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DEDICATION

I dedicate this dissertation to:

The Almighty God;

My mother;

My father;

My brother and sisters; and to

My classmates and my dearest friends.

ACKNOWLEDGEMENTS

This work would not have succeeded without the valuable contribution of all those who participated in my training.

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My sincere thanks also go to my brave parents who have provided overwhelming moral and material throughout my life and my studies. May this work be an expression of my deep appreciation and may they know that this work is part of their culmination of their efforts.

To everyone who, directly or indirectly, contributed to the success of my studies:
THANK YOU.

Theophile Sugira,

2014 Cape Town

GLOSSARY

Art	Article
BBC	British Broadcasting Corporation
Ed	Edition
GA	General Assembly
Ibid	<i>Ibidem</i>
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian law
MICT	Mechanism for International Criminal Tribunals
NPPA	National Public Prosecution Authority
OUP	Oxford University Press
Para	Paragraph
PDF	Portable Document Format
RPE	Rules of procedure and evidence
UN	United Nations
UNSC	United National Security Council

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CHAPTER 1: GENERAL INTRODUCTION

1.1. Introduction

The atrocities of genocide, crimes against humanity and war crimes committed in Rwanda in 1994 were, and continue to be handled by the International Criminal Tribunal for Rwanda (ICTR).¹ This Tribunal is expected to be substituted by another organ known as International Residual Mechanisms for Criminal Tribunals (IRMCT) after the completion of its activities.² The prosecution of those crimes is not only conducted by international courts but it is also a duty of domestic courts whether Rwandan courts or those of any other country, members of the United Nations. This is done in accordance with the principle of concurrent jurisdiction provided for by article 8(1) of the International Criminal Tribunal for Rwanda Statute. Article 8(1) states that:

‘The International Criminal 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 the neighbouring states between 1 January 1994 and 31 December 1994.’³

The principle of concurrent jurisdiction applies to various international tribunals; among of them the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC) and the main focus of this thesis, the ICTR.⁴

The principle of concurrent jurisdiction is observed where two or more courts from different legal systems simultaneously have the jurisdiction to entertain a specific case.⁵

¹ See the United Nations Security Council Resolution 955 Establishing the ICTR, S.C. res. 955, 49 U.N.

² Resolution No s/res/1966 (2010) of the UN Security council establishing residual mechanism to conclude tasks of ICTR and ICTY, at <http://www.un.org/News/Press/docs/2010/sc10141.doc.htm> [Accessed on 16 February 2013].

³ See the article 8 of the ICTR Statute and article 5 of the Statute of the International Residual Mechanism for Criminal Tribunals.

⁴ While Ad hoc International Tribunals apply the principle of primacy over national courts the ICC applies the principle of complementarity.

In international criminal law, the application of the principle of concurrent jurisdiction necessitates the existence of two types of Courts: a national court and an international one. As a result of the uniqueness of the Rwandan context, there were more courts hearing matters that arose from the genocide.⁶ In Rwanda, such cases are tried by ‘conventional courts’ and the ‘Gacaca’ courts. Gacaca is defined as a system of transitional participative community justice, whereby the population is given the chance to speak about the committed atrocities, to prosecute, defend, judge and punish the criminals.⁷ The conventional courts are divided into ordinary courts and military courts. All these courts have the jurisdiction to prosecute genocide cases. Genocide cases were therefore heard in three different courts domestically but in concurrence with ICTR. As a result of the particular context of the Rwandan Genocide of 1994, particular issues arise and will be explored in this study.

1.2. Problem Statement

This dissertation seeks to explore the connection between Rwandan conventional courts and the Gacaca courts on one hand. It also seeks to analyse the relationship between domestic courts (local or foreign) and the ICTR.

⁵ Robert Cryer, Hakam Friman, Darryl Robinson and Elisabeth Wilmschurst *An introduction to international Criminal law and procedure*, 2nd Edition, Cambridge University Press, New York (2010) at 46.

⁶ See the various legislation regulating the organization, functioning and competence of courts. Starting with the supreme law which is the Constitution of Republic of Rwanda, in *Official Gazette of the Republic of Rwanda* Special number of 4th June 2003. See also the Organic Law N°08/96 of 30/08/1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990 in *Official Gazette of the Republic of Rwanda N°17* of 1/9/1996. See also the Organic Law No 40/2000 of 26/01/2001 setting up Gacaca jurisdictions and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994. In *Official Gazette of the Republic of Rwanda* No 06 of 15 March 2001. These legislations illustrate how the crime of genocide was handled by 2 sorts of courts beside the ICTR.

⁷ Conventional courts in the judicial system of Rwanda encompass those courts and tribunals belonging to the formal judicial system contrary to Gacaca courts which combine the nature of formal courts and restorative justice system. See also Cecile Aptel *The oxford Companion to International Criminal Justice*, Oxford University Press, New York (Ed) (2009) at 330.

Furthermore, seeing as the Gacaca courts have already been wound up, and the ICTR is now nearing completion, this research aims to illustrate also how the issues left by these two Courts can be handled. A proper attention will be paid especially for the case of ICTR whereby the residual mechanism established to continue the work of the ICTR is also ad hoc.⁸ The legal issues to be analysed in this study are of two categories: Criminal justice and Human Rights. This paper will analyse the juxtaposition of Rwanda as the country where the crimes were committed and other countries having jurisdiction over such crimes. Furthermore, the matters intrinsic to the particular context of Rwanda will be examined.

The Gacaca system has been chastised for violating human rights standards, for example the violations of procedural rights of the accused.⁹ The response by the Rwandan government has been that any possible human rights violations in Gacaca courts are justified by the necessity of providing a legal process for a good number of incarcerated genocide suspects; who apart from that would not have gone through the process.¹⁰ This study focused on looking at the legitimacy such human rights exceptions seen in Gacaca process to satisfy that no right has been violated under the pretext of the particular circumstances surrounding the process of Gacaca.

This dissertation will focus on three main points:

- i. To examine the relationship between the ICTR and national courts under the concurrent jurisdiction.
- ii. To demonstrate that as a consequence of applying the principle of concurrent jurisdiction, the solutions proposed for the so called ‘residual issues’ to be addressed by the ICTR appear to be taken hurriedly and need to be reassessed in the interest of justice.

⁸See the resolution s/res/1966. It stipulate in its preamble that, the MICT ‘shall be a small, temporary and efficient body ‘with the task to continue the essential functions of ICTR and ICTY. This implies that the residual mechanism will also have an end.

⁹ Amnesty International Report, December 2002(AI index AFR 47/007/2002) at 35 para VII (2) (a): Minimum fair trial standards and Gacaca Jurisdictions.

¹⁰ National service of Gacaca jurisdictions (2008), Gacaca courts process: implementation and achievements. Kigali, available online at http://www.minijust.gov.rw/uploads/media/GACACA_COURTS_IN_RWANDA.pdf [Consulted on 25/11/2013].

- iii. The internal situation in Rwanda and the question around what advantages and disadvantages the country has gained from Gacaca and the weight afforded to them.

The study asserts that Gacaca has been a success so far in terms of fast tracking cases and contributing to national healing and reconciliation. However, the concerns around human right violations attached to Gacaca courts cannot be ignored or taken lightly.

1.3. Delimitation of the Study

This dissertation is limited to the analysis of issues arising from the principle of concurrent jurisdiction concerning the crime of genocide only. This thesis does not engage with all the international crimes within the jurisdiction of ICTR, Rwandan and third countries Courts. It simply focuses on the crime of genocide and the role played by the Gacaca courts to try principally this crime.

1.4. Relevance of the Study

The fact is that the ICTR is preparing to close and Gacaca courts have long closed their operations. Initially, for the ICTR, the Security Council have decided that the Tribunal shall complete its investigations by the end of 2004, trials at first instance by December 2008 and appeal proceedings by December 2010. These deadlines were not met as planned and the year 2014 has been announced as the year of closure.¹¹ To ensure that those procedures are resonating and project what will occur in the future; a comprehensible conception of the situation is required. This study aspires to provide such insight.

¹¹ SC Res 1534, 26 March 2004. These deadlines have not been met and another proposed date to close officially has been set for 2014 in December. See the statement of the spokesperson of ICTR Roland Amoussouga available online at <http://www.ippmedia.com/frontend/index.php?l=35152> [Accessed on 8/1/2014].

The application of the articles 25-27 of the ICTR statute was a referral point for national courts concerning the enforcement of sentences, pardon, the commutation of sentences and the review of proceedings in the context of closing the ICTR. It is interesting to consider how all these tasks will unfold in the context of ICTR post closure. Presently, as the ICTR is winding up, it is the opportune time to think of how procedures laid out in the statute should be exercised. This is in order to recognize, in advance, the potential pitfalls so that the transitional necessary measures can be taken into consideration in a timely manner.

1.5. Objectives of the Study

The objective of this research is to highlight the legal issues arising from the principle of concurrent jurisdiction over the crime of genocide in Rwanda. It also seeks to determine the legal effects of the completion of the ICTR relating to the concurrent jurisdiction it has with other domestic courts. This study will make hopefully, meaningful recommendations which should help to address the issues related to the relationship between ordinary courts and Gacaca courts within Rwanda and it questions the validity justifying human rights violations committed in the Gacaca courts.

