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**NEW ENGLAND SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT  
RWANDA GENOCIDE PROSECUTION**

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**MEMORANDUM FOR THE  
OFFICE OF THE PROSECUTOR**

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**ISSUE # 9: SURRENDER OF ACCUSED BY  
DOMESTIC STATES TO THE ICTR**

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Prepared by Agnes Escurel  
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## **I. Introduction and Summary of Conclusions**

### **A. Issues**

This memorandum analyzes the competing interests involved in the surrender of the accused by domestic states to the International Criminal Tribunal for Rwanda (Tribunal). In this analysis, the Tribunal's primacy status, the obligations of the States to cooperate with the Tribunal, and the principles of concurrent and universal jurisdiction will be evaluated. In addition, this memorandum will look into the legal arguments that can be made to confirm the Tribunal's priority right if a situation arises in which the Tribunal and other States wish to invoke their jurisdiction over the accused.<sup>1</sup>

### **B. Summary of Conclusions**

#### **1. Despite objections from other States, the Tribunal's primacy status takes precedence over other jurisdictional considerations.**

Although the States offer fairly compelling, jurisdictional arguments against the Tribunal's primacy, these challenges do not invalidate the Tribunal's

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<sup>1</sup> The Prosecution Counsel for the International Criminal Tribunal for Rwanda anticipates that possible problems may arise when the Tribunal and other nation States wish to exercise their jurisdiction and prosecute the same suspect. Possible case scenarios to consider include an exercise of universal jurisdiction by Belgium or an assertion of jurisdiction by Switzerland which is not a party to the United Nations. With this in mind, the Prosecution counsel has asked for a report which investigates whether or not the Tribunal can prevail in these situations if this issue arises before a competent court. E-mail from Andra Mobberley, Prosecution Counsel, International Criminal Tribunal for Rwanda, to Agnes Escurel, Student, New England School of Law (Oct. 6, 2001 10:37:45 EST) (copy on file with Prof. Michael Scharf). [Reproduced in the accompanying notebook at Tab 26.]

right to supercede any national court's jurisdiction. Not only is the Tribunal's primacy established under statute, the willingness of most States to surrender the accused to the Tribunal has effectively cemented the validity of the Tribunal's priority right.<sup>2</sup> In addition, States are required to cooperate with the Tribunal in the surrendering the accused in accordance with Article 28 of the Rwanda Statute.<sup>3</sup> Even non-UN members are required to cooperate with the Tribunal pursuant to a provision under Article 2(6) of the UN Charter. And since all states are obligated to comply with the Tribunal's requests, the Tribunal should still prevail in cases where its primacy is challenged.

**2. Although the legal case on primacy is clear, the Security Council's failure to impose sanctions on non-cooperative countries makes it more likely that other countries will challenge the Tribunal's primacy.**

While there is no question as to the legal argument for the Tribunal's primacy, in terms of practicality of acquiring accused persons from recalcitrant States, the Tribunal has a much harder battle. According to the Rules of Procedure and Evidence for the Rwanda Tribunal, a State that fails to cooperate with the requests of the Tribunal will be reported to the Security Council which

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<sup>2</sup> Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 Yale J. Int'l L. 383 (1998). [Reproduced in the accompanying notebook at Tab 18.] In *Prosecutor v. Tadic*, which was the very first case tried before the International Criminal Tribunal for Yugoslavia, Peter Wilkitzi, the German Federal Ministry of Justice told the Tribunal that Germany had accepted its primacy. Tadic's lawyer also gave no objections against transferring the proceedings from Germany to the Tribunal. MICHAEL P. SCHARF, *BALKAN JUSTICE* (1997). [Reproduced in the accompanying notebook at Tab 13.]

<sup>3</sup> Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955., *reprinted in* GABRIELLE K. McDONALD AND OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, 311 (2000). [Reproduced in the accompanying notebook at Tab 3.]

will then in turn impose sanctions on that country. However, despite pleas from judges and lawyers to the Security Council to impose such sanctions, the Security Council has repeatedly failed to do so. This lack of enforcement on the part of the Security Council hampers the Tribunal's primacy status and its chances on procuring suspects from uncooperative countries. As a result, the Tribunal must take a more aggressive, but diplomatic stance in promoting cooperation of all States to surrender accused persons. One approach would be to enlist the help of other countries in applying economic and diplomatic pressure upon States that refuse to comply with their obligations. Another approach that in order to reduce conflicts between States and thereby promote their cooperation with the Tribunal. The Tribunal could perhaps restrict its use of primacy to cases which involve the following: (1) high level officials; (2) crimes of mass atrocities; and (3) novel issues of international law for which the Tribunal should create a uniform standard.

## **II. Factual Background**

### **Definitions**

The process of surrender or transfer of a suspect to the Tribunal begins when the Prosecutor at the Tribunal submits a request to the State to obtain custody of the accused. In cases of surrender the accused is already in the custody of the national authorities whereas in transfer, national authorities have acted in accordance with the Tribunal's order to effect the constructive custody

of the accused to the Tribunal.<sup>4</sup> According to the Statute, the Prosecutor may seek orders to gain custody of accused persons in either of the above situations.<sup>5</sup>

However, the success of these proceedings depends greatly on the cooperation of the States with the Tribunal. Although the Statute creates an obligation for the States to comply with Tribunal's requests, they have not always adhered to it citing their own national interests. So there is cause for concern that problems could arise in the future if and when a State and the Tribunal both wish to exercise jurisdiction over the suspect. Battles over defendants could pose a threat to the power and efficiency of the Tribunal. With that in mind, several arguments are outlined below to evaluate how to approach such non-compliance by the States.

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<sup>4</sup> GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 493 n. 1568 (1998). The terms "surrender" and "transfer" are used in lieu of "extradition" to describe the means of bringing the accused to trial. The rules of extradition are inapplicable in these situations since they are not expressly incorporated in the Statutes, Rules or domestic legislation regarding the Tribunal. *Id.* at 49. [Reproduced in the accompanying notebook at Tab 9.]

