

2002

## Transfer v. Extradition: A discussion of the interpretation and authority of the transfer provisions of the ICTR Statute and Rules.

Alexander C. Reinhardt

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### Recommended Citation

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Memorandum for the  
Office of the Prosecutor  
International Criminal Tribunal for Rwanda

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Issue 10: Transfer v. Extradition: A discussion of the interpretation and authority  
of the transfer provisions of the ICTR Statute and Rules.

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International War Crimes Prosecution Project  
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April 2002

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## Discussion

### I. Introduction and summary of conclusions.

To effectively prosecute war crimes offenders, the International Criminal Tribunal for Rwanda (ICTR) must rely on State cooperation to secure the presence of those offenders before the Court.<sup>1</sup> Among the obligations placed upon States is the responsibility to transfer suspects from the country where they are arrested to the ICTR.<sup>2</sup> The transfer of suspects is crucial to the prosecution of war crimes offenders, and the ICTR and other international organs have attempted to clearly emphasize this obligation in their statutes and rules in hopes of securing the presence of suspects with the least amount of difficulty.

Cooperation with the plethora of Member States throughout the world, however, is inherently difficult to achieve. The age-old procedure of extradition has been well engrained in the legislation of numerous countries and they are fast to adhere to their national provisions before following the guidelines issued by International Tribunals. Extradition Proceedings do not necessarily achieve the aim of the ICTR – securing the presence of suspects without undue delay. Procedural safeguards associated with extradition often prevent delivery of suspects to the ICTR expediently and without obstacle.

The Statute and Rules promulgated by the ICTR plainly require that States transferring suspects to the ICTR are to avoid extradition proceedings. Assuming the language of the statute and rules is clear, States should distinguish transfer from extradition when faced with a transfer order from the ICTR. The reaction of Member States around the world, however, demonstrates

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<sup>1</sup> Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* vol. 1, 637-38 (Transnational Publishers 1998) [Reproduced in accompanying notebook at Tab 28].

<sup>2</sup> Statute of the International Tribunal for Rwanda, Article 28 (annexed to S/RES/955 (1994)). [Reproduced in accompanying notebook at Tab 8].

that the provisions of the ICTR statute and rules have not achieved the effect arguably desired by their drafters. To adhere to the provisions regarding transfer of an accused, many states have enacted legislation that applies local extradition law. Relying on the cooperation of States and their domestic legislation on extradition has caused problems.

For example, the ICTR recently addressed a case that elucidated the problems associated with a delayed transfer of a suspect from a member state. In March of 1997, Judge Aspegren issued a transfer order pursuant to rule 40*bis* of the ICTR rules of Evidence and Procedure,<sup>3</sup> requesting Cameroon to surrender Jean-Bosco Barayagwiza to the ICTR.<sup>4</sup> Cameroon balked in swiftly producing Barayagwiza, allegedly due to time-consuming extradition proceedings, and the Prosecutor could not bring Barayagwiza before the Court for indictment until ninety-six days later.<sup>5</sup> The prolonged period between the issuance of the transfer order and the indictment compelled the Appeals Chamber to dismiss the indictment against Barayagwiza and order his immediate release.<sup>6</sup>

The Prosecutor probably could have avoided the Barayagwiza dismissal if Cameroon had not conducted time-consuming extradition proceedings. Although the Statute and Rules of the ICTR arguably seek to compel the immediate transfer of a suspect when the Chamber so orders, the Prosecutor will nevertheless face similar obstacles in obtaining the presence of suspects in conformity with the rules. Achieving State cooperation in this respect depends on an

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<sup>3</sup> Rule 40*bis* summarily provides that a Judge may, at the request of the prosecution, order transfer and provisional detention of a suspect if certain conditions are met. ICTR Rules of Procedure and Evidence. U.N. Doc. ICTR/40*bis*/Rev., 31 May 2001. [Reproduced in accompanying notebook at Tab 6].

<sup>4</sup> *Prosecutor v. Barayagwiza*, Order For Transfer and Provisional Detention, Case No.: ICTR-97-19-DP, 3 March 1997. [Reproduced in accompanying notebook at Tab 12].

<sup>5</sup> *Prosecutor v. Barayagwiza*, Decision, para. 68-72. Case No.: ICTR-97-19-DP, 3 November 1999. [Reproduced in accompanying notebook at Tab 11].

<sup>6</sup> *Id.* at para. 113.



interpretation of the Statute of Rules, and an analysis of their authority. This memo will discuss both.

#### **A. Issues**

In response to this problem, this memo will address the following issues.<sup>7</sup> The first issue is whether “transfer” can ever mean “extradition” under the ICTR statute and rules. To resolve this issue, the memo will apply the interpretive rules of the Vienna Convention on the Law of Treaties to the transfer provisions of the ICTR Statute and rules. The memo will consider the ordinary meaning of the provisions in light of their object and purpose, as well as the *travaux préparatoires* (the preparatory work), and other interpretative sources.

Assuming the Statute and Rules unambiguously requires a State to transfer a suspect to the ICTR without conducting extradition proceedings, the memo will then examine whether the obligation is binding on states. In response to this issue, the memo will consider the application and authority of the United Nations Charter and the guidance of ICTY and ICTR case precedent. Moreover, assuming the obligation to transfer is binding on states, the memo will also discuss how the ICTR may enforce the obligation.

#### **B. Conclusions**

##### **Transfer does not mean extradition.**

Under the plain meaning of the language of the Statute and Rules, “transfer” is intended to be distinguished from “extradition,” and transfer is to be accomplished

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<sup>7</sup> The issues, as presented upon assignment of this memo, were “(a) whether a “transfer” can be characterized as an extradition; and (b) The ICTR was established pursuant to a binding decision of the Security Council with which member states are obliged to comply. Do states have a responsibility in these circumstances to transfer suspects to the ICTR without conducting extradition proceedings? Email from the Prosecutor’s Office, January, 2002. [Reproduced in accompanying notebook at Tab 40].

without being impeded by national extradition law. Moreover, referral to other sources that aid in the interpretation of the statute and rules result in the same conclusion. This conclusion is apparent throughout the analysis of all the relevant sources.