1.6. Methodology of the Study

This study is a desktop based. It draws mainly on the legal analysis of international criminal law by assessing various international instruments and domestic legislation. These instruments and legislation are read in conjunction with the domestic and international case. It also investigates and examines academic literature on the subject matter. The sources of this thesis includes journal articles, books, legal briefings, the resolutions of the United Nations Security Council (UNSC), reports and other closely linked references available online.

1.7. The structure of the dissertation

This thesis consists of five chapters. This introduction is chapter one of the thesis and presents the dissertation and its focal points. It provides a brief overview, sets out the problem statement, the justification for the study, research questions, and the scope of the study, the significance and structure of the study.

Chapter two discusses the background and a theoretical overview of the principle of concurrent jurisdiction in general, the scope, rationale and the implications of this principle in practice.

Chapter three considers the legal issues that arise from the application of the principle of concurrent jurisdiction that are common to Rwanda and other countries.

The fourth chapter then narrows the focus to exploring the legal issues that are specific to the Rwandan legal system. The relationship between Rwandan formal courts and Gacaca Courts will be covered in this chapter. Unlike this relationship, the link between Gacaca and ICTR is not really pertinent to be covered because Gacaca as a tool to try genocide is also concerned by the same principles governing national courts in terms of concurrent competence.

The fifth and final chapter consists of the summary of the study and outlines the main recommendations drawn from the whole study.

CHAPTER 2: GENERAL REVIEW OF THE PRINCIPLE OF CONCURRENT CRIMINAL JURISDICTION UNDER INTERNATIONAL CRIMINAL LAW

2.1. Introduction

When creating the ICTR, the Security Council took a decision to confer the tribunal with what was known as ‘concurrent jurisdiction’.¹² This conferring of concurrent jurisdiction was combined with the ‘primacy’ clause.¹³ This was done to clarify the relationship between national and international jurisdiction.

Article 8 of the ICTR Statute recognizes the principle of concurrent jurisdiction as between the ICTR and the domestic courts.¹⁴ This signifies that national courts also have jurisdiction over the crimes investigated by the international criminal tribunal for Rwanda. The concurrent jurisdiction has meant that, an international court may waive its jurisdiction and allow for the national courts to prosecute the accused. This principle implies also that two or more courts have jurisdiction over the same case. Such situations are characterized by equal competence accorded to several courts and tribunals.¹⁵ These are the place of commission of the offence, the place of arrest of the accused, the state of nationality of the accused or the victim and also on the basis of universal jurisdiction.¹⁶

This chapter gives a general review of the principle of concurrent domestic and international jurisdiction with regard to international crimes. The analysis of the principle revolves around four essential sections dealing with the notions, the scope and

¹² Brownlie I *Principles of Public International Law* 4th edition, (Clarendon Press 1995) at 317.

¹³ Article 8 § 2 of the ICTR Statute.

¹⁴ See art 9 §1 of ICTY Statute and art 8 §1 of ICTR.

¹⁵ Conte P and Maistre du Chambon P *Procédure pénale* 4^{ème} éd Paris, Armand Colin, (2002) at 88.

¹⁶ Ibid.

the rationale of the principle, the primacy of the ad hoc tribunals (ICTR) over national courts and the practical implications of the principle.

2.2. Concurrent jurisdictions

2.2.1. Notions

The creation of the ad hoc international tribunals does not induce substitution of domestic courts, but a competing jurisdiction. There is concurrent jurisdiction when two or more courts declare themselves competent for the same facts. Such considerations are based on the sovereign equality of all states.¹⁷ This occurs when the alleged perpetrator is found within or outside a state's territory or whether the perpetrator and the victim are nationals of another country.

In the context of Rwanda, the Statute of the ICTR recognize concurrent jurisdiction between the International Tribunal and national courts.¹⁸ Therefore any national court has jurisdiction to prosecute alleged offenders.

These national courts have the jurisdiction to try case on the following basis:

- i. the territoriality principle¹⁹,
- ii. the principle of personality (active or passive)²⁰,
- iii. the principle of protection also called the principle of reality,²¹ and
- iv. The principle of universal jurisdiction.²²

¹⁷ Ibid.

¹⁸ See art8 §1of the ICTR statute.

¹⁹ See the case of *S.S Lotus (France vs Turkey)*, publications of the PCIJ Series A. No. 10, 7th September, 1927. Para 71-84.

²⁰ See *U.S. v. Yunis* (1991) 30 *ILM* 403, see also *Nottebohm case (Liechtenstein v. Guatemala)*, ICJ Rep., 1955, p. 4, available online at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/internationalcases/internationalcourt/nr/1925> [Consulted on 23/05/2014].

²¹ See *Attorney- General of the Government of Israel v. Eichmann*, (1961) 36 *ILR* 5; available in Harris, *Cases and Materials on International Law*.

²² For more details see the case of *Arrest Warrant of 11 April 2000 Case (Democratic Republic of the Congo v. Belgium)*, Decision of the ICJ, 2002.

2.2.2. Practical implications of the principle of concurrent jurisdiction

This section will examine the principles governing the national criminal jurisdiction and the rationale and the scope of the principle of concurrent jurisdiction.

2.2.2.1. Principles governing national criminal jurisdiction

By principles governing the criminal jurisdiction of a State wishing to prosecute crimes under international law, this dissertation refers to cases where national jurisdictions deal with the international criminal responsibility of an individual based on the criteria of the criminal jurisdiction of their respective State.

These principles refer to the jurisdiction of a State in connection to all offences committed in their territories and those committed extraterritorially.²³ Indeed, even if the offence has an international character, it is usually committed in the territory of a given State against the victims of such state or a citizen of a particular State. Similarly, if by principle the offence is international because it violates the essential interests of the international community as a whole; it is, above all, the interests of a particular State that are violated. The traditional criminal jurisdiction of a state also applies in matters involving international crimes.²⁴

Under the principle of territoriality, it is the State on whose territory an international offence was committed that has jurisdiction. Specifically, the State of Rwanda and its neighbouring countries are competent to punish international crimes committed on their territories during the Rwandan genocide. In the famous *Lotus case*, when the collision occurred between the two French and Turkish vessels in August 1926, Turkey had tried and convicted the French Lieutenant Demons and the Permanent Court of International Justice, accepting the jurisdiction of the Turkish court in 1927

²³ O'Keefe R 'Universal jurisdiction, clarifying the basic concepts' *Journal of International Criminal Justice* 2 (2004) at 738-739.

²⁴ Antonio Cassese op cit at 284.

stated that: ‘All we can ask a State is not to exceed the limits which international law places upon its jurisdiction; below its limits, the title of the exercise of jurisdiction rests in its sovereignty’.²⁵ This means literally that a State may exercise this type of jurisdiction except if there is a principle of international law prohibiting the exercise of the same jurisdiction. The exercise of this jurisdiction is among the uncontroversial basis of jurisdiction; however the consequences of absolute territoriality would be unfortunate, that is why States also exert extra territorial criminal jurisdiction.²⁶ This is what happens when a State has its own nationals as perpetrators or victims.

Under the principle of personality for example, France may try crimes committed by some of its military in Rwanda during the genocide and Burundi may initiate proceedings against its nationals who could be alleged perpetrators of genocide in Rwanda.²⁷ This is done on the basis of the active personality principle. The active personality principle applies when a state has the authority to criminalize conduct performed on its soil, as well as a conduct performed abroad by its nationals.

Similarly, when Belgium pursues Rwandans accused of murdering Belgian soldiers during the genocide, such action is based on passive personality jurisdiction. Passive personality jurisdiction addresses the conduct of non-nationals whereby the victims of that conduct are nationals of a State prescribed to that jurisdiction.²⁸

The protective principle is an extra territorial jurisdiction, through which a State exercises its criminal authority over offences committed outside of its territory. The offences committed in such a situation are deemed to produce a threat to the national

²⁵ See *S.S Lotus (France vs Turkey)*, publications of the PCIJ Series A. No. 10, 7th September, 1927 at 124.

²⁶ O’Keefe op cit 23.

²⁷ In this respect, Rwanda used to maintain discretionary a list of Burundians who have been involved in the 1994 genocide in Rwanda if this list is published, Burundi may choose to prosecute itself without extradite them to Rwanda.