<sup>5</sup> Article 28 of the Rwanda Tribunal Statute provides as follows: Article 28: Co-operation and judicial assistance. 1. States shall co-operate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) The identification and location of persons; (b) The taking of testimony and the production of evidence; (c) The service of documents; (d) The arrest or detention of persons; (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda. [Reproduced in the accompanying notebook at Tab 3.]

### **III. Legal Discussion**

#### **A. An Obligation to Surrender**

As a construct under Chapter VII of the United Nations Charter, the Rwanda Tribunal requires that States which are a party to the United Nations comply with the Statute of the International Criminal Tribunal for Rwanda.

Security Council Resolution 955 which created the Rwanda Tribunal states that:

all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28.<sup>6</sup>

This language in the Security Council Resolution demonstrates the drafters' intention to create a broad obligation to cooperate with the Rwanda Tribunal and eliminate any basis for States to refuse the surrender of wanted suspects.<sup>7</sup>

Article 28 of the Statute of the International Criminal Tribunal for Rwanda even stipulates that "States shall comply without undue delay with any request for assistance or an order issued by the Trial Chamber."<sup>8</sup> Should any state notified

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<sup>6</sup> Robert Kushen and Kenneth J. Harris, *Current Development: Surrender of Fugitives by the United States to the War: Crimes Tribunals for Yugoslavia and Rwanda*, 90 A.J.I.L. 510, 512 (1996). [Reproduced in the accompanying notebook at Tab 35.]

<sup>7</sup> *Id.* This obligation is also provided for in paragraph 4 of Security Council Resolution 827 which established the International Criminal Tribunal for Yugoslavia. *Id.* [Reproduced in the accompanying notebook at Tab 35.]

<sup>8</sup> Statute of the International Tribunal for Rwanda, *supra* note 3, at 318. [Reproduced in the accompanying notebook at Tab 3.] U.S. Ambassador to the

of a deferral request by the Tribunal not respond satisfactorily in sixty days, the Trial Chamber may request the President to report the noncompliance to the Security Council which will presumably impose sanctions.<sup>9</sup>

Although the Security Council should impose sanctions on countries who fail to comply with the Tribunal, it has never undertaken any actions against countries that violate their obligations. In 1996 when the Yugoslavia Tribunal reported to the Security Council that the Federal Republic of Yugoslavia (FRY) repeatedly refused to arrest and transfer individuals that it had requested, the Security Council condemned the FRY's failure to comply but declined to impose any sanctions.<sup>10</sup> The Deputy Prosecutor of the Yugoslavia Tribunal, Graham Blewitt warned that the Security Council's failure to impose sanctions would encourage the FRY's refusal to cooperate.<sup>11</sup> Blewitt's prediction proved to be true. Three years later the FRY refused the Tribunal's request for the of three Serb officers.<sup>12</sup> The chief judge at the Yugoslav Tribunal, Gabrielle Kirk McDonald made two personal appeals and four in writing to the Security Council

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United Nations, Madeline Albright commented on the obligations of every country to cooperate with the Tribunal. She warned, "Unless [the countries] comply with their obligations, the parties to the conflict cannot expect to reap the benefits of peace." Michael P. Scharf, *The Tools For Enforcing International Criminal Justice in the New Millenium: Lessons From the Yugoslavia Tribunal*, 49 DePaul L. Rev. 925 (2000). [Reproduced in the accompanying notebook at Tab 32].

<sup>9</sup> PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL 45 (2000). [Reproduced in the accompanying notebook at Tab 15.]

<sup>10</sup> Scharf, *supra* note 6, at 943. [Reproduced in the accompanying notebook at Tab 32].

<sup>11</sup> *Id.* [Reproduced in the accompanying notebook at Tab 32].

<sup>12</sup> *Id.* The three Serbs, Mile Mrksic, Veselin Sljivancanin and Mirslav Radic who were also known as the "Vukovar Three" were wanted on charges for the killing of 260 unarmed men at a farm in Vukovar in

to compel Serbia to turn over the officers.<sup>13</sup> Her pleas went unanswered and no sanctions were imposed upon Serbia. This failure of the Security Council to enforce measures undermines the Tribunal's authority and poses a serious problem for the Tribunal in acquiring accused persons from reluctant countries. If countries know that there will be no repercussions for their non-compliance, they will have no incentive to cooperate with the Tribunal.

However, in accordance with Chapter VII obligations of the UN Charter, all UN members are required to cooperate with the Rwanda Tribunal in the surrender of suspects regardless of whether or not they have ratified the Genocide Convention. Non-UN member states can choose whether or not to cooperate and that poses potential problems for the Tribunal's primacy.<sup>14</sup> There is also no universal agreement which provides for the reciprocal cooperation of States in these types of matters.<sup>15</sup> While this may be the case, the international community has affirmed that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to general recognized norms of international law."<sup>16</sup>

Additionally under Article 2(6) of the UN Charter, non-member States are

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1991. *Id.* [Reproduced in the accompanying notebook at Tab 32].

<sup>13</sup> *Id.* [Reproduced in the accompanying notebook at Tab 32]. In her departing speech, McDonald criticized the Security Council for ignoring its duty saying, "The Council has done nothing." *Id.* [Reproduced in the accompanying notebook at Tab 32].

<sup>14</sup> PAUL J. MAGNARELLA, *supra* note 9, at 46. [Reproduced in the accompanying notebook at Tab 15.]

<sup>15</sup> MICHAEL P. SCHARF AND VIRGINIA MORRIS, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1998). [Reproduced in accompanying notebook at Tab 14.]

required to act in accordance with decisions that are necessary for the maintenance of international peace and security.<sup>17</sup> And that includes cooperating with the Rwanda Tribunal through the surrender of suspects.

## **B. Primacy of the Tribunal**

The drafters for both the Yugoslavia and Rwanda Tribunals designed the Tribunals' primacy provisions mainly to prevent States from conducting sham proceedings to absolve their own nationals.<sup>18</sup> The drafters of the Tribunals, wary of local judicial proceedings and the possible unfairness in the prosecutions of national adversaries, implemented the primacy provision so as to not replicate these injustices.<sup>19</sup> But while primacy does not allow the appeal of domestic convictions to the Rwanda Tribunal, the need for legitimacy in prosecuting crimes of war has warranted the Rwanda Tribunal's primacy status.