**The obligation to transfer is binding on States.**

The ICTR and its Statute and Rules were created by a Security Council resolution under the Chapter VII powers of the UN Charter. Therefore, the obligation to transfer is an obligation stemming from the authority of the Security Council and the UN Charter. Moreover, the International Criminal Tribunal for the former Yugoslavia has reinforced the binding nature of the transfer provisions in its judgments and decisions. Finally, the ICTR may enforce the transfer provisions of its Statute and Rules by reporting any failure to comply with the Rules to the Security Council. The Security Council has taken action in the past in response to such failures.

The final section of this memo will present a survey of certain countries' legislation regarding transfer. As the survey demonstrates, many countries have enacted legislation that is not favorable to compliance with the transfer provisions, while others have enacted legislation favorable to compliance. The Prosecutor's office will be able to better anticipate delays with knowledge of the applicable foreign statutes, as well as have an argument backed by sound legal authority to pressure the Court into securing transfer of suspects more efficiently.

## II. Legal Analysis

### A. Defining extradition

Extradition means “[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged.”<sup>8</sup> Although the term “extradition” seems to describe the process of states surrendering alleged war crimes suspects to the International Criminal Tribunal for Rwanda (ICTR), the practice of extradition has deeper dimensions. For instance, extradition between two sovereign states often requires a treaty.<sup>9</sup> Extradition proceedings also provide criminal suspects certain safeguards that may ultimately preclude their surrender to another state.<sup>10</sup>

These safeguards may include the political-offense exception, which protects individuals who are defeated partisans in an insurgent or civil war, or those accused of a crime after having been defeated in an attempted revolution or war of self-determination.<sup>11</sup> Furthermore, before surrendering a suspect to a neighboring country, a State may consider the fairness of the indictment, the grounds for extradition, and other circumstances that may result in a violation of the suspects’ rights under their domestic law.<sup>12</sup> Extradition, therefore, is the surrender of a

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<sup>8</sup> *Black’s Law Dictionary* 605 (Bryan A. Garner ed., 7th ed.1999). [Reproduced in accompanying notebook at Tab 39].

<sup>9</sup> *Id.*; Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. 1 at 496. [Reproduced in accompanying notebook at Tab 28].

<sup>10</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 40 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002). [Reproduced in accompanying notebook at Tab 20].

<sup>11</sup> Sheila O’Shea, *Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. Int’l L. & Pol. 367, 387-88 (1996). [Reproduced in accompanying notebook at Tab 32]. *See e.g.* 18 U.S.C § 3192 (Federal Extradition Statute for the United States). [Reproduced in accompanying notebook at Tab 4].

<sup>12</sup> *See e.g.*, Articles 3 and 4 of the Model Treaty on Extradition, G.A. Res. 116, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, vol. I, at 211, U.N. Doc. A/45/49 (1991) (reprinted in 30 I.L.M. 1407). [Reproduced in accompanying notebook at Tab 41]. *See also* Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. 1 at 496.

criminal suspect by one state to another that involves some procedural safeguards, as well as the existence of a treaty.

**B. Extradition and transfer are distinguished from each other under the ICTR's Statute and Rules.**

The ICTR and ICTY have promulgated rules that have arguably obligated states to surrender criminal suspects to an international tribunal without the procedural safeguards and requirements normally associated with extradition. Rules 40 and 40*bis* authorize the Judge to issue the provisional arrest, detention and transfer of a suspect from the country where he is arrested to the ICTR.<sup>13</sup> Transfer within the brief time period prescribed by the Judge under 40 is essential.<sup>14</sup> Rules 40 and 40*bis* must be read in conjunction with Article 28 of the ICTR Statute.<sup>15</sup> Article 28 of the ICTR Statute reads “[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial chamber, including but not limited to ... [t]he surrender or the transfer of the accused to International Tribunal for Rwanda.”<sup>16</sup> Furthermore, Rule 58 of the ICTR Rules of Procedure and Evidence states, “The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to 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.”

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<sup>13</sup> ICTR Rules of Procedure and Evidence. U.N. Doc. ICTR/40*bis*/Rev., 31 May 2001.

<sup>14</sup> *Prosecutor v. Barayagwiza*, Decision, para. 68-72. Case No.: ICTR-97-19-DP, 3 November 1999. [Reproduced in accompanying notebook at Tab 11].

<sup>15</sup> ICTR Rules of Procedure and Evidence. U.N. Doc. ICTR/40, 40*bis*/Rev., 31 May 2001

<sup>16</sup> According to Morris and Scharf, the terms “surrender” and “transfer” have distinct meanings. If the authorities of a nation arrest a suspect within their country and under their laws, and that is concurrently subject to the jurisdiction of the ICTR, then that the arresting nation must “surrender” that suspect to the ICTR. A Nation “transfers” a subject to the ICTR when a suspect is arrested pursuant to an indictment issued by the ICTR and, therefore, “is in the constructive custody of the Rwanda Tribunal as of the time of arrest.” Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. 1, at 493.

The text of Article 28 and the rules avoids the term “extradition”<sup>17</sup> and Rule 58 explicitly provides that the obligation of state to surrender or transfer a suspect to the ICTR “shall prevail” over any legal impediment and/or procedural requirements “which may exist under the national law or extradition treaties of the state concerned.”<sup>18</sup> On its face, Rule 58 obligates States to transfer suspects to the tribunal without the procedural safeguards normally associated with extradition.

**1. *The ordinary meaning of transfer is distinct from extradition.***

The Vienna Convention on the Law of Treaties provides guidelines to treaty interpretation and is applied to interpret the meaning of the language in the statutes and rules of international tribunals.<sup>19</sup> Under the Vienna Convention, the Chamber interprets the statute and rules in “good faith” and in accordance with their “ordinary meaning” in light of the treaty’s “object and purpose.”<sup>20</sup> The chamber may also consider the Statute’s drafting history or other “supplementary means” to interpret the meaning of the rules in conjunction with the statute, if the meaning is ambiguous or it leads to an absurd result.<sup>21</sup>

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<sup>17</sup> The title to rule 58, however, is “National Extradition Proceedings.” Rules of Procedure and Evidence, U.N. Doc ICTR/58/Rev., 31 May 2001.

<sup>18</sup> Rule 56 of the ICTR Rules of Procedure and Evidence also commands States receiving a transfer order to cooperate “with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.” U.N. Doc. ICTR/56/Rev., 31 May 2001.

<sup>19</sup> *Prosecutor v. Tadić*, Case No.: IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18. [Reproduced in accompanying notebook at Tab 18].