²⁸ O’Keefe op cit 23.

interest of that particular country.²⁹ In the case opposing *United States v Zehe*, the United States District Court of Massachusetts held that it has jurisdiction on the basis of the protective principle because the espionage acts by Zehe causes threats on its national security³⁰. This principle provides a State with jurisdiction as soon as one of its vital interests such as when its sovereignty, security or important governmental functions are threatened.³¹

Finally, some States exercise the criminal jurisdiction on the basis of universality where there is absence of any other available prescriptive jurisdiction connection.³² According to the principle of universality, a State asserts its jurisdiction without any criterion of direct connection with the offence except possibility in the presence of the author on its territory.³³ The principle of universality gives jurisdiction to the courts of the State in whose territory the offender is arrested or is even located temporarily to continue to try, regardless of the place of commission of the offence or nationality of the perpetrator or victim.³⁴ The rationale for this is grounded in an argument that, if national courts were based solely on the principles of territoriality alone many gaps would remain and that would have unjust consequences. This is why States are also using universal jurisdiction. In this perspective, the Indictment Division of Paris confirmed the jurisdiction of the French Court for crimes against humanity and genocide committed in Rwanda in the *Munyeshyaka* case.³⁵ Again in the case of *A.G. of Israel v Eichmann*, whereby the main issue was to know if Israel has the jurisdiction to try Eichmann crimes when it had none of the jurisdictional links to his offence. The Court held that ‘the universal character of the crimes’ in issue gives rise to Universal jurisdiction, even if there is no nexus between the forum State, the conduct, the offender or victims.³⁶ The reasoning is that a State can invoke the universality principle when it comes to

²⁹ Ibid.

³⁰ *United States v. Zehe*, 601 F. Supp. 196 (D. Mass. 1985).

³¹ Robert Cryer at al op cit at 47.

³² Cryer op cit at 45.

³³ Ibid.

³⁴ Cryer op cit at 47.

³⁵ International federation of human rights league available online at <http://www.fidh.org/> [Accessed on 25 January 2014].

³⁶ See *Attorney- General of the Government of Israel v. Eichmann*, (1961) 36 ILR 5.

international crimes that threaten the interests of the international community and thus that State acts on behalf of the later.

The principle of universality gives States jurisdiction of a universal nature. However, the principle somewhat violates the principle of the sovereign equality of nations which is a fundamental principle under international law. The State is sovereign within its territory when its jurisdiction is exclusive and absolute. Acts carried out by a State should enjoy an irrefutable presumption of validity. Thus enable the foreign Court 'to challenge' the validity of decisions of the State constitutes 'unjustifiable interference in the internal affairs of such a state'.³⁷ But because of the limitations due to the necessary coexistences with other States as subjects of international law, the independence of the State is no way compromised or its sovereignty affected by the existence of international obligations of the State. Indeed, sovereignty does not mean that the State can break the rules of international law.³⁸ This is even true that a State has a repressive power that would normally regard affairs of another state. Therefore, the principal of universal jurisdiction is an exception to the normal rules of international law and only applies to the most serious crimes of international law.

Concerning the competing jurisdiction with international courts, the case law available on this matter comes from the International Criminal Tribunal for the former Yugoslavia (ICTY). This is a tribunal similar with the ICTR in terms of make-up and workings. In the *Celebici* case, the Appeals Chamber of the ICTY held that 'there is no hierarchical relationship' between the International Court of Justice (ICJ) and an International Tribunal and that there is no legal basis justifying that the 'ad hoc Tribunal can defer in favour of the ICJ and, therefore, is bound by the decisions of the latter'.³⁹

³⁷ Kelsen H., Sovereignty and international law, in the *Georgetown Law Journal*, vol 48(1960) at 627.

³⁸ Ibid.

³⁹ ICTY Appeals Chamber, Case No IT-96-21-A, *Prosecutor v Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, called 'Case Celebici' Judgment of 20 February 2001, § 4.

Again in the *Kvacka* case,⁴⁰ one of the defendants made a motion to suspend the proceedings before the ICTY arguing that a concurrent process was before the ICJ (*Bosnia - Herzegovina v Yugoslavia*).⁴¹ The Trial Chamber dismissed the claim on the grounds that ‘... the ICJ, the main judicial organ of the UN, deals with States responsibility, while the tribunal, established by the Security Council on the basis of the chapter VII of the UN Charter, deals with individual criminal responsibility.’

On 25 May 2001, the Appeals Chamber confirmed the finding of the trial chamber noting, among other things, that: ‘... no legal basis exists for suggesting that the international tribunal must defer to the International Court of Justice such that the former would be legally bound by decisions of the latter’.⁴² This signifies that there is no rule which provides that the international tribunal must defer to the International Court of Justice as the first should be bound by the decisions of the later but the reverse is impossible.

With regard to regional international courts, there is no issue of competing jurisdiction with ad hoc tribunals that have been noticed.⁴³ As for the ICC, the issue of concurrent jurisdiction with ad hoc tribunals does not arise because the ICC only has jurisdiction, in general, with respect to crimes committed after the date of its entry into force, which is from 2002.

As explained previously (see page 8), the ICTR and domestic courts both has jurisdiction over the crime of genocide committed in Rwanda. The exercise of such

⁴⁰ ICTY Trial Chamber I, in *Kvacka* Case No. IT-98-30/1. Decision on the Defence Motion Regarding concurrent proceedings before the International Criminal Tribunal for the Former Yugoslavia and ICJ on the same questions, 5 December 2000.

⁴¹ Bosnia- Herzegovina had seized the ICJ by a request from the March 20, 1993 against Yugoslavia (Serbia and Montenegro) to recognize the violation by the latter, the Convention on the Prevention and Punishment of the Crime of Genocide, but also the four Geneva Conventions and the UN Charter, besides other provisions of general and customary international law.

⁴² ICTY Appeals Chamber, Case *Kvacka*, No. IT-98-30/1- AR 73 , 5 , Interlocutory Appeal of Decision by the accused Zoran Zigic against the decision of Trial Chamber I of 5 December 2000.

⁴³ Adjovi Roland and Dellamorte Gabriel *Le procès équitable devant les tribunaux pénaux internationaux* (2012) at 8.

jurisdiction by one of those courts may cause a kind of competition of jurisdiction when it comes to each of them wanting to assert jurisdiction on the same matter. From that situation of competition between national courts and ad hoc tribunals in exercising jurisdiction it may result in unfortunate conflicts of jurisdiction. That is why the statutes of the ad hoc tribunals have, however, provided a remedy which will be examined in the following section.

2.2.2.2. The rationale and the scope of the principle of concurrent jurisdiction.

The establishment of the principle of concurrent jurisdictions in the statute of the ICTR has been inspired *inter alia* by the following elements.

First, it was apparent from the beginning that the ICTR would not be able to prosecute all the cases before it in the short time of its mandate. As of 1997, the Rwanda's prisons were overcrowded with up to 90 000 inmates, all waiting for prosecutions.⁴⁴ The ICTR could not manage to finalise all these cases in a reasonable time.⁴⁵ In these circumstances the adoption of concurrent jurisdiction principle was a good option. This was also because genocide was an international crime of which States could exercise their jurisdiction. This refers to prerogatives States have to assert their jurisdiction. Thus, the establishment of an international Tribunal could not deprive national courts of the competence they previously had on that crime. Therefore, it was necessary to allow them to do so and not deprive them of their judicial powers based on the ratification of the Genocide Convention empowering them to assert jurisdiction over this crime.

Secondly, as highlighted by Cassese, the ICTR does not hold any territory or prison where its sentences should be carried out. Unlike domestic criminal courts, international tribunals do not have enforcement agencies. Without a link between the

⁴⁴ Ibid.

⁴⁵ Morris M .H, 'The trial of concurrent jurisdiction: the case of Rwanda' *Duke Journal of Comparative and International Law*, vol.7, (1997) at 357.

ICTR and national authorities, the ICTR cannot perform some of the activities to achieve its goals. For example, it would be near impossible to acquire evidence, compel witness to give testimony, search the scenes where crimes have allegedly been committed, or to execute arrest warrants.⁴⁶ On this basis, international courts must establish ways to cooperate with State authorities to provide them with the necessary support to investigate.⁴⁷

This is what the drafters of the ad hoc tribunals statutes emphasized on. The statute was aimed to give assurance that the purpose of the tribunals was not to replace national judicial systems but that the tribunals would collaborate in the pursuit of the same goals.⁴⁸ The question is therefore whether cooperation between the tribunal and the domestic courts exists and what it looks like.

2.2.3. Principles of Concurrence and primacy of jurisdiction

2.2.3.1. The primacy principle

From the jurisdiction over the crime of genocide recognised to both the ICTR and domestic, it may originate the jurisdictional conflict. In the situation whereby the two collided on the same case, the conflict to know which takes precedence over the other is resolved by the ICTR statute. This section, analyses the primacy of ad hoc tribunals over domestic courts and the relationship with each other. In our case, the ICTR will have primacy over national courts of every country asserting the same jurisdiction.

⁴⁶ Cassese A, *International Criminal Law* 2nd Edition, (2008) at 346.

⁴⁷ Ibid.

⁴⁸ Ibid.