Also, granting the Rwanda Tribunal primacy over national courts prevents multiple courts from exercising jurisdiction over the accused person at the same time.<sup>20</sup> If courts of different nations decided to seek the prosecution of the accused simultaneously, there could be problems of gathering evidence due to

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<sup>16</sup> *Id.* [Reproduced in accompanying notebook at Tab 14.]

<sup>17</sup> *Id.* at 638. [Reproduced in accompanying notebook at Tab 14.]

<sup>18</sup> RUTH WEDGWOOD, NATIONAL COURTS AND THE PROSECUTION OF WAR CRIMES 406 (2000). [Reproduced in the accompanying notebook at Tab 16.]

<sup>19</sup> *Id.* In one notorious national prosecution, the local courts of Bosnia and Herzegovina initially rejected to suspend the execution of the death sentence for a Serb Soldier who was wrongly convicted. Sretko Damjanovic had been found guilty for the murder of two Muslim brothers who later turned up alive. *Id.* And since 1996, the Bosnian Serb government has been conducting an unauthorized trial *in absentia* of President Izetbegovic. *Id.* at 407. [Reproduced in the accompanying notebook at Tab 16.]

the different investigative procedures of each country, evidence could be destroyed or damaged if it were used in multiple trials, witnesses may become reluctant to testify, and courts seeking to prosecute a defendant from a rival nation would raise questions of the impartiality of the judicial proceedings.<sup>21</sup>

In addition, primacy of jurisdiction is necessary to ensure an effective deterrent against leaders and organizers of the genocide. Ordinarily, before they can be prosecuted by their own national authorities, leaders of crimes flee and take refuge in other countries willing to shield them.<sup>22</sup> When that happens, the prosecuting State may experience great difficulty in retrieving these self-exiled leaders. In these circumstances, an international tribunal will presumably have more success than national authorities in gaining custody of the defendants. As a result, effective deterrence at the leadership level may possibly only be achieved through the threat of prosecution before the Rwanda Tribunal.<sup>23</sup> Also there is the premise that grave offenses against mankind like genocide demand to be heard before an international entity in order to give humanity a voice.<sup>24</sup>

Although these rationales deserve consideration, some critics decry the

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<sup>20</sup> Bartram S. Brown, *supra* note 2, at 383 (1998). [Reproduced in the accompanying notebook at Tab 18.]

<sup>21</sup> *Id.* at 398. [Reproduced in the accompanying notebook at Tab 18.]

<sup>22</sup> Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 368 (1997). [Reproduced in the accompanying notebook at Tab 25.]

<sup>23</sup> *Id.* [Reproduced in the accompanying notebook at Tab 25.]

<sup>24</sup> *Id.* [Reproduced in the accompanying notebook at Tab 25.] In his opening speech for the Prosecution at the international tribunal at Nuremburg Robert H. Jackson stated, "The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated." MICHAEL P. SCHARF, *BALKAN JUSTICE* xiii (1997). [Reproduced in the accompanying notebook at

international community's interest in denouncing international crime where the perpetrator is a leader as not sufficiently significant to warrant a stratified system for the distribution of defendants. Additionally, this type of system exhibits some inherent inconsistencies: (1) trials of the Tribunal will tend to be more favorable to the defendants than in a national forum-no death penalty; (2) the international prisons of the Tribunal have better conditions than that of the national courts; and (3) Due process for defendants is of great concern for the Rwanda Tribunal whereas many times this is not the case in national courts.<sup>25</sup>

### **C. Challenges to the Tribunal's Primacy: Jurisdictional Considerations**

#### **1. Concurrent Jurisdiction**

Article 8 of the Rwanda Statute states that "the International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighboring States."<sup>26</sup> However, the ICTR "shall have primacy over national courts of all States."<sup>27</sup>

In the case of *Prosecutor v. Bernard Ntuyahaga*, the Prosecutor's

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Tab 13.]

<sup>25</sup> *Id.* [Reproduced in the accompanying notebook at Tab 25.]

<sup>26</sup> Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955., *reprinted in* GABRIELLE K. McDONALD AND OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, 311 (2000). [Reproduced in accompanying notebook at Tab 3.]

withdrawal of Ntuyahaga's indictment blurred the lines of primacy and concurrent jurisdiction. The motion was unprecedented in the Rwanda Tribunal. In this case, the prosecutor used the principle of concurrent jurisdiction provided in Article 8(1) of the Statute to argue the withdrawal of the indictment.<sup>28</sup> In its argument, the prosecution stated, "It is our submission that this case falls into the category of cases most appropriate for the exercise of concurrent jurisdiction by Belgium which has instituted criminal investigations against the accused since 1994" and that "concurrent jurisdiction is not about competing or antagonistic claims. It is about universal jurisdiction for the crimes in question."<sup>29</sup> Mr. Othman Chande, a senior Prosecution attorney for the Tribunal submitted that "primacy of jurisdiction ought not be construed as monopoly of jurisdiction."<sup>30</sup>

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<sup>27</sup> *Id.* [Reproduced in accompanying notebook at Tab 3.]

<sup>28</sup> *Prosecutor v. Ntuyahaga*, ICTR-98-40-T(18 March 1999).

<http://www.ictr.org/ENGLISH/cases/Ntuyuhaga/decisions/withdraw.htm>.

(visited Oct. 10, 2001). [Reproduced in accompanying notebook at Tab 7.] Rule 51 which provides for the withdrawal of indictment states as follows: (A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73. (B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused. International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence. <http://www.ictr.org> (visited Oct. 14, 2001). [Reproduced in accompanying notebook at Tab 1.]

<sup>29</sup> Press Release, *The Prosecutor v. Ntuyahaga* <<http://www.ictr.org/ENGLISH/PRESSREL/1999/update13.htm>>. [Reproduced in accompanying notebook at Tab 47.]