<sup>20</sup> Vienna Convention of the Law of Treaties at Art. 31 (May 23, 1969) U.N. doc. A/CONF.39/27 (reproduced in 8 I.L.M. 679). [Reproduced in accompanying notebook at Tab 1].

<sup>21</sup> *Id.* at Art. 32. “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” For an example of the ICTY chamber looking to drafting history of the Statute for means of interpretation, see *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 3. [Reproduced in accompanying notebook at Tab 16].

Examining Article 28, and rules 58, 40 and 40*bis*, the plain meaning of the language regarding transfer of suspects is apparent and unambiguous. Article 28 clearly mandates States to comply with transfer orders issued by the ICTR.<sup>22</sup> Moreover, Rule 58 reinforces the supremacy of Article 28. Rule 58 states that Article 28 “shall prevail over any legal impediment to the surrender or transfer of the accused.” Rules 40 and 40*bis* likewise obligate State adherence to Article 28 when the ICTR issues a transfer order. Nowhere in the rules or the Statute is the word “extradition” used. The title of rule 58, “National Extradition Provisions” announces the rule’s intention to specifically address national extradition provisions that may conflict with Article 28. Thus, following the Vienna Convention’s “ordinary meaning” provision, Article 28 and Rules 58, 56, 40 and 40*bis* do not explicitly intend for “transfer” to be synonymous with “extradition” given that that term is never used, and the supremacy of Article 28 over national extradition provisions is expressly authorized.<sup>23</sup>

This reading of the statute and rules is also consistent with the object and purpose of the ICTR statute with respect to the transfer of suspects to the tribunal. UN Security Council Resolution 955, which established the ICTR under Chapter VII of the UN Charter, expressly provides that “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 of the

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<sup>22</sup> Article 28 provides that “[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to ... e) [t]he surrender or transfer of the accused to the International Tribunal for Rwanda.” Statute of the International Tribunal for Rwanda (annexed to S/RES/955 (1994)). [Reproduced in accompanying notebook at Tab 8].

<sup>23</sup> The Supremacy of Article 28 over domestic extradition law is also consistent with the general principle international law prevails over national law at the international level. See Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. 1 at 499. [Reproduced in accompanying notebook at Tab 28].

Statute ....”<sup>24</sup> Reading this in conjunction with the statute and the rules, one would probably conclude that the object and purpose of Article 28 and the rules is to mandate states to transfer suspects without obstruction by any legal impediments arising under domestic law. The Security Council itself highlighted Article 28 and obligated States to comply with its provisions. The language of the Resolution, the statute, and the rules seems unequivocal and unambiguous: States must comply with transfer orders without applying the safeguards associated with extradition. Thus, under the plain meaning of the statute, the “transfer” is readily distinguishable from “extradition.”

**2. *Other sources of law characterize transfer as distinct from extradition.***

Assuming the language of the Statute and the Rules creates some doubt as to whether “transfer” implies “extradition,” The Chamber should follow the interpretive rules of the Vienna Conventions Law on Treaties, and look to supplementary means of interpretation.<sup>25</sup> Given the recent establishment of the ICTR, the associate Statute and Rules of the ICTY will be considered, along with the Rome Statute, the establishment of the Nuremburg Tribunal, and the Geneva Conventions.

**a. *The Statute and Rules of the International Criminal Tribunal for Yugoslavia.***

Rule 58 of the Rules of Procedure and Evidence for the International Tribunal for Yugoslavia (ICTY) also provides that Article 29 of the ICTY Statute shall prevail over any legal impediments to transfer existing under domestic law.<sup>26</sup> Security Council Resolution 827, which

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<sup>24</sup> Security Council Resolution 955 (S/RES/955 (1994)). [Reproduced in accompanying notebook at Tab 42].

<sup>25</sup> See Vienna Convention on the Law of Treaties, Art. 32. “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” *Id.* [Reproduced in accompanying notebook at Tab 1]

established the ICTY, also obliges States to cooperate with the Tribunal in transferring suspects expeditiously. Article 29 captures the intent of the Security Council, and rule 58 reinforces it.<sup>27</sup>

The ICTY's First Annual Report additionally supports this interpretation of the statute and rules. The First Annual Report, in part, addressed State compliance with Article 29, and observed that many States had applied domestic extradition law to the transfer of suspects to the ICTY. In response to this, the Report essentially recapitulated what is stated in Rule 58:

the statute imposes a specific obligation on each State Member of the United Nations to cooperate with the Tribunal and to comply with its orders, including those for the arrest or detention of suspects. These obligations prevail over any national law impediment to the surrender or transfer of the accused, including any treaty or national legislation on extradition.<sup>28</sup>

Here, the drafters of the Rules of Procedure and Evidence clearly disclose their intention for transfer to mean something other than “extradition,” by specifically mentioning that the obligations of a state to transfer or surrender a suspect will prevail over national extradition law. In conclusion, the recourse to supplementary means that Article 32 of the Vienna Convention on the Law of Treaties prescribes arguably leads to a reading of the statute rules that distinguishes “transfer” from extradition.

*b. The Rome Statute for the International Criminal Court.*

By comparison, the language found in the Rome Statute for the proposed International Criminal Court (ICC) also supports the intention of the drafters of the ICTR

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<sup>26</sup> ICTY Article 29's transfer provision is identical to ICTR's Article 28. See Article 29 of the International Tribunal for Yugoslavia (annexed to S/RES/827 (1993) and as amended by S/RES/1166 (1998) and S/RES/1329 (2000)). <<http://www.un.org/icty>> (last accessed May 5, 2002).

<sup>27</sup> See John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2d ed., Transnational Publishers 2000). [Reproduced in accompanying notebook at Tab 27].

<sup>28</sup> ICTY First Annual Report (reproduced in M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the former Yugoslavia* 907 (Transnational Publishers, 1996)). [Reproduced in accompanying notebook at Tab 25]. Moreover, the *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* (reprinted in 32 I.L.M. 1159), by which the Secretariat presented the ICTY Statute to the Security Council, also explicitly avoided the term “extradition.” [Reproduced in accompanying notebook at Tab 22].



statute to distinguish “transfer” from “extradition.” The Rome Statute expressly provides that States receiving requests for transfer or surrender “shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”<sup>29</sup> Here, the Statute urges States to apply their national law, rather than announcing that the obligations of the statute “shall prevail” over any “legal impediment” under national law.<sup>30</sup> One could argue that the Rome Statute intends to provide more deference to national law, countering the interpretation that “transfer” under the Rome Statute and the ICTR statute is distinct from extradition since it is implied that States will revert to their national law.