The primacy principle originates from the fact that the tribunal was created by the UNSC acting under Chapter VII of the UN Charter.⁴⁹ Article 8 of the ICTR Statute stipulates that national courts and the ICTR have concurrent jurisdiction to prosecute persons who fall within the scope of covered crimes. The competing jurisdiction has the consequence that the ICTR may waive its jurisdiction and allow priority to a national court.⁵⁰ The primacy of ICTR and ad hoc tribunals, in general, tampers with competing jurisdiction. The ICTR statute states that ‘the International Tribunal shall have primacy over national Courts’.⁵¹ Clearly, the ICTR and domestic courts does not have exclusive jurisdiction but for ICTR, it may ‘at any stage of the procedure formally request national courts to defer to its jurisdiction’ in accordance with its Statute and its Rules of Procedure and evidence.⁵²

In fact, the ad hoc tribunals and ICTR in particular, do not have exclusive power to try alleged perpetrators but they may require national courts to handover the case to their jurisdiction. The primacy seems best suited to ensure impartiality of the court. Impartiality is an inherent condition to the idea of justice.⁵³ Clearly, this principle is a direct consequence of the mode of creation of the two ad hoc tribunals. Both courts were established by the United Nations Security Council (UNSC) to help ensure peace and security. The maintenance of peace and security is the primary mission of the UNSC. Therefore, they have the same binding effect as any of the Security Council's decisions taken under Chapter VII of the UN Charter.⁵⁴ This was the grounds in *Tadic* case where the Appeals Chamber issued a landmark judgment. In this case the five judges unanimously upheld the Tribunal's jurisdiction. The Chamber held that the decision of the Security Council to establish the Tribunal was a legitimate action under the UN Charter aimed to contribute to peace and security.⁵⁵

⁴⁹ Morris Virginia and Michael P Scarf, *The International Criminal Tribunal for Rwanda* volume 1, transnational publishers, Inc. (1998) at 99.

⁵⁰ Morris Virginia & Michael P Scarf op cit at 315.

⁵¹ Article 8 § 2 of ICTR Statute.

⁵² Articles 9 § 2 and 8 § 2 of ICTY and ICTR Statutes.

⁵³ See Morris Virginia and Michael P Scarf op cit at 316.

⁵⁴ Virginia and Scarf at 97.

⁵⁵ *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction, 2 October 1995, Para 47.

2.2.3.2. The meaning of the principle of primacy

The principle of primacy of the ad hoc tribunals means that the fact that domestic law does not punish an act which constitutes a crime under international law does not relieve the person who commits such a crime of any responsibility.⁵⁶ The relationship between the ad hoc international criminal tribunals and national courts is defined by the Statutes in terms of the primacy of the international tribunals and the existence of concurrent jurisdiction between the tribunals and the national courts.⁵⁷ The two, thus have a ‘concurrent jurisdiction’ with national jurisdictions.⁵⁸

The concurrent jurisdiction principle implies that crimes covered by the statutes of the two ad hoc tribunals can be prosecuted both domestically and by the ad hoc international tribunals.

As part of this ‘concurrent jurisdiction’, the ad hoc international criminal tribunals have primacy over the national courts.⁵⁹ Indeed, Article 8 of the ICTR Statute provides:

‘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 the neighbouring States, between 1 January 1994 and 31 December 1994.’

Article 8 § 2 goes on to state that: ‘The International Tribunal for Rwanda shall have primacy over national courts ...’

From the foregoing three consequences can be derived from the principle of primacy:

- i. The authority of res judicata by the international tribunal which is binding on the courts of all states.⁶⁰

⁵⁶ Virginia and Scarf at 312.

⁵⁷ Ibid.

⁵⁸ Article 9, § 1 of ICTY Statute and art8, § 1 of the ICTR Statute.

⁵⁹ Articles 9 § 2 and 8 § 2 of ICTY and ICTR Statutes.

- ii. At any stage of the procedure, the international tribunal may ask national authorities to defer to its jurisdiction.⁶¹
- iii. The transfer of suspect criminals before the ad hoc international tribunals.

Note, for all intents and purposes, the national courts may prosecute the perpetrators of crimes within the jurisdiction of the ad hoc international criminal tribunals if the latter do not intervene to impose their primacy. Thus, the judgments rendered by the State courts are endowed with the authority of *res judicata* before the ad hoc tribunals, except in cases where the prosecution would prove as a qualification of ordinary offenses.

2.2.3.3. Legal basis of the primacy principle

Article 25 of the UN Charter states that ‘members of the United Nations agree and accept to carry out the decisions of the Security Council in accordance with the present Charter’. In its advisory opinion on 21 June 1971 on the ‘Legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) of the Security Council, the ICJ stated that Article 25 of the UN Charter is not limited to decisions regarding enforcement action but applies ‘to the decisions of the Security Council’ adopted in accordance with the Charter. Also the question as to whether article 25 applied only to decisions of the UNSC on coercive measures under articles 41 and 42 in Chapter VII of the Charter would render article 25 superfluous.⁶²

From the above, it could be deduced that only decisions of UNSC taken under Chapter VII of the UN Charter are binding. However, by passing resolutions 808 (1993) and 955 (1994) creating ad hoc tribunals, the UNSC has always justified the creation of the tribunals and their jurisdiction as acting under Chapter VII of the Charter. These

⁶⁰ See Article 10 of ICTY and art 9 of the ICTR Statutes.

⁶¹ Article 10 RPE common to the two ad hoc tribunals; see also art 9 § 2 of the ICTY statute and art 8 § 2 of the ICTR statute.

⁶² See ICJ Reports (1971) at 53 § 113.

resolutions are binding decisions. Accordingly, as the subsidiary bodies of the UNSC, ‘the decisions of the ad hoc tribunals have the same binding force as any UNSC decisions’ taken under Chapter VII of the UN Charter.⁶³

However, if an ad hoc tribunal faces resistance from States that refuse to implement the decisions they have taken, their only recourse is to approach the UNSC for it to use his political power to persuade or coerce recalcitrant States.⁶⁴ This is exactly what Carla Del Ponte; former Prosecutor of the ad hoc tribunals did in November 1999 about Croatia and Bosnia when they showed reluctance to cooperate with the ICTY.

In the situation of competition of jurisdiction, the International Criminal Tribunal takes precedence over national courts insofar as they may have jurisdictions to handle facts, but must defer to the International Tribunal if it request deference.⁶⁵

2.2.3.4. Primacy versus Complementarity

To provide a comparison between the two concepts, it is interesting to analyse it in terms of the relationship between the international tribunals and the State’s criminal justice system. On the one hand, it is the relationship between the two systems expressed as concurrent jurisdiction or the primacy of the tribunal over the national court. On the other hand the relationship between these entities can be examined from a perspective of the principle of ‘complementarity’.

The primacy of the ICTR over national courts arises from the principle of concurrent jurisdiction. The establishment of the principle of concurrence of national and international jurisdictions involve the issue of how to harmonize the relationship

⁶³*Prosecutor v. Tadic*, Case No. IT-94-1-T (Trial chamber, decision on the defense motion: jurisdiction of the tribunal, 10 august 1995 at para 11.

⁶⁴ See the amicus curiae statement of the United States, *Prosecutor v. Tadic*, Case No. IT-94-1-T of 25 July 1995, at 2-3.

⁶⁵ See the ICTR Statute, art 8 § 2 and Rules of Procedure and Evidence (Art 9-12).

between international tribunals and national courts. As national courts and international tribunal both share jurisdiction to pronounce on the crime of genocide, it is important to know which forum takes precedence.⁶⁶

To circumvent any confusion between primacy and the notion of complementarity, it might be useful to provide an example through our understanding of the ad hoc tribunals and the ICC. In the situation of the ad hoc tribunals, primacy has been granted to them over national courts. At the ICC system, the situation is reversed and the primacy is given to the national courts, but under certain conditions.⁶⁷

Indeed, in the ICC context, the situation is referred to as complementarity instead of primacy. Concerning the meaning of the principle of complementarity, Cassese argues that ‘the first responsibility comes to the national courts to act over the case, thus the ICC will step in to serve in the event where justice is inappropriately dispensed’.⁶⁸ The ICC will not be competent to assert its jurisdiction if the case is being investigated or prosecuted by a state which has jurisdiction over it, or if the case has been investigated by the State which has jurisdiction over it.⁶⁹ These were the grounds in *Prosecutor v Al- Senussi*; where the Trial Chamber upheld the complementarity on the basis of article 17 of the Rome Statute. The Chamber concluded that the case against the accused is inadmissible before the ICC due to the factors that it was being investigated domestically by Libya.⁷⁰ According to the wording of this provision encapsulating the complementarity of the ICC, a case will be admissible at the ICC only if the State which has jurisdiction over it is ‘unwilling or unable’ to carry out investigations or prosecutions. Therefore, the domestic courts have a primary responsibility to investigate and prosecute international crimes. The ICC will only intervene if national courts fail to

⁶⁶ Cassese A Guido Acquaviva et al, *International Criminal Law, Cases and Commentary*’ Oxford University Press (2011) at 523.

⁶⁷ Cassese op cit at 339.

⁶⁸ Cassese A Guido Acquaviva et al op cit 66.

⁶⁹ See *Prosecutor v Al - Senussi*, ICC-01/11-01/11-466-Conf, , Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013.

⁷⁰ Sands P, *From Nuremberg to The Hague, the future of the international justice*(Ed) (2003) at 74-75.

do so. It is obvious, that this arrangement appear opposite to that of the situation of ad hoc tribunals.