<sup>30</sup> *Id.* [Reproduced in accompanying notebook at Tab 47.] In July 1998, Belgium sent an extradition request to Tanzania after Ntuyahaga surrendered himself to the Tribunal. Belgium based its warrant of arrest on Ntuyahaga's involvement in the deaths of 10 Belgian soldiers in UNAMIR, the willful killing of the then Prime Minister of Rwanda,

The Belgian Government agreed with that sentiment and stated that the cooperation of the member States with the Tribunal set forth in the Statute necessarily implies a reciprocal cooperation of the Tribunal with the States.<sup>31</sup> Eric David, appearing on behalf of the Kingdom of Belgium as an *amicus curiae* argued that the principle of concurrent jurisdiction in the Statute “is the rule and primacy of the Tribunal over national courts, the exception.”<sup>32</sup> This statement from the Belgian lawyer indicates that Belgium does not agree with how the Tribunal asserts its primacy and that perhaps it should only be reserved for special cases. Belgium appears to interpret the language in the Statute in the exercise of jurisdiction between the Tribunal and the States as complementary, not as one judicial body superceding the other. However, the Trial Chamber which eventually granted the Prosecutor’s request, concluded in its opinion that the question of concurrent jurisdiction cannot be used by the Prosecutor for the withdrawal of an indictment.<sup>33</sup> While it wanted to emphasize that the Rwanda

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Mrs. Agathe Uwilingiyimana, and crimes against certain other Rwandans. *Id.*  
[Reproduced in accompanying notebook at Tab 47.]

<sup>31</sup> *Prosecutor v. Ntuyahaga*, *supra* note 28, at 2. [Reproduced in accompanying notebook at Tab 7.] Defense counsel, Mr. Georges Komlavi Amegadjie from Togo opposed the prosecution’s motion and urged for Ntuyahaga’s acquittal. He stated that because the ICTR is a United Nations body, “the Prosecution should not act as a rubber stamp for some national jurisdictions.” Amegadjie added that the Statute of the ICTR does not provide for the ICTR to hand over an accused person to a national jurisdiction. Press Release, *supra* note 20.

[Reproduced in accompanying notebook at Tab 47.]

<sup>32</sup> Press Release, *supra* note 29. [Reproduced in accompanying notebook at Tab 47.]

<sup>33</sup> *Prosecutor v. Ntuyahaga*, *supra* note 28, at 2 [Reproduced in accompanying notebook at Tab 7.] In its decision, Trial Chamber I reasoned the Prosecutor’s motion for withdrawal for indictment was well founded not on the reason of concurrent jurisdiction but that under Rule 51 the Prosecutor has the sole responsibility for prosecutions and has the right to decide whether or not to

Tribunal encourages the exercise of universal jurisdiction to prosecute crimes of such a severe nature, the Trial Chamber still maintained the Rwanda Tribunal's primacy by concluding that the "deferral of investigations and proceedings by the Tribunal to any national jurisdiction, is not provided for."<sup>34</sup>

## **2. *Universal Jurisdiction***

The universality principle assumes that the crimes committed are so universally recognized and condemned by all nations of the world that any nation may bring a prosecution of the perpetrators. This principle permits all states to apply their laws in these circumstances "even if it ... occurred outside its territory, even if it has been perpetrated by a non-national, and even if its national have not been harmed by it ...."<sup>35</sup> The Geneva Conventions which were entered into force in 1950 recognized the principle of universal jurisdiction to authorize the courts of signatory states to prosecute grave breaches of the Conventions.<sup>36</sup> With universal jurisdiction, any state can try an offender but jurisdiction is only applicable to a limited number of crimes. In customary

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proceed with the indictment. Therefore, the Prosecutor may apply for leave to withdraw an indictment at any stage of the proceedings. *Id.* [Reproduced in accompanying notebook at Tab 7.]

<sup>34</sup> *Id.* [Reproduced in accompanying notebook at Tab 7.] In its decision the Trial Chamber stated that under the provisions of the Statute and the Rules, it does not have jurisdiction to order the release of a person who is not longer under indictment into the custody of another state, even the Host state. *Id.* [Reproduced in accompanying notebook at Tab 7.]

<sup>35</sup> Leila N. Sadat, *Redefining Universal Jurisdiction*, 35 New Eng. L. Rev. 241 (2001). [Reproduced in accompanying notebook at Tab 24.]

<sup>36</sup> GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 406 (1998). [Reproduced in accompanying

international law, these crimes include piracy, slave trade and traffic in children and women. It also includes genocide, crimes against humanity and war crimes.<sup>37</sup> However, very few courts have invoked universal jurisdiction which seems to refute the suggestion of some scholars who assert that universal jurisdiction has “passed into customary law and should be recognized as available to any country that wishes.”<sup>38</sup>

A possible challenge to third states that wish to invoke universal jurisdiction in opposition to the Tribunal’s request for the surrender of the accused is that there is no provision for universal jurisdiction over crimes of genocide in the Genocide Convention, although critics have argued otherwise.<sup>39</sup> However, opponents argue that such prosecutions of crimes of humanity are

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notebook at Tab 9.]

<sup>37</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 60 (2001). [Reproduced in accompanying notebook at Tab 17.] Piracy was the first widely accepted crime of universal jurisdiction because it consisted of heinous acts of violence or depredation committed against the vessels and nationals of numerous states. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 New. Eng. L. Rev. 363 (2001). [Reproduced in accompanying notebook at Tab 30.]

<sup>38</sup> GEOFF GILBERT, *supra* note 36. [Reproduced in accompanying notebook at Tab 9.]