Despite this language, however, the drafters of the Rome Statute also intend for surrender to be accomplished without being impeded by national law.<sup>31</sup> The drafters acknowledge that national law will have to be considered when surrendering a suspect to the ICC, but that “national procedures must be used to meet, not defeat, the obligation to comply with a request to surrender.”<sup>32</sup> This conclusion is similar to the language of UN Resolution 955 applying to the ICTR statute.<sup>33</sup>

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<sup>29</sup> Statute of the International Criminal Court, Art. 89(1), U.N. Doc. A/CONF.183/9, 17 July 1998. [Reproduced in accompanying notebook at Tab 7]. The Treaty establishing the International Criminal Court was recently ratified. The Court will begin operation in July, 2002. Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. Times A3 (April 12, 2002). [reproduced in accompanying notebook at Tab 35].

<sup>30</sup> Compare ICTR Rule 58 of Rules of Procedure and Evidence, U.N. Doc. ICTR/58/Rev., 31 May 2001.

<sup>31</sup> Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court; Observers' Notes, Article by Article* 1074 (Nomos Verlagsgesellschaft, 1999). [Reproduced in accompanying notebook at Tab 29].

<sup>32</sup> *Id.* at 1075. Article 89 states that it is to be considered with “provisions” of this part, along with “procedures under ... national law.” Reading Art. 89 in accordance with article 88 (“States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”) leads to the asserted conclusion. See *id.* at 1074.

Thus, although the drafters give explicit directions to comply with national law under the Rome Statute, they intend for an order to surrender to prevail over national legal impediments while realizing that national procedures will be implemented and utilized. By contrast, Rule 58 of the ICTR rules expressly announces this intention. Thus, when comparing the Rome Statute to the drafters' explicit provision that the ICTR statute will trump national extradition law, it is clear once again that the "transfer" under the ICTR Statute and Rules most probably means something other than "extradition," since it is discussed specifically in the ICTR statute, and similarly addressed in the Rome Statute.

c. *The Trials at Nuremburg.*

The General Assembly first distinguished the concept of "transfer" to an international tribunal from the concept of "extradition" between States when it established the Tribunal at Nuremburg to prosecute the Nazi war crime offenders. The General Assembly recognized that,

in particular, [laws of extradition] were devised with a view to protecting individuals from being prosecuted for so-called 'political crimes' crimes, which were in most cases the result of exercising in their own country fundamental political freedoms, considered to be inalienable rights in democratic countries ... None of these factors applied to the case of war criminals. Their crimes were of such a heinous nature that there was no doubt as to their degree of criminality, and it was there, therefore, even necessary to ensure that the normal procedure of extradition was not unwittingly applied in their case ... Consequently the rules, procedures and machinery advocated by the Commission, and those eventually developed by Allied governments and military authorities, were from the outset divorced from the peace time notion of extradition. A technical distinction came to be drawn between *extradition* proper and the *surrender* of war criminals.<sup>34</sup>

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<sup>33</sup> To reiterate, UN Resolution 955 states that "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 of the Statute ...." S/RES/955 (1994). [Reproduced in accompanying notebook at Tab 42].

<sup>34</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 392 (1948). Reprinted in Morris & Scharf, *The International Criminal Tribunal for Rwanda* at 498. [Reproduced in accompanying notebook at Tab 28].

Beginning with the Trials at Nuremburg, extradition has been distinguished from the surrender of a criminal to an international tribunal for war crimes prosecution. The circumstances associated with prosecuting war crimes criminals demand the presence of suspects without the delays and safeguards associated with extradition. The General Assembly resolution encouraging the surrender of alleged war crimes suspects serves as precedent to the establishment of the ICTR and the distinction between “extradition” and “transfer.”

d. *The Geneva Conventions.*

The Geneva Conventions also act as precedential authority for distinguishing “transfer” from “extradition,” compelling states to comply with transfer order issued by the ICTR. All states have an obligation under the Geneva Conventions of August 12, 1949 to search for, arrest and bring to justice all those responsible for grave breaches of the conventions. States shall bring such offenders before their own courts, or before international tribunals.<sup>35</sup> Moreover, The Official Commentary of the Red Cross (ICRC) makes clear that the duty to search, arrest, and transfer individuals to domestic courts or international tribunals is absolute.<sup>36</sup> Thus, one could

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<sup>35</sup> Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition in The Prosecution of International crimes* 355 (Rogers S. Clark & Madeleine Sann eds., Transaction Publishers 1996). [Reproduced in accompanying notebook at Tab 25]. The official commentary additionally suggests that States may satisfy their duties under the Geneva Conventions by transferring suspects to an international criminal tribunal:

[T]here is nothing in the paragraph [Geneva Convention No. I, Art. 49, para. 2] to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law.

International Commentary of the Red Cross, I *Commentary on the Geneva Conventions of 12 August 1949*, 366 (1952) <<http://www.icrc.org>> (last accessed May 5, 2002). [Reproduced in accompanying notebook at Tab 26].

<sup>36</sup> *Id.* at 373.

infer that the duty to transfer an individual for a grave breach of the Geneva Conventions<sup>37</sup> cannot be impeded by procedural safeguards arising under domestic extradition law.

The Geneva Conventions, however, provide that the transfer is to be accomplished in accordance with a State's domestic legislation, and only if the State or Tribunal requesting transfer has made out a *prima facie* case.<sup>38</sup> This leaves room for the interpretation that domestic extradition law may be used when faced with a breach of the Geneva Conventions. Thus, although the duty to transfer suspects under the Geneva Conventions is arguably absolute, the fact that suspects may also be prosecuted under domestic law weakens the argument.

In sum, reading the “ordinary meaning” of the language of Article 28 of the ICTR Statute, and Rules 58, 40, and 40*bis*, in light of their object and purpose necessarily leads to the conclusion that transfer is characterized as something other than extradition. Extradition, under these provisions, is to be specifically avoided. Moreover, referring to supplementary means renders the same conclusion. Synonymous provisions regarding transfer in the ICTY Statute and Rules and the in the Rome Statute imply that transfer is distinct from extradition, as supported by the ICTY First Annual Report and the disclosed intentions of the drafters of the Rome Statute. The General Assembly in establishing the Nuremburg Tribunal also noted the difference between “transfer” and “extradition,” and the Geneva conventions captures the distinction as well. Thus, the obligation is clear that states are to transfer and not extradite under the ICTR Statute and Rules. As discussed in the next section, the obligation to transfer without conducting extradition proceedings is embedded in international law and consequently binding on States.