Coming back to the primacy recognized to both ad hoc tribunals, it has been challenged as violating domestic jurisdiction of States and their sovereignty.⁷¹ Those were the grounds in *Tadic* case, when his defence council challenged the primacy of the tribunal. In this case the tribunal held that the accused lacked the capacity to raise such issue of primacy involving a petition of State's sovereignty violation.⁷² It held that, such a power only is to be exercised by the concerned State.⁷³ It quashed the claim in the terms which clarify the logic of this primacy by confirming that, when an international tribunal such as the ICTY is created, 'it must be given with primacy over national courts'.⁷⁴ The reasons to assert the primacy are to avoid the passivity of States to prosecute due to their limited capacity or to intervene in situation of sham trials.

2.2.4. Justification for the primacy principle

On the one hand, the principle of primacy is justified by the rejection of impunity and, secondly, by seeking impartial justice.

2.2.4.1. The refusal of impunity

The rejection of impunity justifies the principle of primacy of international criminal justice of both International Tribunals on the internal States justice. This theme

⁷¹ *Prosecutor v Tadic*, case IT -94-1-AR 72, decision on appeal jurisdiction, rendered by the appeal chamber on 2/10/1995, at para 41 - 55.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ See the *Prosecutor v Tadic*, Case No IT-94-1 Decision on the Defence motion for interlocutory Appeal on jurisdiction, 2 October 1995, paras 58-59, available online at www.un.org/icty/ind-e.htm; *Tadic*: Appeals Chamber decisions.

of rejection of impunity is pervasive. International Centre for Human Rights and Democratic Development (ICHRDD)⁷⁵, published a review in 1998 entitled ‘info - impunity’. In that publication, they bring together several articles relating to the genocide in Cambodia by the Khmer Rouge, on how the UN addresses the issue of impunity. They indicate that the particular condition of a true democracy in Cambodia is the use of authentic trials; they argue that justice is the only way to overcome hatred and ulterior motives on which it is not possible to build a sustainable peace.⁷⁶

Louise Arbour, former Chief Prosecutor of the ad hoc tribunals until 1999⁷⁷ was convinced of the usefulness of justice as a mean to restore lasting peace. She stated that ‘[t]he Courts have not prevented the crime and the risk of punishment encourages the author to be more clever ... the effect is not measurable because it is impossible to know what would have happened in Kosovo if ad hoc tribunals does not exist’.⁷⁸

On 26 February 1996 the President of the ICTY stated:

‘No one would deny that peace in this region of Europe should be accompanied by justice. It is not enough to put an end to armed conflicts, repair destroyed buildings, to organize the return of refugees, it is not enough to restore order in the streets, it is still necessary to restore order in the mind.’⁷⁹

The first annual report of the ICTY to the General Assembly and UNSC stated that ‘the impunity of perpetrators’ would fuel the desire for revenge in the former Yugoslavia, making references to the return of ‘legality’, ‘reconciliation’ and ‘restoration of peace worthy of its name.’⁸⁰ Thus, the primacy of the ad hoc tribunals was necessary to make sure that the impunity which reigns in the history of Rwanda and

⁷⁵ This centre is a non-governmental organization that advocates for the fight against crimes against humanity and war crimes. It describes itself agency of information on impunity. Headquartered in Montreal (Canada) as instructed online at <http://www.ngo-monitor.org/article.php?id=942>. [Accessed 05 February 2014].

⁷⁶ See Virginia Morris op cit at 103.

⁷⁷ See the Resolutions of the UNSC: S/Rés.1047 (1996) appointing Louise Arbour as Prosecutor of the ICTR and ICTY.

⁷⁸ Semo Marie ‘All tracks’ in *Libération* of 29 January 1999, cited by Virginia Morris op cit at 111.

⁷⁹ See the statement of the president of the ICTY available online at <http://www.wcl.american.edu/hrbrief/16/2orentlicher.pdf> [Accessed on 04 February 2014].

⁸⁰ Annual Report of the ICTY to the GA and UNSC, A/49/342, S/1994/1007, 29 August 1994, § 11-16.

Yugoslavia be curbed The primacy in this sense enables the ad hoc tribunals to cure proceedings where domestic courts failed to try adequately perpetrators or to carry out justice.

2.2.4.2. Seeking the impartial justice

The primacy principle seems to be a best option to ensure impartiality. When the protagonists in a conflict are given the task to resolve the conflict themselves in the country or countries affected by the conflict, it guarantees the continuation of the struggle by interposed litigations. And in this case, revenge takes over the justice.⁸¹ That is why the ICTY took a decision in regard with that issue.

The ICTY has ruled on that in the *Tadic* case. Dusko Tadic was initially pursued but not prosecuted by the German authorities who forwarded the case to the ICTY. Tadic did not object to the transfer, probably because of the heavy charges against him in Germany including grave breaches of International Humanitarian Law (IHL), violations of the laws and customs of war and crimes against humanity.⁸² When he arrived in The Hague, he challenged the jurisdiction of the tribunal on the ground that the rule of international jurisdiction over national courts violated the sovereignty of States. But this claim was rejected by both the trial chamber and the appeals chamber as mentioned earlier. It has highlighted in its reasoning that human nature being what it is, the primacy principle should apply when it comes to hearing international crimes.⁸³ The application of this principle is of paramount importance to ensure that cases are dealt fairly and without bias.

About impartiality of ad hoc tribunals, it is finally to note that the defence of the accused Joseph Kanyabashi challenged the primacy of the ICTR on domestic courts

⁸¹ See Virginia Morris op cit at 312.

⁸² ICTY Trial chamber II, *Tadic* (1997), § 9 *Journal of international Jurisprudence*, at 1361.

⁸³ See *Prosecutor v Tadic*, supra.

arguing that it violates the principle of *jus de non evocando*. This principle states that some people retain the right to be tried by regular internal and criminal courts rather than by ad hoc tribunal because of their political nature, which in times of crisis may not be impartial.⁸⁴

Challenging this argument, the ICTR appeals Chamber held that the primacy principle aims to prevent the creation of special courts or extraordinary which tries political offences without the guarantees of a fair trial. It held that unlike the special courts, the international tribunal is neither ‘designed in order to remove the offenders to a fair and impartial justice or to be judged by prejudiced arbitrators’.⁸⁵ It is important to note that the primacy is not always a justification of impartiality but it may apply in certain circumstances aimed to deal with cases judiciously as explained previously.

2.2.5. The effect of the principle of primacy

The principle of primacy induces *ipso facto* the principle of *ne bis in idem*, the deferral of criminal cases and the transfer of the alleged perpetrators to national Courts, a consequence that flows from the principle of primacy and concurrent jurisdiction endowed to ICTR. In the next section, this dissertation analyses the principle of double jeopardy, while other effects will be discussed in chapter three.

2.2.6. The ‘ne bis in idem’ principle

The principle of *ne bis in idem* holds that no one should be tried twice for the same offence. The principle is applicable both in domestic criminal law and international

⁸⁴ See *Prosecutor v Kanyabashi*, case ICTR-96-15-T, Trial Chamber Decision on the defence motion on jurisdiction, 18 June 1997 at para 526.

⁸⁵ See *Prosecutor v Kanyabashi*, case ICTR-96-15-T, Appeals Chamber Decision on the defence motion on jurisdiction, 18 June 1997 at para 526.

criminal law. This is a legal guarantee provided by the Covenant on Civil and Political Rights.⁸⁶

The principle is again reiterated by ad hoc tribunal's statutes.⁸⁷ Under these provisions no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the statute if he or she has already been tried for the same offence by an international tribunal.⁸⁸ This principle is a fundamental element of fairness in criminal procedure. At its core, it prohibits States from repeatedly prosecuting, and punishing individuals for the same offence.

The application of this principle at domestic level poses problems when it comes to its interpretation regarding whether it applies only to decisions of the same country or to those of different states. This is what occurred in the case of *A.P v Italy*.⁸⁹ In this case the factual situation was about the conviction of Italian citizen for same offence (money laundering) in two countries. The substantive issue in this case was the *non bis in idem* as set forth in article 14(7) of the ICCPR. This citizen claimed being a victim of violation of this provision of the covenant. The author was first convicted by a Switzerland court and sentenced for 2 years which he served and expelled from Switzerland afterwards. Arriving in Italy, the Italian government seeks to punish him for the same offence he had already convicted and served. Italian courts convicted him in the first instance and the appeal confirmed the conviction to four years of imprisonment and a fine. He referred the matter before the Human rights committee and invoked article 14(7) of ICCPR as being violated by Italy. He rejects that this provision applies only with regard to judicial verdict of the same country and not with regard to judicial decisions of different States. The Committee in deciding on the admissibility of this communication, it held that it was incompatible with the covenant, especially article 14(7). The committee make it clear that this provision does not guarantee *non bis in*

⁸⁶ See International Covenant on Civil and Political Rights of 16 December 1966, art14 point 7.

⁸⁷ See article 9 of the ICTR statute.

⁸⁸ See respective statutes of the two ad hoc tribunals art 10 for ICTY and art 9 for ICTR.

⁸⁹ See *A.P. v Italy*, Communication No. 204/1986 rendered on 2 November 1987, Para 67.

idem with regard to the domestic courts of two or more states. It emphasizes that the provision in question prohibits double jeopardy only with regard to an offence tried in a given country. This case shows that very few States accept the application of this principle between them unless they have signed a bilateral agreement to that effect. This lack of trust between States on how criminal justice is administered in another States is not a good thing in terms of protection of individual rights.