<sup>39</sup> Thomas Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 568 (1995). [Reproduced in accompanying notebook at Tab 37.] The provision for universal jurisdiction was proposed but rejected during negotiations of the Genocide Convention. It was strongly opposed by France, the Soviet Union and the United States. Madeline H. Morris, *Universal Jurisdiction in a Divided World*, 35 New. Eng. L. Rev. 337 (2001). [Reproduced in accompanying notebook at Tab 26.] In *Attorney General of Israel v. Eichmann*, the Israeli Supreme Court stated that “every sovereign [s]tate may exercise its existing powers within the limits of customary law....” Michael P. Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 Law & Contemp. Prob. 67 (2001). [Reproduced in accompanying notebook at Tab 31.]

now widely accepted and so too should the crime of genocide.<sup>40</sup> But while that may be the trend, a Commentary to the Third Geneva Convention points out that, "The Contracting Parties ... should at least insert in their legislation a general clause providing for the punishment of other breaches."<sup>41</sup> One country which has followed up on that notion is Belgium. In 1993 Belgium enacted Rimes de droit international which conferred upon the Belgian Courts criminal jurisdiction over certain breaches of the Geneva Conventions, Protocol I and Protocol II.<sup>42</sup> They have since utilized the principle of universal jurisdiction and have issued international arrest warrants against persons involved in the Rwandan conflict.<sup>43</sup>

### **3. Territorial Jurisdiction--Rwanda**

In accordance with the general practice of international law, States holding the accused should transfer the fugitive to the State with territorial jurisdiction.<sup>44</sup> However, allowing the national courts in Rwanda to prosecute the accused versus in the Rwanda Tribunal would create a lack of neutrality in these prosecutions. Governments are usually harsher in punishment when their

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<sup>40</sup> Thomas Meron, *supra* note 39, at 568. [Reproduced in accompanying notebook at Tab 37.]

<sup>41</sup> Thomas Meron, *supra* note 39, at 568. [Reproduced in accompanying notebook at Tab 37.]

<sup>42</sup> *Id.* at 576. [Reproduced in accompanying notebook at Tab 37.]

<sup>43</sup> *Id.* [Reproduced in accompanying notebook at Tab 37.]

<sup>44</sup> GEOFF GILBERT, *supra* note 36, at 403. [Reproduced in accompanying notebook at Tab 9.]

citizens have been attacked and there would most likely be a broad public sentiment to quickly condemn the accused without a fair trial and thus it would encourage the danger of victor's justice, personal partiality and bias.

Tensions have arisen between Rwanda and the Tribunal over the Rwanda Tribunal's provisions. Rwanda did not agree with the final draft of the Rwanda Statute or the Tribunal's location in Tanzania and had wanted the temporal jurisdiction to cover crimes as early as 1990 since the genocide was planned 3 years in advance.<sup>45</sup> Also, Rwanda has argued that the Tribunal uses the Statute to compete with it for suspects in third countries.<sup>46</sup> In a formal position paper that it sent to the UN entitled *The Position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR)*, the Rwandan government voiced concerns about the Tribunal's procedures to obtain suspects.<sup>47</sup> In one part of its report, Rwanda stated that the prosecutors "have not determined policy as to whom the tribunal should pursue. They have never indicated the kind of cases they wish to prosecute before the Tribunal and those

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<sup>45</sup> HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE 172 (1999). [Reproduced in accompanying notebook at Tab 10.]

<sup>46</sup> *Id.* [Reproduced in accompanying notebook at Tab 10.]

<sup>47</sup> *Id.* [Reproduced in accompanying notebook at Tab 10.] Other concerns that the Rwandan government raised about the Tribunal included the poor organization of the ICTR, the personnel problems of the ICTR, the ICTR's conduct of investigations, the prosecutor's interpretation of the ICTR mandate, and the attitude of the Prosecutor's Office toward the Rwandan government and its people. At the conclusion of its report Rwanda recommended changes to the ICTR which called for: (1) an independent Prosecutor for the ICTR; (2) moving the ICTR to Kigali, Rwanda; (3) strengthening the powers of the prosecutorial staff of the ICTR; (4) recruiting more qualified personnel for the ICTR; and (5) improving cooperative actions with the Rwandan government and legal authorities. *Id.* [Reproduced in accompanying notebook at Tab 10.]

they expect to be tried by national courts ... They proceed on an *ad hoc* basis."<sup>48</sup>

Also conflicts over the exercise of jurisdiction between Rwanda and the ICTR have not been set out in any type of agreement or mutual understanding. Any conflicts that have arisen have been resolved on an *ad hoc* basis.<sup>49</sup>

In response to their dissatisfaction with the new Tribunal, on September 1, 1996 Rwanda established the Rwandan Organic Law on the Organizations of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990.<sup>50</sup> Rwanda designed the law to expedite domestic trials and encourage refugee Hutus to return to Rwanda.<sup>51</sup> Although the Statute gives the ICTR priority on who to indict and try the new Tutsi leaders in Rwanda also decided to charge and try the Hutu leaders, thereby creating tension between the ICTR and the Rwandan government.<sup>52</sup> Under these laws, leaders and organizers of genocide who were found guilty were given the

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<sup>48</sup> *Id.* [Reproduced in accompanying notebook at Tab 10.]

<sup>49</sup> Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349 (1997). [Reproduced in accompanying notebook at Tab 25.]

<sup>50</sup> HOWARD BALL, *supra* note 45, at 184. [Reproduced in accompanying notebook at Tab 10.] Suspects under this law fell into four categories: (1) leaders and organizers of the genocide and perpetrators who committed heinous murders and/or sexual torture; (2) all others who were found guilty of murder; (3) Hutu who committed "grave assaults" that did not end with murder of the victim; and (4) all those who committed property damages in connection with the genocide. *Id.* [Reproduced in accompanying notebook at Tab 10.]

<sup>51</sup> Paul J. Magnarella, *Expanding Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 Fla. J. Int'l L. 421 (1994). [Reproduced in accompanying notebook at Tab 34.]

