, the convicted persons are relocated to a third state for the enforcement of their sentences. So far, the majority of convicts have been transferred to Mali and Benin; these are two of the eight countries that have signed agreements with the United Nations for the purpose of enforcing ICTR sentences.¹³

The general improvement of conditions of imprisonment in the countries that have accepted ICTR convicted prisoners is clearly beyond the Tribunal's mandate and budget. Nevertheless, the ICTR attaches great importance to the promotion of at least the minimum standards of prisoners' rights. Therefore, the Tribunal has developed creative strategies to export its legacy in this area. An interesting

¹³ The United Nations has concluded agreements on the enforcement of ICTR sentences with the following countries (in alphabetical order): Benin, France, Italy, Mali, Rwanda, Senegal, Swaziland, and Sweden.

example is the training of local police officers escorting ICTR convicted persons. Whenever a convicted person serving his sentence in Mali or Benin is called to testify in another ICTR case, the Tribunal seizes this opportunity to organize trainings for the accompanying prison officers. During their stay in Arusha, the prison officers receive briefings on the management of detainees in accordance with the international minimum rules for the treatment of prisoners. The issues addressed include the rights and privileges of prisoners as well as security and record management. Following the briefing, corrections officers actively participate in the daily operations of the UNDF. This practical training facilitates further comprehension and smoother adoption of similar practices in their own countries. Upon their return to Mali and Benin, the prison officers tend to implement the practices and knowledge acquired at the UNDF. The success of the training program has been demonstrated by a decrease in complaints and problems associated with the management of ICTR prisoners.

Perhaps even more important than the training of the prison officials is the positive impact on the local prison population that results from the presence of ICTR convicts. As local authorities are bound by international minimum standards, they are constantly exposed to good practices, realize their benefits, and reapply them to the extent allowed by the available financial resources. A small, but very tangible and significant improvement in the daily life of convicts in a prison of Benin may be attributed to the standards applied by the ICTR; local convicts today have access to two meals per day instead of one.

C. Promotion of the use of new technologies in judicial proceedings

The lack of information on court operations may give rise to suspicion and distrust about the fairness, transparency, and integrity of the justice system. A closed, secretive justice system may foster the development of a phenomena it seeks to avoid by creating a perception of favoritism, malfeasance, and denial of rights. New technologies may assist in limiting these risks, ensure judicial expediency, and promote transparency, good governance and the rule of law.

The ICTR introduced a real-time court transcription system in 2007. This is a software program that allows instantaneous transcription of machine-generated shorthand stenography notes into plain English or French, which is electronically displayed and stored.

This software lessens costs by improving efficiency. Moreover, it increases openness and transparency, and consequently enhances accountability, which, in turn, strengthens the quality of decisions and judgments.

The real-time transcription system of the ICTR has sparked the interest of several African countries. Since neither its mandate nor its budget allows the Tribunal to provide technical assistance directly to those countries, the ICTR has only been in a position to offer information to interested parties. The Registry has received delegations from Botswana, Burkina Faso, Cameroon, Ghana, Rwanda and Zambia who are eager to acquaint themselves with its real-time transcription system. A donor, the Investment Climate Facility for Africa (ICF), as well as the International Committee of the Red Cross (ICRC), visited the tribunal to learn about the system. The ICTR has given demonstrations of this technology in Kenya, Nigeria, Tanzania, Togo, Senegal, South Africa, and Uganda. However, despite the initial enthusiasm of these countries, the implementation has been hampered by a lack of funding. Thus far, only Zambia and Uganda have secured funding for the implementation of a real-time transcription system. Out of the two, only Zambia has acquired the necessary equipment and trained its first group of court reporters. These individuals will likely be sent to the ICTR for further training.