The application of the principle of *non bis in idem* before ad hoc tribunals is a bit different to the practice at domestic level where there is no rule of international law imposing the obligation to respect this principle between States. Before ad hoc tribunals, a person who has been tried by a national court for acts constituting serious violations of IHL may be subsequently tried by these tribunals.⁹⁰ Conversely, the prosecution of a person tried by an international tribunal by domestic courts for the same offence is not possible. The Rules of Procedure and Evidence of the two ad hoc tribunals (hereafter RPE), endorse the principle relating to the primacy. Indeed, if the President receives reliable information of criminal proceedings against a person before a domestic court for an offence for which the person has already been tried by the international tribunal, the trial chamber takes an order in accordance with the procedure referred to in article 10, *mutatis mutandis*, requesting the court to discontinue its proceedings.⁹¹ The RPE adds that if the Court fails to do so, the President may refer the matter to the UNSC.⁹²

Moreover, article 12 of the RPE provides that decisions of the domestic courts are not binding before the international tribunal subject to article 10 paragraph 2 and article 9 paragraph 2 of the ICTY and ICTR Statutes. These provisions clarifies that the decisions of the ad hoc tribunals are stronger than those of national courts. Literally, it means that domestic courts cannot proceed with a case against the perpetrators of crimes falling in the competence of the ad hoc tribunals if they have already took a final verdict for the same crimes. This exception aims ‘to prevent a travesty of a trial before a

⁹⁰ See articles 10 of ICTY and article 9 of ICTR Statute.

⁹¹ See Rules of Procedure and Evidence art13 common to both ad hoc tribunals.

⁹² *Ibid.*

complacent court not to impose the deserved punishment'.⁹³ However, ad hoc tribunals can judge an alleged person who has already been tried by a national court if:⁹⁴

- i. The act for which the accused was tried was characterized as an ordinary crime;
- ii. The national court has not acted impartially or independently;
- iii. The proceedings before that court designed to shield the accused from international criminal responsibility;
- iv. The case was not diligently prosecuted.⁹⁵

Note, for all practical purposes, these conditions are not cumulative. It is sufficient that one condition is present for the international tribunal to take control of the case; this should be proved by the prosecutors of ad hoc tribunal.⁹⁶ It is crucial to recall that there are no precedents involving international crimes which have produce a common standard regarding the application and the scope of this principle.

In different circumstances, the defence counsel of the accused *Nahimana*, former director of Independent Radio Television of Mille Collines (RTL) in Rwanda, argued that the cumulative of charges violated the principle of *ne bis in idem*. He argued that, in this case he was prosecuted several times for the same offence. Indeed, he believed that the principle applies not only in cases where a person is prosecuted in several jurisdictions for the same offence, but also when he is prosecuted several times for the same offence before the same court. The exception was rejected on the grounds that the question was relevant only for the determination of sentences.⁹⁷ One can say that the defendant argument would have much sense if each charge against him could endorse its

⁹³ Coffey Gerard, 'Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting *Ne Bis In Idem* in Conjunction With the Principle of Complementarity' *Journal of European Criminal Law*, vol. 4, issue 1-2, (2013) at 63.

⁹⁴ See art10 § 2 of ICTY and art 9 § 2 of ICTR Statutes.

⁹⁵ See article 8 (2) ICTY St. and art 9 (2) ICTR Statute.

⁹⁶ Coffey op cit at 63.

⁹⁷ See ICTR case of Ferdinand Nahimana, decision on the objection raised by the defense on procedural defects relating to the indictment of 24 November 1997, Reports (1995-1997) at 451 § 37.

punishment but the rule of criminal law determines that the greater punishment absorbs the lesser when it comes to single act constituting various offences. Thus, this rule makes his claim baseless.

2.3. Conclusion

This chapter has provided the overview of the principle of concurrent domestic and international jurisdiction and has discussed its scope and rationale. It has focused on the principle of primacy throughout the jurisdiction of the ad hoc tribunals. The principles governing the national criminal jurisdiction have also been discussed in this chapter. Ultimately, it argued that, the ad hoc tribunals and national courts have concurrent jurisdiction to prosecute the perpetrators of crimes committed in Rwanda. But the chapter has clarified that ad hoc tribunals continue to keep pre-eminence over national courts in asserting the primacy over the accused. This supremacy is a direct consequence of the principle of *res judicata* by an international tribunal and the possibility of deferral of national courts to the competence of ad hoc tribunal at any stage of the procedure.

CHAPTER 3: LEGAL ISSUES ARISING FROM THE PRINCIPLE OF CONCURRENT JURISDICTION

3.1. Introduction

The principle of concurrent jurisdiction implies two categories of relationships, each with its own set of problems. The first is the vertical relationship between national courts and the international tribunal and the second one is the horizontal relationship between different countries courts.⁹⁸ In the horizontal relationship, particular attention will be paid to the relationship between the country where the crime has been committed and other countries on the possible basis of jurisdiction discussed in chapter two. This chapter discusses legal issues surrounding the concurrent jurisdiction between ICTR and the national courts, specifically those arising from the ICTR closure. The analysis will consider the transfer of cases to national courts. I will look at some decisions of the tribunal regarding the request of transfers and illustrates the kind of issues that the ICTR closure may generate in terms of enforcement of its judgements. I will refer to these issues, generally, as the ‘post-closure’ issues.

As the ICTR statute does not provided the terms of its closure as an ad hoc tribunal with a limited lifespan, such situation has occasioned the need to consider how the transfer of cases can be one of the ways to close its activities.⁹⁹ This chapter illustrates how the transfer requests of cases to national courts on the basis of concurrent jurisdiction create challenges. It deals with those concerns that arise from the principle of concurrent jurisdiction, however the analysis will focus on those that are specific to Rwanda and those issues shared with other countries where the genocide fugitives may have hidden or have been arrested.

⁹⁸ Shany Y ‘The Competing Jurisdictions of International Courts and Tribunals’ *International Courts and Tribunals Series* (2003) at 1298.

⁹⁹ See Resolution 955 op cit at Para 1.

3.2. Problems pertaining to the prosecution of genocide cases

3.2.1. Concurrent jurisdiction of ICTR between the country of the commission of crimes and other countries

The analysis of the situation of competing jurisdiction of different countries and the country where the crimes have been committed should be done taking into account the distinction between the two situations. There is the prosecution to be commenced by the country of the commission of crimes itself for one hand, and to the other hand the transfer of cases from ICTR to domestic courts.

Concerning the first situation, practice has shown that most countries are reluctant to investigate and prosecute genocide suspects who reside in their countries.¹⁰⁰ The report of the Genocide Fugitives Tracking Unit (GFTU) shows that until 2013 only few foreign countries had prosecuted Rwandan genocide suspects at national level, these are Norway, France, Switzerland, Belgium, Sweden and Canada.¹⁰¹ The motivation of these countries to do so are varied but could include the moral sentiment towards contributing to the universal justice and of the implications of the principle of '*aut dedere aut judicare*' that obligates countries to either extradite or to punish.¹⁰² Apart from the aforementioned justification, there is no other known palpable benefit or interest for a foreign country to prosecute such cases when there is a cost implication attached to those proceedings.

¹⁰⁰ See the annual report of the National Public Prosecution Authority of Rwanda (2013) at 8. This report shows that only countries like Canada, Norway, France, Switzerland and Belgium have shown willingness to start investigations and extradition of the suspects where possible while others continue to be reluctant regardless of the indictments drawn and sent in different countries that shelter fugitives.

¹⁰¹ Jennifer G Riddell 'Addressing crimes against international law: Rwanda's Gacaca in practice' Thesis, university of Aberdeen (2005) at 26.

¹⁰² Bassiouni C and Wise EM 'Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute' in *International Law* Boston/London (1995) at 3.

The above mentioned report highlights that there are still many genocide suspects living outside of Rwanda. The ICTR continues with the daunting task finding a way to persuade countries who continue to shelter genocide suspects to become more active in prosecuting them. The United Nations should motivate member States to take their international law obligations seriously when it comes to gross violations of human rights by individuals.

Regarding the transfer of ICTR cases to Rwanda, a substantial element and a consequence of the completion strategy of the ICTR, was specified at its creation by Resolution 955 as stated in the introduction of this chapter.¹⁰³ It clearly shows that the continuance of the ICTR is not desired. The transfer of ICTR cases to national courts has become a relevant option to meet the deadlines given by UNSC in order to ensure a safest closure. The UNSC had asked the international community to assist national courts to strengthen their capacity to deal with cases transferred by the ICTR.¹⁰⁴ Rwanda as the main country wishing to receive ICTR cases began to adjust its national legislation to comply with international requirements. In 2007, Rwanda adopted law abolishing the death penalty and the Organic Law for referral to Rwanda by the ICTR cases and other states.¹⁰⁵

Recently Rwanda has been given priority over other countries that also have the ability to prosecute genocide cases. This is for the reason that justice is more seen to be rendered if genocide suspects are judged in Rwanda where the victims of their crimes are based. Another justification is the fact that Rwanda has worked incessantly to make sure that the conditions of eligibility have been improved. This is not a compelling principle to favour transfer of cases to Rwanda over other countries as the Mechanism

¹⁰³ Resolution 955.