<sup>52</sup> HOWARD BALL, *supra* note 45, at 183. [Reproduced in accompanying notebook at Tab 10.]

death sentence.<sup>53</sup> Defendants at the Rwanda Tribunal enjoy more favorable treatment including escaping the death penalty, better prison conditions, and the guarantee of due process safeguards.<sup>54</sup> On December 27, 1996 Rwanda initiated domestic trials for genocide and crimes against humanity in Kigali.<sup>55</sup> Most defendants did not have adequate counsel and usually guilt did not have to be proven beyond a reasonable doubt.<sup>56</sup> In 1998 Rwanda executed 22 people by firing squad.<sup>57</sup>

In contrast to Rwanda's system of justice, the Rwanda Tribunal is not authorized to impose the death penalty, consistent with its prohibition under the Second Optional Protocol to the ICCPR of 1989 which leads to an ironic situation.<sup>58</sup> One of the main purposes for establishing this Tribunal was to create

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<sup>53</sup> *Id.* at 184. [Reproduced in accompanying notebook at Tab 10.] Many international human rights organizations along with the United States, the European Union and Pope John Paul II argued against these executions and appealed to the Rwandan government for clemency for the condemned but Rwanda rejected their requests. *Id.* at 185. [Reproduced in accompanying notebook at Tab 10.]

<sup>54</sup> Madeline H. Morris, *supra* note 49. [Reproduced in accompanying notebook at Tab 25.] In 1997 Amnesty International produced a report which described the unfairness of the trials conducted in the Rwandan national courts. The report pointed out that some defendants had trials which only lasted four hours, defendants had no access to legal counsel and were denied the opportunity to summon witness for their defense or cross-examine the prosecution's witnesses. HOWARD BALL, *supra* note 43, at 186. [Reproduced in accompanying notebook at Tab 10.]

<sup>55</sup> *Id.* at 185. [Reproduced in accompanying notebook at Tab 10.]

<sup>56</sup> *Id.* [Reproduced in accompanying notebook at Tab 10.] In reference to the domestic trials in Rwanda, U.N. spokesperson Jose Luis Herrero stated that "there is no such certainty of guilt" in these cases. *Id.* [Reproduced in accompanying notebook at Tab 10.]

<sup>57</sup> *Id.* [Reproduced in accompanying notebook at Tab 10.] Foreign Minister Anastase Gasana stated that the executions served "an educational and pedagogical purpose. *Id.* [Reproduced in accompanying notebook at Tab 10.]

<sup>58</sup> PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE

legitimacy in the process of prosecuting the accused and not turn it into a court of personal retribution. However, such trials have already happened in Rwanda. Since the Rwanda Tribunal gets to pick which cases it gets to prosecute, it usually goes for the high standing leaders, leaving Rwanda the task of prosecuting the subordinates.<sup>59</sup> And since Rwanda has capital punishment and the Rwanda Tribunal does not, it is highly plausible that those who were the most responsible for the genocide crimes will receive a less harsh punishment than those who did not have such an active role in the genocide.

It is important to note that Rwanda formally requested the creation of the Tribunal so it voluntarily gave up some of its jurisdiction to the ICTR.<sup>60</sup> Also because Rwanda's judiciary was devastated during the genocide, the Tribunal was needed to carry out the necessary procedures to hold accountable the people who were involved in the genocide.<sup>61</sup> Ironically Rwanda's delegation to the Security Council cast the sole vote objecting to the establishment of the ICTR.<sup>62</sup>

According to the Statute, Rwanda along with its neighbors are required to

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UN CRIMINAL TRIBUNAL 50 (2000). [Reproduced in accompanying notebook at Tab 15.]

<sup>59</sup> *Id.* at 55. [Reproduced in accompanying notebook at Tab 15.]

<sup>60</sup> *Id.* [Reproduced in accompanying notebook at Tab 15.]

<sup>61</sup> *Id.* [Reproduced in accompanying notebook at Tab 15.] Before the genocide Rwanda had 750 judges, 87 prosecutors and 139 investigators. After the genocide, only 244 judges, 14 prosecutors, and 39 investigators were left. Many of these law enforcement figures left the country or were killed. HOWARD BALL, *supra* note 43, at 183. [Reproduced in accompanying notebook at Tab 10.]

<sup>62</sup> *Id.* [Reproduced in accompanying notebook at Tab 15.]

surrender accused persons to the Rwanda Tribunal without a choice.<sup>63</sup>

And since the ICTR is basically expected to go after the leaders and the organizers of the genocide, the Rwandan government and the ICTR have clashed in their efforts to obtain suspects.<sup>64</sup>

#### **4. State Sovereignty**

Many states insist that their sovereignty gives them ultimate discretion on how to deal with suspects wanted by the ICTR who threaten their security.<sup>65</sup> A basic principle of international law states that a nation has jurisdiction to prosecute crimes committed within its territory.<sup>66</sup> Since these crimes involve violations of national law, a nation has an interest in applying their own type of justice.<sup>67</sup> However, States that sign onto the UN Charter, the Genocide Convention, and other international agreements give up absolute sovereignty.<sup>68</sup> Whether this will become an accepted principle of international law will depend on State action and reaction and measures taken by the Security Council. As of

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<sup>63</sup> Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955., *reprinted in* GABRIELLE K. McDONALD AND OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, 311 (2000). [Reproduced in accompanying at Tab 3.]

<sup>64</sup> Madeline H. Morris, *supra* note 49, at 349 (1997). [Reproduced in accompanying notebook at Tab 25.]

<sup>65</sup> Thomas Meron, *supra* note 39. [Reproduced in accompanying notebook at Tab 37.]

<sup>66</sup> *Id.* [Reproduced in accompanying notebook at Tab 37.]

<sup>67</sup> Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 *Geo. Wash. Int'l L. Rev.* 363, 370 (2001). [Reproduced in the accompanying notebook at Tab 19.]

July 23, 2001 there have been thirty-eight arrests in Africa, eleven arrests in Europe and one arrest in the United States for surrender to the Tribunal.<sup>69</sup> These numbers seem to suggest that countries are complying with their obligations to cooperate with the Tribunal in the surrender of accused persons and therefore it has become a customary practice of international law.

#### **IV. Can the Tribunal Realistically Retain Its Primacy Status?**

##### **A. Indications that the Tribunal may Prevail**

###### **1. *Enactments of national legislation to comply with the Tribunal***

On January 24, 1995 the United States signed an agreement called the Agreement on Surrender of Persons Between the Government of the United States and the Tribunal to carry out its obligations under paragraph 2 of Resolution 955.<sup>70</sup> In 1996, the United States along with France, Germany and

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<sup>68</sup> *Id.* at 383 (2001). [Reproduced in the accompanying notebook at Tab 19.]