Another example of an ICTR practice that may be reproduced and implemented in national jurisdictions is the video-link technology used in judicial proceedings. With the financial support of Germany, the ICTR is assisting Rwanda in setting up a video-link system in the Supreme Court in Kigali as one measure to secure witness participation in genocide proceedings. The introduction of this technology, which has also been acknowledged in the referral decisions by the ICTR judges, ¹⁴ aims to facilitate the

¹⁴ Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Referral Bench), ¶ 65 (May 28, 2008); Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Referral Bench), ¶¶ 78-80 (June 6, 2008); Prosecutor v. Idelphonse Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (Referral Bench), ¶ 70 (June 19, 2008); Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Referral Bench), ¶¶ 69-71 (Nov. 17,

hearing of witnesses, especially those residing outside Rwanda who, for several reasons, may not be able to travel to Rwanda to give testimony in person. In addition to the crucial guarantees of personal safety, testimony through video-link may assist the prompt delivery of evidence for witnesses living in remote locations. Furthermore, testimonies through video-link would entail substantial savings in terms of time and costs associated with the travel of witnesses. This aspect is particularly significant as the Rwandan witness protection program takes its first steps.

V. CAPACITY-BUILDING AND REFERRAL OF CASES TO RWANDA

Although a final assessment of the Tribunal's legacy should await the completion of its work, many acknowledge that recent legal developments in Rwanda may be attributed to the influence of the ICTR. In 1996, Rwanda adopted its Genocide Law¹⁵ that encompasses the definitions of the 1948 International Convention on Genocide. The Rwandan domestic law also recognizes the principle of command responsibility that is enshrined in the ICTR Statute. The Rwandan Constitution of 2003¹⁶ reaffirms its adherence to international instruments, such as the Universal Declaration of Human Rights¹⁷ and the International Covenant on Civil and Political Rights.¹⁸ In 2007, Rwanda adopted Organic Law No.

2008); Prosecutor v. Fulgence Kayishema, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Fulgance Kayishema to Rwanda (Referral Bench), ¶¶ 44-45 (Dec. 16, 2008); Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Appeals Chamber), ¶ 42 (Oct. 8, 2008); Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis (Appeals Chamber), ¶ 33 (Oct. 30, 2008); Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Appeals Chamber), ¶ 26 (Dec. 4, 2008).

¹⁵ Organic Law No. 08/96 of Aug. 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since Oct. 1, 1990, 1996 (Rwanda).

¹⁶ CONSTITUTION OF THE REPUBLIC OF RWANDA at 119 (O.G No. Special of June 4, 2003) and CONSTITUTION OF THE REPUBLIC OF RWANDA Amendment of Dec. 2, 2003 at 11 (O.G No. Special of Dec. 2, 2003).

¹⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁸ International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI),

11/2007, commonly referred to as the "Transfer Law." The Transfer Law specifically designates the Rwandan High Court and Supreme Court to deal with cases transferred to Rwanda from the ICTR or third states and to exercise jurisdiction over crimes identical to those in the Tribunal's Statute. The Transfer Law builds on many of the Tribunal's due process and fair trial standards (especially ensuring the rights of the accused), as well as its rules of evidence, and applies them to defendants transferred to Rwanda from the ICTR or third states.

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In light of these developments, the ICTR Prosecutor filed a series of motions in 2007²⁰ to refer certain cases to the Rwandan judiciary under Rule 11 *bis* of the ICTR Rules of Procedure and Evidence.²¹ Rule 11 *bis* gives a Trial Chamber appointed by the

993 U.N.T.S. 171, (Dec. 16, 1966).

¹⁹ Organic Law No. 11/2007 of Mar. 16, 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, 2007 (Rwanda).

²⁰ Prosecutor v. Kayishema, Case No. ICTR-2001-67-I, Decision on the Request by Ibuka & Avega for Leave to Appear and Make Submissions as Amicus, ¶ 2 (Jul. 1, 2008),

http://www.unictr.org/Portals/0/Case%5CEnglish%5Ckayishema%5Ctrail%20cha mber%5C080701d.pdf; Prosecutor v. Kayishema, Case No. ICTR-2001-67-I, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence (June 11, 2007)); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-I, Decision on Defence Request to Grant Amicus Curiae Status to Four Non-Governmental Organizational Organizations, ¶ 1 (Feb. 22. http://www.unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions %5C080222e.pdf; Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-I, Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence (Sept. 7, 2007)); Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55-I, Decision on Defence Motion for the Continuation of Proceedings Before the Tribunal, ¶ 4 n.6 (Nov. 5, 2007), http://www.unictr.org/Portals/0/ Case%5CEnglish%5CHategekimana%5Cdecisions%5C071105.pdf; Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55-I, Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence (Sept. 7, 2007); Prosecutor v. Gatete, Case No. ICTR-2000-61-I, Decision on Defence Motion for Protection of Witness ¶ 1 (Apr. 10, 2007), http://unictr.org/Portals/0/Case%5CEnglish%5CG atete%5Ctrail%20chamber%5C070410.pdf; Prosecutor v. Gatete, Case No. ICTR-2000-61-I, Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda Pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence (Nov. 28, 2007).