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<sup>37</sup> Genocide is a grave breach of the Geneva Conventions according to Article III common to the Geneva Conventions of 12 August 1949 and 1977 Additional Protocol II. *Prosecutor v. Akayesu*, Judgment, para. 638 Case No.: ICTR-96-4-T, 2 September 1998. [Reproduced in accompanying notebook at Tab 14].

<sup>38</sup> Gallant, *securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition in The Prosecution of International crimes* 355.

**C. The obligation to transfer suspects to the ICTR is binding on States.**

**1. *The UN Charter commands States to transfer suspects without conducting extradition proceedings.***

The UN Charter underpins Article 28 and Rules 58, 40 and 40*bis* thereby obliging States to comply with the ICTR Statute and rules in accordance with international law.<sup>39</sup> Acting under Chapter VII of the UN Charter, The Security Council established the ICTR and promulgated the Rules requiring States to transfer suspects to the tribunal.<sup>40</sup> Under Article 25 of the Charter, all members of the United Nations agree to accept and carry out the decisions of the Security Council, and under Article 49 all members must “join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”<sup>41</sup> Chapter XIV forces to states to comply with the provisions of the ICTR issued pursuant to the UN Charter.<sup>42</sup> The UN Charter is a cornerstone of international law, and “an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.”<sup>43</sup>

Since the transfer provisions of the ICTR Statute and Rules are embedded in international law, a state may not claim that its national law precludes strict compliance with the ICTR Statute and rules. President Cassese vocalized this proposition: “[N]o international legal subject can plead provisions of national legislation, or lacunae in that legislation, to be absolved of its obligations; when they do so, they are in breach of those obligations. This proposition is

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<sup>39</sup> See Morris & Scharf, *The International Criminal Tribunal for Rwanda* at 495

<sup>40</sup> Amnesty International, *International Criminal Tribunals; Handbook for government cooperation* 3-4 (Aug. 1996). <<http://www.amnesty.it/campaign/icc/library/aids/ICC400796.html>> (accessed May 4, 2002). [Reproduced in accompanying notebook at Tab 20].

<sup>41</sup> *Id.* at 4.

<sup>42</sup> Morris & Scharf, *The International Criminal Tribunal for Rwanda* at 495, n.1662.

<sup>43</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), (reprinted in 32 I.L.M. 1159) at para. 126, U.N. doc. S/25704 (1993). [Reproduced in accompanying notebook at Tab 22].

supported by copious international case law.”<sup>44</sup> The safeguards of extradition, therefore, cannot apply to overcome the obligation created by an ICTR transfer order because it would violate a superior international law obligation.<sup>45</sup>

The Security Council and the General Assembly in various resolutions have also reinforced the obligation incumbent upon states to comply with the ICTR Statute and Rules. In 1995, the Security Council stressed the need for states implement the necessary legislation comply with the ICTR orders, including *inter alia*, orders to transfer suspects to the ICTR.<sup>46</sup> Subsequently in 1996, the General Assembly urged States to honor their obligations under international law to arrest, detain, and bring to justice war crimes offenders.<sup>47</sup> The General Assembly reiterated the States’ obligations in 1997, urging “all States to cooperate fully, without delay, with the [ICTY]....”<sup>48</sup> As evidenced by these resolutions, the General Assembly and the Security Council urge States to honor the obligation created by the ICTR Statute and Rules, further supporting the argument that it is a binding obligation under the UN Charter.

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<sup>44</sup> *Decision on the Defence Motion Filed Pursuant to Rule 64 in Prosecutor v. Blaškić* para. 7 (3 April 1996) (reprinted in John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 199 (Transnational Publishers, 2000)). [Reproduced in accompanying notebook at Tab 28] President Cassesse further stated that “all states have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal.” *Id.* at para. 8.

<sup>45</sup> *See Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc S/25704 & Add.1 (1993) (reprinted in 32 I.L.M. 1159). [Reproduced in accompanying notebook at Tab 22] *See also* ICTR Rules of Procedure and Evidence 58, U.N. Doc. ICTR/58/Rev., 31 May 2001.

<sup>46</sup> Security Council Resolution 978, S/RES/978 (1995) (reprinted in Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. II, at 314). [reproduced in accompanying notebook at Tab 28].

<sup>47</sup> General Assembly Resolution 50/200, *Situation of Human Rights in Rwanda*, A/RES/50/200 (1996) (reprinted in Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. II, at 333, 335).

<sup>48</sup> General Assembly Resolution 51/114, *Situation of Human Rights in Rwanda*, A/RES/51/114 (1997) (reprinted in Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. II, at 337, 338).

**2. *The ICTY Chamber has commented that States must transfer suspects to the tribunal without conducting extradition proceedings.***

International tribunals are vested with the power to issue binding orders to States.<sup>49</sup> The ICTY has observed this power as a force derived from the UN Charter.<sup>50</sup> Article 29 of the ICTY statute, according to the chamber, does not create bilateral relations between states, as does an extradition treaty, but imposes an obligation upon all Member States towards all other member states, or an “obligation *erga omnes partes*.”<sup>51</sup> Article 29, as a legal extension of the UN Charter, compels every “Member State of the United Nations to have a legal interest in the fulfillment” of its obligations, including the obligation to transfer suspects to the ICTY.<sup>52</sup>

The ICTY Chamber has admitted, however, that “the terms of the Article itself, nor the Report of the Secretary-General, provide that this duty of States [under Chapter VII] precludes

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<sup>49</sup> See *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997. [Reproduced in accompanying notebook at Tab 15]. The Chamber discussed the International Tribunal’s power to issue binding orders to states, and acknowledged that “[t]he International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence summon witnesses and have indictees arrested and surrendered to the International Tribunal.” The Chamber then discussed the language of Article 29 and Security Council Resolution 827, and concluded that “in Article 29 is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States.” States which are not members of the United Nations may comply with the provisions of Article 29 of the ICTY statute, or Article 28 of the ICTR statute by expressly accepting the obligation in writing, pursuant to Article 35 of the Vienna Convention on the Law of Treaties. Article 35 provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing.”