<sup>69</sup> Coalition for International Justice, *Who's in Custody of the ICTR?* (Jul. 23, 2001), available at <http://www.cij.org/ictr/2pager2.htm>. [Reproduced in the accompanying notebook at Tab 40.]

<sup>70</sup> *In the Matter of the Surrender of Elizaphan Ntakirutimana*, 1998 U.S. Dist.

nine other states enacted legislation in order to fulfill their legal obligation under Resolution 955 of the Security Council to surrender suspects charged with violations of international humanitarian law.<sup>71</sup> On February 10, 1996 Section 1342(a)(1) of Public Law was enacted to implement the Surrender Agreement.<sup>72</sup> The United States utilized this legislation to serve as an example to other states toward the fulfillment of their UN obligations and used the bilateral extradition process as a model for creating a surrender framework.<sup>73</sup> Although the United States arrested Ntakirutimana on September 26, 1996 and Judge John Rainey ordered Ntakirutimana's surrender to the Tribunal on August 5, 1998, the process was anything but smooth.<sup>74</sup> The first magistrate judge denied surrender on the basis of insufficient national legislation to carry out such procedures. The surrender was only recently approved after the case was brought to another federal judge.<sup>75</sup> However, under the U.S. scheme for surrender there exists a possibility for a denial of surrender. Under domestic law, the Secretary of State

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LEXIS 22173 (Aug. 6, 1998). [Reproduced in the accompanying notebook at Tab 5.]

<sup>71</sup> *Id.* [Reproduced in the accompanying notebook at Tab 5.]

<sup>72</sup> *Id.* [Reproduced in the accompanying notebook at Tab 5.]

<sup>73</sup> Robert Kushen and Kenneth J. Harris, *supra* note 4, at 515. [Reproduced in accompanying notebook at Tab 35.]

<sup>74</sup> HOWARD BALL, *supra* note 45, at 175. [Reproduced in accompanying notebook at Tab 10.]

<sup>75</sup> RUTH WEDGWOOD, *supra* note 16, at 409. [Reproduced in the accompanying notebook at Tab 16.] The first judge, Magistrate Notzon denied the Government's request for the surrender of Ntakirutimana for two reasons: (1) extradition requires an extradition treaty ratified by the President and two-thirds of the Senate; and (2) the Government's request did not establish probable cause. *In the Matter of the Surrender of Elizaphan Ntakirutimana*, *supra* note 67, at \*4. [Reproduced in the accompanying notebook at Tab 5.]

retains the discretion to deny surrender even after the surrender has been certified by a U.S. Court.<sup>76</sup> So while the provisions of the Security Council supposedly are absolute, there are some loopholes. While domestic legislation provides a legal basis for the surrender of the accused to the ICTR, many states which have not enacted such legislation have turned over suspects to the Tribunal.<sup>77</sup>

Recently, Italy refused to cooperate with the Rwanda Tribunal's request for the arrest of a Rwandese citizen claiming that its domestic legislation gives it no legal basis to carry out the arrest.<sup>78</sup> Italian authorities state that they would have to issue an ad hoc decree to implement the international arrest warrant. But while Italy justifies its refusal for surrender of the accused as contrary to its laws, compliance with the Rwanda Tribunal's requests is a fundamental rule of international law. In the Vienna Convention of the Law of Treaties, Article 27 states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>79</sup> Furthermore, Rule 58 of the Rwanda Tribunal's Rules of Procedure in Evidence states that, "the obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to

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<sup>76</sup> *Id.* [Reproduced in the accompanying notebook at Tab 5.]

<sup>77</sup> Press Release, Amnesty International, *International Criminal Tribunal for Rwanda's Request for the Surrender of Muvunyi and Ndindiliyimana: A Step Closer to Justice* <<http://www.amnesty-usa.org/news/2000/14700400.htm>> (Feb. 8, 2000). [Reproduced in accompanying notebook at Tab 45.]

<sup>78</sup> Press Release, Amnesty International, *Italy Must Immediately Arrest Rwandese Indicted by the International Criminal Tribunal for Rwanda [ICTR]* <[http://www.amnesty-usa.org/news/2001/italy\\_2\\_07172001.html](http://www.amnesty-usa.org/news/2001/italy_2_07172001.html)> (Oct. 4, 2001). [Reproduced in accompanying notebook at Tab 46.]

the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."<sup>80</sup> If the State fails to surrender the accused, the Security Council may be notified.<sup>81</sup>

## **2. *Limitations of National Tribunals***

The Rwanda Tribunal was created specifically to prosecute those responsible for the genocide in that country. Part of the reason the Rwanda Tribunal has primacy of jurisdiction over these types of suspects is because its existence stemmed from the need to bring these criminals to justice. Rwanda knew the limitations of its national courts in trying to prosecute these suspects and recognized that a competent judicial body needed to be implemented.<sup>82</sup> At least an international tribunal, as compared to a national court is "equally fair, more distanced from the facts of the case and taking a broader view of the matter," with "impartial, independent and disinterested judges coming... from all continents of the world."<sup>83</sup>

## **3. *Precedence of Primacy in the International Criminal Tribunal for Yugoslavia***

The principle of primacy was a relatively novel concept when it came into

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<sup>79</sup> *Id.* [Reproduced in accompanying notebook at Tab 46.]

<sup>80</sup> GEOFF GILBERT, *supra* note 36, at 498. [Reproduced in accompanying notebook at Tab 9.]

<sup>81</sup> *Id.* [Reproduced in accompanying notebook at Tab 1.]