²¹ Rule 11 bis: Referral of the Indictment to another Court

President of the Tribunal discretion to transfer ICTR cases to appropriate national jurisdictions. In determining whether to refer a case, the Trial Chamber needs to be assured that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed.

The Trial Chambers assigned to adjudicate these motions denied the requests. The Appeals Chamber affirmed the denial of three of these requests following appeals filed by the Prosecution. It follows from these cases that the new Transfer Law did not satisfactorily address all facts required by Rule 11 *bis*. While some of the denials were a rather close call, the harshest criticism for the Rwandan judicial system came in the *Munyakazi* case.²² In this

- (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
 - (i) in whose territory the crime was committed; or
 - (ii) in which the accused was arrested; or
 - (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
- (B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.
- (C) In determining whether to refer the case in accordance with paragraph
- (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.
- (D) Where an order is issued pursuant to this Rule:
 - (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
 - (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
 - (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
 - (iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf.
- (E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.
- Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Decision on Referral Under Rule 11 *bis*, ¶ 2 (Oct. 8, 2008), http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTR/Munyakazi

decision, the Trial Chamber took a strict stance based on its assessment that the accused might not receive a fair trial in Rwanda. The obstacles to the referral of that case are representative of the reasons underpinning all denials.

First, despite having abolished the death penalty for referred cases, the Rwandan Death Penalty Law, which was at the time *lex posterior* to the Transfer Law, provides for life imprisonment "with special provisions" as the heaviest penalty. Given that "special provisions" is synonymous to imprisonment in isolation, the Trial Chamber found that this penalty violated human rights standards.

Second, the Rwandan system only provides for a single judge in the first instance, whereas serious crimes against international humanitarian law require three judges in the first instance. Past incidents of questionable judicial independence in Rwanda led the Chamber to voice concerns about the independence of the Rwandan judiciary under the Transfer Law, since a single judge is more prone to be influenced and put under pressure by a government. Notably, however, neither the Appeals Chamber, nor other Trial Chambers considering referral requests, found the use of a single judge *per se* as posing a barrier to transfer.

Third, the Trial Chamber determined that the Rwandan Witness Protection Unit was inadequate. At that time, the Unit was still under control of the Public Prosecutor. The Trial Chamber followed the defense argument, which cautioned that its witnesses, many who had fled the country, might be unwilling to testify because they doubted the independence of the Unit, and feared possible harassment, intimidation, arrest for denying genocide, or worse. That the Rwandan government had envisioned video-link testimonies for witnesses abroad did not help, since the Trial Chamber held that use of that technology did not satisfy the principle of equality of arms if prosecution witnesses were heard in person and those of the Defense only via video-link. What is more, the Rwandan government had not arranged for assistance agreements with third countries for witness protection or for giving testimony via videolink. Consequently, the Trial Chamber did not find that equality of arms would be respected.

Despite the denials of the first round of the Prosecution's motions for referral, the Trial Chambers considering those requests

Appeal_Referral.pdf (Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, May 28, 2008).

acknowledged that Rwanda had taken positive steps and did not categorically preclude future requests for referrals. At the same time, the Chambers observed that there was room for improvement in the Rwandan judicial system. The work of improving the Rwandan judiciary has continued over the past few years, and the trainings and outreach activities put in place by the Registry have provided a valuable contribution in this regard.