¹⁰⁴ Ibid.

¹⁰⁵ See the Organic Law No. 31/2007 of 25/7/2007 on the abolition of the death penalty, in official Gazette n ° special of 25/07/2007. See also the Organic Law n ° 11/2007 of 16/03/2007 relating to the referral of cases from the ICTR to the Republic of Rwanda and other states, in Official Gazette n ° special of 19/03/2007.

for International Criminal Tribunals (MICT) statute is clear in its article 6(1).¹⁰⁶ In addition to abolishing the death penalty, Rwanda has done its best to improve its judicial system. In 2004 Rwandan tribunals and courts recruited more experienced and qualified staff to reinforce its justice system.¹⁰⁷ In the area of sentencing, a new prison, complying with the international standards required by United Nation was built and approved to satisfy all requirements.¹⁰⁸ However, the capability of the Rwandan judicial system has been also questioned and acts as an obstacle to the transfer of cases from the ICTR to Rwanda. What was unusual during this process of requesting the transfer of cases is that the denial of certain transfer arises at the time all these improvements were unfolding.¹⁰⁹

3.2.2. Basis for the transfer

It is important to recall that before 2002, in the statute of the ICTR, there was no provision regulating the transfer of case, until an amendment of the RPE was made.¹¹⁰ This section discusses and analyses certain cases decided by the ICTR on the prosecutor's request to transfer cases to national courts. It examines the reasons offered by the tribunal for refusal or granting the transfer request. Two cases emanating from a request by Rwanda and two cases of requests from other countries will be reviewed.

¹⁰⁶ This provision stipulates that the Mechanism have the power to refer cases involving persons under its jurisdiction to the authorities of States. This implies that it may be any state not only Rwanda as a country where crimes have been committed.

¹⁰⁷ See the keynote address of the Chief justice of Rwanda on 28/02/2013 available online at http://www.qatarlawforum.com/wpcontent/uploads/2012/01/Rugege_Speech_Legal_Reforms_and_the_Rule_of_Law_in_Rwanda.pdf [Accessed on 12/02/2014].

¹⁰⁸ This is an international prison called Mpanga that has been constructed in Nyanza District, Southern province of Rwanda.

¹⁰⁹ The death penalty was abolished prior to the Rule 11 bis decisions. The ground for transfer refusal common to all decisions taken by ICTR was that there was legal ambiguity relating to the maximum sentence if it is life imprisonment or life imprisonment with special provisions (perpetual confinement). The court held that this could be an impediment for witnesses both inside Rwanda and abroad because they would be unwilling to testify in defence for fearing torture, harassment and other consequences. This has been confirmed in various decisions handed down by ICTR. See *Prosecutor v Hategekimana* para 22-38, *Prosecutor v Munyakazi* para 37 *Prosecutor v Kanyarukiga* para 26, *Prosecutor v Gatete* para 64 and *Prosecutor v Kayishema* para 40.

¹¹⁰ See the amendment of the RPE made on the 16 July 2002 by the ICTR Judges. In this amendment Rule 11 bis was legally adopted to authorize transfer of cases.

Evidently, the sole fact that crimes have been committed on the Rwandan territory cannot serve as a *sine qua non* condition to justify the transfer of cases to Rwanda. There is a set of standards that is taken into account by the ICTR for example, the guarantee of a fair trial to the accused person and the compliance to the human rights requirements in general by the domestic criminal judicial system.¹¹¹ The criteria for transfer of cases to national courts are set forth in Rule 11 *bis* of RPE which provides basis through which the Court must follow to refer cases. Thus, these criteria governing the referral of cases can be summarized in the principle that, ICTR chambers have to be convinced that the accused will be subjected to a fair trial, and not sentenced to death penalty if convicted.¹¹² In this regard, the ICTR judges are given a new role by this rule (Rule 11bis (C)) i.e. deciding on issues outside of their scope in which international criminal law applies to assess whether a national system is capable to conduct a fair trial.

Antonio Cassese highlights that ‘the availability of the death penalty and issues regarding the capacity and fairness of the domestic system appear to exclude the referral of cases to the national authorities in Rwanda’.¹¹³ Which means that concerned states are encouraged to meet the above requirements if they want cases to be transferred to them otherwise the request would be rejected.

3.2.3. Case law and issues regarding competing jurisdictions seeking to prosecute transferred cases

The case that marks the first trial to be decided on in relation to transfer of cases from ICTR to national courts is the case of *Prosecutor v Michel Bagaragaza*.¹¹⁴ The ICTR prosecutor in requesting this transfer, he found Norway as the suitable destination.

¹¹¹ Cassese A *The oxford Companion to International Criminal Justice* Oxford University Press, New York (Ed) (2009) at 363.

¹¹² See RPE op cit at (C).

¹¹³ Ibid.

¹¹⁴ See *Prosecutor v Michel Bagaragaza*, case no. ICTR-2005-86.R 11 bis.

But the Trial Chamber III rejected the prosecutor's arguments to transfer this case to Norway due to the lack of subject matter jurisdiction.¹¹⁵

While some incarcerated defendants were refused transfer to the national courts, in the case of *Prosecutor v Laurent Bucyibaruta & Prosecutor v Wenceslas Munyeshyaka*, the tribunal decided to transfer indictments of both accused to France.¹¹⁶ The tribunal accepts to grant referral without complications contrary to the request made by the prosecutor for the cases involving Rwanda. Those cases whose transfer has been denied include the prosecutor requests to transfer various defendants like Munyakazi, Gaspard Kanyarukiga and Hategekimana Ildelfonse to Rwanda, all rejected by Trial Chamber III of the ICTR.¹¹⁷

In the case involving the transfer of Munyakazi, the Trial chamber advanced certain reasons to refuse the referral of the accused to Rwanda. Firstly, the trial chamber was not convinced that the accused person would be prosecuted by an independent court and that the accused would not be subjected to a fair trial. The court justification was based on the composition of the bench of judges in the legal system of Rwanda formed by a single judge.¹¹⁸ The court asserted that, conducts amounting international crimes the suspect was alleged having committed, should not be tried under the bench of a

¹¹⁵ *Prosecutor v Michel Bagaragaza*, Case No. ICTR/98/44/AR11 bis (Appeals Chamber), Decision on Rule 11bis Appeal, 30 August, 2006, Para 16.

¹¹⁶ *Prosecutor v Bucyibaruta*, Case No. ICTR-2005-85-I (Trial Chamber), Decision on the Prosecutor's Request for Referral of the Indictment against Bucyibaruta to the French authorities, 20 November 2007. 'Ordered that the *Prosecutor V. Bucyibaruta* be referred to the French authorities, charging for them to seize immediately the competent court in their State'; *Prosecutor v Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, (Trial Chamber), decision on the Prosecutor's Request for Referral of the Indictment against Wenceslas Munyeshyaka to the French authorities, 20 November 2007, 'Orders that the case *Prosecutor v Munyeshyaka* be referred to the French authorities, to allow them immediately to seize the competent court in their state.'

¹¹⁷ *Prosecutor v Munyakazi*, Case No. ICTR/97/36/11bis, (Trial Chamber), Decision on the prosecutor's request to refer the case to the Republic of Rwanda, 28 May 2008, para.67: 'The chamber is not satisfied that the accused, if transferred to Rwanda at the time, would receive a fair trial'. See also *Prosecutor V. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the prosecutor's request to refer the case to the Republic of Rwanda, 6 June 2008, par.104; see also *Prosecutor v Ildelphonse Hategekimana*, Case No. ICTR-00-55B-I (Trial Chamber), Decision on the prosecutor's request to refer the case to the Republic of Rwanda.

¹¹⁸ *Prosecutor v Munyakazi* supra at para 40.

single judge and, doing so would be a peril of violation of the accused rights to be tried by an independent tribunal.¹¹⁹

The second reason for the court in this case, was that the Trial Chamber was not convinced with the adequacy of the penalty structure in the Rwandan criminal law. It held that, the transfer cannot be granted in order to avoid that the sentence of life imprisonment in isolation be imposed on the accused person. This sentence was provided in place of the death penalty which was abolished and replaced. In the reasoning of the court, it believed that such punishment was applicable to the accused transferred from ICTR also.¹²⁰ A decision which was challenged by the prosecutor showing that the punishment of life imprisonment in isolation was not applicable to transferees, because they have their own special regime governing them which provided as maximum sentence the life imprisonment. However, the court quashed that argument and ruled that it was not satisfied that such kind of sentence would not be imposed to the accused.

The last reason advanced by the Court in this case, was the issue of right to a fair trial of the accused. The Trial Chamber was not convinced that the accused would be able to secure attendance of witnesses and examine defence witnesses as easily as the prosecutor would. Thus the court ruled that the fair trial could not be promised in Rwanda.¹²¹ The outcome of this case at appeal was that, the Appeals Chamber concurred with the Trial Chamber's decision on certain points such as the penalty structure and witness protection.¹²² The Appeals Chamber changed the impugned decision on the issue regarding the independence of the judiciary whereby it held that the fair trial is not determined by the existence of more than one judge.¹²³

¹¹⁹ *Prosecutor v Munyakazi* supra at para 49.