<sup>50</sup> See *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997; *Prosecutor v. Dokmanović*, Case No.: IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, para. 35, 22 October 1997. [Reproduced in accompanying notebook at Tab 17]. The Chamber in *Dokmanović* also cites Article 29 as being a bind obligation on States as a result of its creation under Chapter VII of the UN Charter.

<sup>51</sup> *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997. The Chamber cites to the International Court of Justice (ICJ) case, *Barcelona Traction, Power & Light Co.*, where the ICJ discussed the obligation of States “towards the international community as a whole” or “*erga omnes*.” (ICJ reports 1970, p. 33, para. 33). The International Law Commission later made the distinction between obligations towards the international community as a whole, and obligations incumbent upon all member states towards all other member states.

<sup>52</sup> *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997.

the arrest and transfer of accused person by other methods.”<sup>53</sup> Although the duty to transfer exists, the Chamber invites States to use “other methods” without disclosing what those methods might be. The Security Council has also admitted that States may have to implement legislation to fulfill the obligations laid down by the Statutes of the ICTY and ICTR.<sup>54</sup> The argument could be presented that States must fulfill their obligations to transfer suspects to international tribunals, but they will do so under the legal constraints of their domestic law. In other words, they may conduct extradition proceedings.

Moreover, the novelty of the transfer provisions of the ICTY and the ICTR may also be raised as a point of weakness, allowing states to apply their own extradition law.<sup>55</sup> Many states have never been subject to the jurisdiction of an international tribunal, and may be weary of strict compliance in light of the unprecedented appearance of a transfer order.<sup>56</sup> Moreover, the lack of the normal safeguards associated with extradition could make States even more suspicious of the transfer provisions’ clout.<sup>57</sup>

The ICTY and ICTR, however, regard the transfer provisions of their statutes and rules as overarching and supreme over legal impediments that may exist in Member States, and explicitly anticipated the possible obstruction to transfer that national legislation might create.<sup>58</sup> According

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<sup>53</sup> *Prosecutor v. Slavko Dokmanović*, Case No.: IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, para. 35, 22 October 1997. [Reproduced in accompanying notebook at Tab 17].

<sup>54</sup> See Security Council Resolution 955. (S/RES/955 (1994)). [Reproduced in accompanying notebook at Tab 40].

<sup>55</sup> Hazel Fox, *The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 Int’l Comp. L. Q. 434, 435 (1997). [Reproduced in accompanying notebook at Tab 30].

<sup>56</sup> See *id.* at 436.

<sup>57</sup> See *id.* at 436-437. The Author advocating this position specifically addresses these arguments with regard to England, although these arguments could be advanced with regard to many countries.

<sup>58</sup> Rules of Procedure and Evidence, U.N. Doc ICTR/58/Rev., 31 May 2001.



to the ICTY chamber, the drafters of the rule generated “the exceptional legal basis of Article 29” to account for “the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States.”<sup>59</sup> Since the Security Council is responsible for maintaining international peace and security, the ICTY chamber has reasoned, the thrust of Article 29 is the obligation expressly handed down from the security council itself, creating a responsibility from one Member State to another to assist the security council and the ICTY and ICTR in prosecuting war crimes offenders.<sup>60</sup>

### **3. *Enforcing the obligation***

The method of enforcement prescribed by ICTR Rule *7bis* further supports the argument that the obligation to transfer is a concrete mandate issued directly from the Security Council of the United Nations. Rule *7bis* states that

(A)...where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council.

(B)If the Prosecutor satisfied the President that a State has failed to comply with an obligation under Article 28 of the Statute in respect of a request by the Prosecutor under rule 8 or 40, the President shall notify the Security Council thereof.<sup>61</sup>

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<sup>59</sup> *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997. [Reproduced in accompanying notebook at Tab 15]. Under customary international law, the Chamber admits, states cannot be “ordered” either by states or by international bodies.

<sup>60</sup> *Prosecutor v. Blaškić*, Case No.: IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26, 29 October 1997.

<sup>61</sup> ICTR Rules of Procedure and Evidence. U.N. Doc. ICTR/7bis/Rev., 31 May 2001. (reprinted in Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* at 545. [Reproduced in accompanying notebook at Tab 27] ).

The Rwanda Tribunal itself is not authorized to impose sanctions for noncompliance with Article 28 of the Statute.<sup>62</sup> Under Rule 7bis, however, the President of the Tribunal may report matters of noncompliance to the Security Council, so that may appropriately enforce the obligation created under the UN Charter.<sup>63</sup> Since Rule 7bis directly implicates the role of the Security Council in enforcing the obligation under Chapter VII of the UN Charter,<sup>64</sup> one may infer that the obligation to transfer mandated by the UN Charter and, therefore, binding on states.<sup>65</sup>

In practice, the Security Council has taken action to pressure States to comply, such as writing letters and putting pressure on a State publicly, although it has never imposed sanctions. For example, in July of 1999, the Prosecutor requested the President, under rule 7bis, to notify the Security Council that the Republic of Croatia had not fulfilled its obligations under Article 29 of the ICTY Statute.<sup>66</sup> The President found that Croatia had refused to transfer the accused Naletilić in violation of the Statute, and notified the Security Council on August 25, 1999.<sup>67</sup> Although time consuming, the action proved effective as Croatia eventually transferred Naletilić in March of 2000.<sup>68</sup> Thus, the remedy to non-compliance with the ICTR statute and rules is found under rule 7bis, and it has proven to effective, but time-consuming.

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<sup>62</sup>Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. I, at 660.

<sup>63</sup> See Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* at 545. [Reproduced in accompanying notebook at Tab 27].

<sup>64</sup> Morris & Scharf, *The International Criminal Tribunal for Rwanda* vol. I, at 660.

<sup>65</sup> For a discussion of the transfer obligation's binding nature on states, consult *supra* notes 40-44.

<sup>66</sup> Report 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 at para. 155-164, U.N. Doc. A/55/273, 7 August 2000 <http://www.un.org/icty> (accessed May 5, 2002).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

### III. A report on the practice of states.

As of December 2001, individuals had been arrested under the ICTR's jurisdiction in the following countries: Cameroon, Kenya , France, Togo, Belgium, Mali, Benin, Namibia, United Kingdom, Burkina Faso, Denmark, Zambia, Tanzania, Senegal, Switzerland, USA, Ivory Coast, South Africa and the Netherlands.<sup>69</sup> Two transfers have already been successfully completed in the year 2002.<sup>70</sup> Although the year 2001 was the Tribunals most successful year to date in terms of arrests,<sup>71</sup> there are still many countries that have legislation that may impede the transfer of arrestees to the ICTR.