These further improvements motivated the Prosecutor to file a motion for the referral of the *Uwinkindi* case in November 2010. In his motion for referral in the *Uwinkindi* case, ²³ the Prosecutor argued that the standard required from a national judicial system under Rule 11 *bis* cannot be a perfect legal system, since such a system does not exist in reality. Furthermore, he asked the Trial Chamber to take into account that the Rwandan Transfer Law had been amended in 2009 to address previous concerns. In addition, the Prosecution submitted that the Trial Chamber should also accord weight to the undertaking and assurance by Rwanda that the trial would be held in accordance with fair trial standards. The Prosecutor further noted that since the denial of the previous applications, legal reform and capacity-building have contributed to strengthening fair trial guarantees.

Rwanda's recent reforms include establishing a separate Witness Protection Unit within the Judiciary, amending the Transfer Law to allow Rwandan judges to take evidence and testimony abroad with a video-link for the local audience in Rwanda, and granting immunity to witnesses visiting Rwanda from abroad, which preempts witnesses' fears of being indicted themselves. Furthermore, Rwanda has repealed the penalty of life imprisonment "with special provisions" (*i.e.*, solitary confinement), making regular life imprisonment the maximum penalty. Finally, prison facilities have also been improved in Rwanda in order to meet the internationally required standards and prepare for the possible transfer of the ICTR convicts to serve their sentences.

On June 28, 2011, a specially designated Referral Chamber granted the referral of the *Uwinkindi* case to the Rwandan national

for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, Nov. 4, 2010).

²³ Prosecutor v. Jean-Bosco Uwinkindi, Case No. ICTR-2001-75-I, Decision on Motion for Setting a Date for the Filing of a Response to the Prosecution's (Rule 11 *bis*) Request for the referral of the case of Jean Uwinkindi to Rwanda, and Request for Translation, ¶ 2 (Dec. 8, 2010), http://www.unictr.org/Portals/0/Case% 5CEnglish%5CUwinkindi%5Cdecisions%5C101208.pdf (Prosecutor's Request

court system under Rule 11 bis, marking an important milestone in the Tribunal's history. For the first time, a Referral Chamber found that Rwanda possesses the ability to accept and prosecute a case referred by the ICTR. In reaching its decision, the Chamber noted that Rwanda had made material changes in its laws and had indicated its capacity and willingness to prosecute cases referred by the ICTR in adherence to internationally recognized fair trial standards enshrined in the ICTR Statute and other human rights instruments. In particular, the Chamber found that the issues that concerned previous Referral Chambers, namely the availability of witnesses and their protection, had been addressed to some degree in the intervening period. In addition, the Referral Chamber requested the appointment of the African Commission on Human and Peoples' Rights (ACHPR) in order to monitor Uwinkindi's trial in Rwanda. The ACHPR should bring any potential issues that may arise throughout the course of the proceedings to the attention of the ICTR President. The Chamber also emphasized its authority under Rule 11 bis to revoke the case from Rwanda as a last resort if necessary.

The grant of the referral for trial in Rwanda is a milestone in the Tribunal's completion strategy and increases the likelihood of future referrals. The ultimate decision as to the referral in the *Uwikindi* case, however, will be made by the ICTR Appeals Chamber. Although the Rwandan justice system has greatly improved since we began the process of considering cases for referral, a reversal of the Trial Chamber's decision by the Appeals Chamber could indicate that Rwanda still has some way to go before it has the capacity to prosecute referral cases in conformity with international fair trial standards.

VI. CONCLUSION

The ICTR's capacity-building mandate is limited to the strengthening of the courts and judicial system of Rwanda. The Tribunal has less of a mandate to promote capacity-building in the rest of Africa. Nonetheless, it has spared no effort in acting as a role model for the promotion of justice and accountability and exporting its knowledge and lessons learned to all sectors of the Rwandan population and across the African continent.

Indeed, through its mere existence and its strict application of the principles of international criminal law, the ICTR has most certainly influenced, if not improved, the way criminal justice is exercised on the continent. The ICTR's jurisprudence has already found its way into legal literature and practice. However, capacity-building is the tool that makes a difference on the ground, and until the Tribunal closes its gates, it will do its best to preserve its legacy in this regard. The enhancement of the Rule of Law is what is visible to the people of Africa in their daily lives, and it offers them the comfort that what happened in 1994 will never happen again.