<sup>82</sup> Bartram S. Brown, *supra* note 2, at 383. [Reproduced in accompanying notebook at Tab 18.]

force with the creation of the Yugoslavia and Rwanda Tribunals. The International Criminal Tribunal for Yugoslavia (ICTY), the predecessor of the Rwanda Tribunal established its primacy under Article 9 of the ICTY Statute.<sup>84</sup> The application of primacy doctrine first came into force with the trial of Dusko Tadic. In this case, Tadic had been arrested and was awaiting trial in Germany when the ICTY invoked its primacy and requested that Germany defer the case to the ICTY.<sup>85</sup> Germany voluntarily complied and even enacted a law to facilitate Tadic's transfer to the Tribunal.<sup>86</sup> Germany's action the standard for other countries to cooperate in the surrender of accused persons to the ICTY and also provided the Rwanda Tribunal with a precedent through which it could successfully invoke its primacy in obtaining accused persons from other countries.

## **B. Setbacks to the Primacy Argument**

### **1. *The lack of primacy in the new International Criminal Court***

Since the Rwanda Tribunal serves as a precedent for the new International Criminal Court (ICC), it is important to see what provisions the drafters of the ICC have implemented concerning the issue of the surrender or

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<sup>83</sup> *Id.* [Reproduced in accompanying notebook at Tab 18.]

<sup>84</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to S.C. Res. 827, U.N. SCOR., *reprinted in* MICHAEL P. SCHARF, *BALKAN JUSTICE*, 241 (1997). [Reproduced in accompanying notebook at Tab 4.]

<sup>85</sup> Bartram S. Brown, *supra* note 2, at 383. [Reproduced in accompanying notebook at Tab 18.]

<sup>86</sup> *Id.* [Reproduced in accompanying notebook at Tab 18.]

transfer of suspects to the ICC.<sup>87</sup> In the new International Criminal Court the transfer of the accused will not be compulsory for States; instead it will deal with issues of complementarity.<sup>88</sup> The issue of complementarity is not altogether clear. It could mean that domestic courts should have primacy and the ICC should only come in and fill in the gaps of jurisdiction or it may mean that the domestic states and the ICC are equal and should complement each other in terms of taking jurisdiction.<sup>89</sup> Because of criticisms of the use of *ad hoc* Tribunals, some members of the UN are looking to curb the power of the Security Council's power by basing the international tribunals on state consent. On July 17, 1998 the Rome Conference approved The Draft Treaty for a Permanent International Criminal Court. The jurisdiction of the ICC is narrower than that of the States that have the jurisdiction with respect to the same crimes. Its provisions seem to steer away from the doctrine of primacy held by the Tribunals for Yugoslavia and Rwanda and instead gives the national courts the initial opportunity to take the case.

Since the ICC is subject to the principle of complementarity, it thus only acts as a supplement to national proceedings. According to this principle, the

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<sup>87</sup> Evo Popoff, *supra* note 67, at 378. [Reproduced in accompanying notebook at Tab 19.]

<sup>88</sup> Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* 53 (1998). [Reproduced in accompanying notebook at Tab 9.]

<sup>89</sup> Rome Statute of the International Criminal Court, UN. DOC. A/CONF.183/9 (Jul. 17, 1998) *reprinted in* GABRIELLE K. McDONALD AND OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, 449 (2000). [Reproduced in accompanying notebook at Tab 2.]

<sup>90</sup> WILLIAM A. SCHABAS, *supra* note 37. [Reproduced in accompanying notebook at Tab 17.]

ICC cannot take jurisdiction away from the national courts of cases pending on the State's dockets, or of cases in the process of being investigated except in certain circumstances.<sup>91</sup> These circumstances include situations in which the national court system has collapsed or is genuinely unwilling to prosecute.<sup>92</sup> While the concept of complementary was brought up as early as 1994, this mechanism was criticized by some international law figures including Louise Arbour, the previous prosecutor for the ICTR.<sup>93</sup> She has argued that this worked in favor of the rich and against the poor, underdeveloped countries.<sup>94</sup>

Consistent with these policies is the layout of the ICC's procedural guidelines concerning this issue. Whenever the ICC proposes an investigation into a case or a case is referred to it by a State party, the ICC must give States full notice and allow them the chance to prosecute the action at the domestic level.<sup>95</sup> The prosecutor must also seek a pre-trial chamber approval in order to displace a state investigation.<sup>96</sup> And even if this is successful, the State can then appeal the pre-trial chamber decision.<sup>97</sup> Within this framework, obtaining the surrender of the accused will be considerably difficult for the international

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<sup>91</sup> Rome Statute of the International Criminal Court, *supra* note 89. [Reproduced in accompanying notebook at Tab 2.]

<sup>92</sup> *Id.* [Reproduced in accompanying notebook at Tab 2.]

<sup>93</sup> WILLIAM A. SCHABAS, *supra* note 37, at 68. [Reproduced in accompanying notebook at Tab 17.]

<sup>94</sup> *Id.* [Reproduced in accompanying notebook at Tab 17.]

<sup>95</sup> Rome Statute of the International Criminal Court, *supra* note 89. [Reproduced in accompanying notebook at Tab 2.]

<sup>96</sup> *Id.* [Reproduced in accompanying notebook at Tab 2.]

<sup>97</sup> *Id.* [Reproduced in accompanying notebook at Tab 2.]

prosecutor.

This shift in thinking on surrender and transfer procedures appears to hamper the legitimacy of the principle of primacy that the Tribunal enjoys.<sup>98</sup> However, Articles 86, 87, 89, and 90 urge cooperation between the States and the International Criminal Court.<sup>99</sup> Under Article 90 when there are competing requests between a requesting State and the ICC the State holding the accused must give priority to the ICC unless it is bound by an international obligation to extradite to that State.<sup>100</sup> If the State is under an existing obligation, it has the choice to determine whether it will surrender the accused to the Tribunal or the requesting State.<sup>101</sup>

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<sup>98</sup> RUTH WEDGWOOD, NATIONAL COURTS AND THE PROSECUTION OF WAR CRIMES (2000). [Reproduced in accompanying notebook at Tab 16.]

<sup>99</sup> Rome Statute of the International Criminal Court, *supra* note 89. [Reproduced in accompanying notebook at Tab 2.]

<sup>100</sup> *Id.* [Reproduced in accompanying notebook at Tab 2.]

<sup>101</sup> *Id.* [Reproduced in accompanying notebook at Tab 2.]