The legislation, as recommended by Amnesty International, should provide that relevant judicial body "after verifying that the requisite formal conditions are fulfilled, shall approve the transfer of an arrested accused to the custody of the International Tribunal without resort to extraditions proceedings. The accused shall be surrendered to the International Tribunal immediately thereafter."<sup>72</sup> Moreover, Amnesty International recommends that provisions to cover transfer of suspects under Rules 40 and 40bis should also be included.

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<sup>69</sup> Press Release, "Nzabirinda Arrested in Belgium." 21 December 2001. ICTR/INFO-9-2-297.EN. [Reproduced in accompanying notebook at Tab 38]

<sup>70</sup> Press Release, "Bikindi the Musician Transferred to Arusha." 28 March 2002. ICTR/INFOR-9-2-311.EN. Press Release, "Former Priest Arrested in Cameroon; Nzabirinda Alias "Biroto" Transferred to Arusha." 21 March 2002. ICTR/INFO-9-2-308.EN. [Reproduced in accompanying notebook at Tab 37].

<sup>71</sup> Press Release, "Nzabirinda Arrested in Belgium." 21 December 2001. ICTR/INFO-9-2-297.EN. [Reproduced in accompanying notebook at Tab 38].

<sup>72</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 29 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002). [Reproduced in accompanying notebook at Tab 20]. Amnesty International provides guidelines for enacting implementing legislation that complies with the ICTR provisions.

**A. Countries with unfavorable legislation**

The United States somewhat complied with the transfer provisions of the ICTR statute and rules, as demonstrated by the Federal Appeals Court decision in *Ntakirutimana*.<sup>73</sup> In 1995, the President of the United States entered into an executive agreement with the ICTR,<sup>74</sup> that provided that the United States “agrees to surrender to the Tribunal ... persons ... found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal.”<sup>75</sup> The United States Congress enacted implementing legislation of this agreement in 1996.<sup>76</sup> The Appeals Court in *Ntakirutimana* found this legislation to authorize the surrender of Ntakirutimana to the ICTR without the existence of a treaty.<sup>77</sup>

The U.S. Statute authorizing surrender of suspects to the ICTR, however, mandates the application of United States extradition law.<sup>78</sup> This body of law authorizes a judicial officer to evaluate the request for surrender by holding a hearing. If the officer deems the order for surrender to be sufficient to sustain charges against the suspect, then

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<sup>73</sup> *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999). [Reproduced in accompanying notebook at Tab 13].

<sup>74</sup> The agreement was entitled “[t]he Agreement on Surrender of Persons Between the government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such violations Committed in the Territory of Neighboring States.” (hereinafter “Agreement”).

<sup>75</sup> Agreement, art. 1, cl. 1, Jan. 24 1995.

<sup>76</sup> Pub.L. 104-106 § 1342, 110 Stat. 486 (1996). [Reproduced in accompanying notebook at Tab 5].

<sup>77</sup> *Ntakirutimana*, 184 F.3d at 426-427. The Court concluded that it is within the power of the Executive and the Congress to create an executive agreement that authorizes the surrender of fugitives to international tribunals. The United States Constitution has to explicit provision requiring a treaty to surrender a fugitive to another country or international body, and the United States Supreme Court has previously authorized extradition by statute. *Terlindin v. Ames*, 184 U.S. 270, 289 (1902). [Reproduced in accompanying notebook at Tab 19]. Moreover, treaties and statutes have equal authority under the Constitution of the United States.

<sup>78</sup> Pub. L. 104-106, § 1342(a)(1). [Reproduced in accompanying notebook at Tab 5]. The applicable federal extradition statutes are 18 U.S.C §§ 3181 *et seq.* (2001). [Reproduced in accompanying notebook at Tab 2].

the officer certifies to the Secretary of State that the individual may be surrendered.<sup>79</sup>

This provision of United States statutory extradition law, among others, may prevent compliance with Rule 58 of the ICTR.

Germany reacted in a similar way by enacting implementing legislation when it surrendered Dusko Tadić to the ICTY, causing some delay.<sup>80</sup> Many other countries have likewise enacted legislation that allows for the surrender of individuals to the ICTY and ICTR, but requires a hearing.<sup>81</sup> Finland and Sweden have established a different procedure, whereby the transfer order is reviewed by their Courts before fulfilling their obligations to the ICTR or ICTY.<sup>82</sup>

The legislation of Bosnia and Herzegovina is somewhat ambiguous. It provides describes the surrender of accused to international tribunals, as deferral, but provides in Article 11 of its legislation that “the accused shall be remanded into custody for

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<sup>79</sup> 18 U.S.C. § 3184 (2001). [Reproduced in accompanying notebook at Tab 3].

<sup>80</sup> Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 Crim. L.F. 561, 569 (1997). [Reproduced in accompanying notebook at Tab 31]. The applicable German law is Law Regulating Cooperation with the International Tribunal for the Former Yugoslavia, Official Gazette, Apr. 13, 1995.

<sup>81</sup> *Id.* at 568, n.17. Amnesty International also points out that, in addition to close countries named in the text, Austria, Denmark, Finland, and Norway have enacted legislation addressing transfer that provides for extradition proceedings. Amnesty International, *International Tribunals; Handbook for Government Cooperation* 40 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002). [Reproduced in accompanying notebook at Tab 20].

<sup>82</sup> Sheila O’Shea, *Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. Int’l L. & Pol. 367, 378 (1996) [Reproduced in accompanying notebook at Tab ...] (citing the Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the international Tribunal, sec. 2 (1994) (Finland) (“The Ministry of Justice shall receive the requests and notifications made by the Tribunal in a criminal matter falling within the jurisdiction of the Tribunal, including requests for the surrender of offenders and for the enforcement of decisions made by the Tribunal and shall execute the requests by itself or through competent courts and other competent authorities.” Act Relating to the Establishment of an International Tribunal for Trial of Crimes Committed in Former Yugoslavia, sec. 4 (1994) (Sweden) (“Before the Government takes a decision on [a surrender request], it shall obtain a statement of opinion from the Supreme Court, if there are special reasons for so doing.”))

extradition during the deferral procedure.”<sup>83</sup> Thus, the Prosecutor can expect extradition proceeding if attempting to secure the presence of a suspect in Bosnia and Herzegovina.

Legislation in Australia in New Zealand also establishes a safeguard whereby a transfer request issued by a Tribunal could be refused. In both countries, the Attorney General is vested with the discretionary power to refuse requests in “special” (Australia)<sup>84</sup> or “exceptional” (New Zealand) “circumstances.” These circumstances are not explicitly defined in either statute, leaving the possibility of non-compliance unpredictable.<sup>85</sup>

Under Icelandic law, the Minister of Justice “may turn down a request if the request or other evidence indicate that it is manifestly incorrect.”<sup>86</sup> If the Minister of Justice does not turn down the request, he forwards it to the Director of Public Prosecution for investigation, and after investigation, the Minister of Justice decides whether to grant extradition to the International Tribunal, and in what manner.<sup>87</sup> According the legislation, surrender or transfer depends on “whether the legal conditions for extradition are fulfilled,” suggesting that some procedural safeguards will apply.<sup>88</sup>

Neighboring African countries may present the most difficulty when submitted transfer requests. Rwanda, Burundi, Kenya, Tanzania, and Zaire will not grant

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<sup>83</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 41 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002).

<sup>84</sup> O’Shea, *supra* note 82, at 382. (citing International War Crimes Tribunals Act, cl. 16.(2) (1995)(Australia); International War Crimes Tribunals Bill, cl. 12.(2) (1994) (New Zealand).

<sup>85</sup> *See id.*

<sup>86</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 40 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

extradition without a treaty.<sup>89</sup> Moreover, all these countries recognize the political offense exception that could prevent the extradition of suspect.<sup>90</sup> Therefore, the ICTR will have to reach agreement with these countries regarding transfer if they have not done so already.

Switzerland takes into account the special situation International Tribunals present and modifies its Statutes accordingly.<sup>91</sup> The modifications, however, are insufficient to achieve full compliance with the ICTR transfer provisions.<sup>92</sup> For example, Switzerland will transfer one of its citizens to an international tribunal if that citizen is returned to Switzerland to serve his/her sentence.<sup>93</sup>

## **B. Countries with favorable legislation**

Spain and France, on the other hand, have arguably complied with the intent of the Security Council and implemented legislation that circumvents the procedural safeguards associated with extradition. In Spain, the central examining court of National High Court informs the suspect taken into custody of the charges against him, and then approves transfer of the suspect without the need for formal extradition proceedings.<sup>94</sup>

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<sup>89</sup> O'Shea, *supra* note 82, at 410. (As former Belgian colonies, Rwanda, Burundi, and Zaire share the same extradition statute: Le Decret du 12 Avril 1886, modifié par le Decret du 24 Avril 1922, prohibiting surrender of suspect without a treaty. Therefore, these countries will have to sign a surrender agreement with ICTR. Similarly, under the Tanzanian Extradition Act, Part II, clause 3, and 2 laws of Kenya, clause 3, extradition will not be conducted without the presence of a treaty or some other form of agreement). *See id.* at n.175.

<sup>90</sup> *Id.* at 411.

<sup>91</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 41 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> O'Shea, *supra* note 82, at 379. (citing Letter Dated 26 July 1994 From the Permanent Representative of Spain to the United Nations Addressed to the Secretary-General, U.N. Doc. A/49/278, S/1994/876, at 5 (1994)).

In a similar vein, French legislation provides that suspects will be transferred to the tribunal “without any need to conduct the proceedings and invoke the substantive requirements often specified by domestic laws on extradition.”<sup>95</sup> In France, the Court’s only function is to ensure that the allegations contained in the arrest warrant are within the Tribunal’s jurisdiction.<sup>96</sup> The Netherlands and Italy similarly call for minimal judicial involvement in their implementing legislation.<sup>97</sup>

Norway applies normal extradition procedure, although the procedure is relatively simple and efficient.<sup>98</sup> The Court speedily considers the validity of the request and assures that it is for the person sought.<sup>99</sup> Thus, although extradition proceedings are conducted in Norway, the ICTR may expect transfer to occur within the parameters of Rules 40 and 40*bis*.

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<sup>95</sup> *Id.* at 379. (citing The Report of the Committee of French Jurists Set Up by Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to Study the Establishment of an International Criminal Tribunal to Judge the Crimes Committed in the Former Yugoslavia, (U.N. Doc. S/25266, at 30 (1993)).

<sup>96</sup> *Id.* at 379. (citing Loi portant adaptation de la legislation francaise aux dispositions de la resolution 827 du conseil de securite des Nations unies instituant un tribunal international en vue de juger les personnes presumes responsables de violations grave du droit international humaintaire commises sur le territoire de l’ex Yougoslavie Depuis 1991)).

<sup>97</sup> *Id.* (citing Provisions Relating to the Establishment 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, sec. 3(3) (1994) (Netherlands) (“If the District Court ... holds either that it cannot be established that person brought before it is the person whose surrender has been requested or that surrender has been requested on account of offenses in respect of which the Tribunal is not competent under its statute, its judgment shall declare the surrender inadmissible.”) Provisions on Cooperation with 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 1994, art. 11(3) (Italy) (grounds for refusal include lack of jurisdiction and absence of physical identity between the person requested and the person before the court)).

<sup>98</sup> Amnesty International, *International Tribunals; Handbook for Government Cooperation* 41 (1996). <<http://www.amnesty.it/campaign/icc/library/aidocs/IOR400796.html>> (accessed May 4, 2002).

<sup>99</sup> *Id.*



#### **IV. Conclusion**

This brief synopsis of the legislation of a selection of countries represents the effect of the ICTR transfer provisions in practice. Although those provisions legally compel states, by their language and by their authority, to transfer suspects to the ICTR without conducting extradition proceedings, the Prosecutor's office should nevertheless anticipate delays in transfer due to the legislation implemented in various countries. The Prosecutor's office, however, will be armed with the argument that transfer is meant to be distinguished from extradition, and that member states are obligated to transfer suspects without conducting extradition proceedings. Moreover, the Prosecutor should utilize Rule *7bis* when necessary to request the assistance of the Security Council.