¹²⁰ *Prosecutor v Munyakazi* supra at para 32.

¹²¹ *Prosecutor v Munyakazi* supra at para 66.

¹²² *Prosecutor v Yussufu Munyakazi* Decision on the Prosecutor's Appeal Against Decision on Referral under Rule 11 bis (08th October 2008).

¹²³ *Prosecutor v Yussufu Munyakazi*, supra Para 26.

One can say that the common denominator tribunal reasoning of certain transfers being refused to Rwanda; was that the court was not satisfied that the accused persons will receive a fair trial and that the life imprisonment with isolation would not be applied.¹²⁴

The other case relating to a request by Rwanda is that of *Prosecutor v Gatete Jean Baptiste*.¹²⁵ In this case, the Trial Chamber clarified as in other cases on referrals that its role in such case is to examine whether the destination State has a legal framework which criminalizes conduct the accused is alleged being committed, and also the adequacy of penalty structure.¹²⁶

Concerning the issue of a fair trial, the Trial chamber seemed to contradict its first considerations in the previous case, on whether this right would be ensured by Rwandan courts. It affirmed the fact that the Rwandan legal framework reflects the ICTR Statute, specifically article 20 governing the rights of the accused.¹²⁷ However, the Chamber questioned on its practicability and held that the law itself is not sufficient to authorize referral, but other information regarding the practice is needed.¹²⁸ The Chamber recognized that there was a lack of practice in that regard as, there was no any similar case transferred to Rwanda to serve as an example.¹²⁹ This argument seems to be not convincing as it is seen like to pre- judge the matter and it is based on presumption rather than tangible facts.

With regard to the protection of defence witnesses, the Chamber rejects the argument that the witnesses will be at risk while testifying in proceedings in transferred cases. It emphasized that there were witnesses who used to testify before the ICTR and

¹²⁴ Ibid.

¹²⁵ See *Prosecutor v Jean Baptiste Gatete* Case No. ICTR 2006-61 R11 bis Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, decided on 17th November 2008.

¹²⁶ *Prosecutor v Jean Baptiste Gatete* at para 8.

¹²⁷ *Prosecutor v Jean Baptiste Gatete* at para 31.

¹²⁸ Ibid.

¹²⁹ *Prosecutor v Jean Baptiste Gatete* supra at para 32.

back in their respective country.¹³⁰ So this could not be a threat to defence witnesses to bar the referral as the court correctly demonstrates that there is no any judicial system in the world that can promise witnesses absolute protection.¹³¹

3.2.4. Analysis of cases

The issues arising from the above discussed ‘transferral cases’, shows how various judges are unclear in interpreting the criteria governing referrals and their role while deciding referrals. The first problem was to know whether the national legal framework which complies with Rule 11 *bis* is sufficient to guarantee the accused a fair trial or not. This discussion stems from the fact that the prosecutor’s opinion was that the court’s duty was only to determine that available laws applicable to the accused in Rwanda would ensure a fair trial or not.¹³² The Chamber disagreed with the prosecutor’s view by arguing that its task is to make sure that the accused will receive a fair trial by looking beyond legislation.¹³³ It shows clearly that there is a paradigm between the ICTR judges on what tasks the court is required to perform on basis of Rule 11 *bis*.

The above situation seems to be applied only to referrals to Rwanda but not for other states where these complications have never been imposed. For example, in the transfer of cases of *Bagaragaza* to the Netherland and those involving Munyeshyaka and Bucyibaruta to France, the Chamber was satisfied with requirements of Rule 11 *bis* only. It looked at the legal guarantees available in France and Netherland’s legislation to allow referrals.¹³⁴ This is contrary to the judge’s reasoning for cases to be referred to Rwanda, whereby the practice was required on top of legislation.¹³⁵

¹³⁰ *Prosecutor v Jean Baptiste Gatete* para 60.

¹³¹ *Ibid.*

¹³² *Prosecutor v Jean Baptiste Gatete* para 95.

¹³³ *Prosecutor v Jean Baptiste Gatete* at para 35.

¹³⁴ *Prosecutor v Laurent Bucyibaruta* supra and *Prosecutor v Munyeshyaka* supra.

¹³⁵ *Prosecutor v Ildephonse Hategekimana* supra at para 34.

Secondly, on the issue of witness protection, the chamber dismissed referrals to Rwanda where a lot more was required to be done, while it was satisfied that they would be protected in other countries.

3.2.5. The distribution of defendants between domestic and international jurisdictions

The interaction and distribution of defendants between national and international jurisdictions continues to raise particular concern in the exercise of competing jurisdiction in the Rwandan context. In the ICTR context, it has produced some issues which need to be looked at and solved before its completion. In this section of this thesis, I am going to inspect two major problems relating to concurrent jurisdiction that may arise after ICTR closes. The first case pertains to the unreliability of courts of ‘third- party’ states in receiving transferred cases. Secondly, I examine the problems related to ‘stratified-concurrent jurisdiction’ raised by Morris.¹³⁶

We have previously seen three situations in which the ICTR would have to affirm its primacy over domestic courts. One among them is the situation in which the national judicial system proves to be unreliable.¹³⁷ After the ICTR completes its entire work, domestic courts of various countries will continue to exercise their jurisdiction over the crime of genocide as provided in the Convention on the Prevention and Punishment of the Crime of Genocide.¹³⁸ Now at this stage of closing of ICTR, the key issue to consider is to find out what is going to occur when for example countries which had been reluctant to shield genocide suspects living on their soil continue to do so. One may wonder the future in the case the precaution measures provided by the ICTR are no more there. I think that this matter should have been taken into account in advance and provided remedy to it as it has been for other issues that occur after the closure of the

¹³⁶ Morris op cit at 371.

¹³⁷ See article 8 paragraphs 2 and 9 of the ICTR Statute supra note 1.

¹³⁸ See article 1 of the Genocide Convention supra note 35.

court specifically those pertaining to the enforcement of sentences and review proceedings. I propose that the UNSC may establish a roster of *ad litem* judges which will continue to assert the primacy in such circumstances.

The ICTR system of distribution of defendants has been according to Morris defined as a ‘stratified-concurrent jurisdiction’.¹³⁹ She illustrates that it has been an arrangement through which the international ad hoc tribunal prosecute those who bear the greatest responsibility and abandon to domestic courts the rest of the accused who are not the leaders.¹⁴⁰ Morris underlined the negative aspects of such a system by saying that this may ‘generate a divergent repercussions and potential barriers to justice’.¹⁴¹ According to her, those barriers are inter alia, the ‘anomalies of inversion’ whereby the most responsible defendants get the lenient treatment with a least harsh treatment’.¹⁴² She further goes onto exemplify how ‘stratified-concurrent jurisdiction’ is likely to cause injustices in practice just because trial in front of an international tribunal will have tendency to be more favourable for the accused defendants than would trial before domestic courts.¹⁴³

A good example that mirrors the situation is when an international tribunal will not impose the death penalty among the sentences of the tribunal while certain domestic courts still have the death penalty in their penal codes. Secondly, is the issue of the imbalance between two types of prisons where the convicted have to serve their sentences. The prisons utilised by an international tribunal in which to serve sentences imposed by it may generally present excellent conditions than the incarceration conditions for the sentences handed down by domestic courts. Thirdly, it is clear that an international tribunal would strive to guarantee to the defendants the fair trial and avoid unjustified delay of process, while domestic courts especially those struggling with issues of resources and backlogs in their system may not assure that. Finally, the accused

¹³⁹ Morris op cit at 367.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Morris op cit at 368.

¹⁴³ Ibid.

individual in domestic courts will have more ground than the accused tried in front of an international tribunal to fear bias resulting from the victor's justice or lack of independence and impartiality within the domestic judicial system.¹⁴⁴

As seen earlier whereby Rwanda has been refused in the first instance the transfer for certain trials, I believe that it should be given the opportunity to carry out the enforcement of sentences imposed by the ICTR to its citizens. It is of paramount importance to achieve national healing and reconciliation that Rwanda is looking for after the 1994 genocide. This is essential towards the national reconciliation because justice without national reconciliation is insufficient and ineffective.¹⁴⁵

In order to achieve the national reconciliation, it is crucial that the sentences of the leaders convicted by the ICTR be served on the Rwandan soil. This will help to encourage reconciliation the country needs as between the so called 'small fish' convicted at national level and the leaders who planned and incited them to commit crimes. Reconciliation between perpetrators and victims respective families would also be encouraged.

3.3. Issues affiliated to the enforcement of ICTR's judgements by national courts

The transfer of cases is a consequence of ICTR closure and is done based on the concurrent jurisdiction between that tribunal and national Courts. From that situation, there are issues that may arise in the future that need to be examined. After a case is closed before the ICTR and has come up for a conviction, the convict who have been sentenced is supposed to serve the sentence in one of the countries which have an

¹⁴⁴ Morris op cit at 369.

¹⁴⁵ Ibid.

agreement to that effect with the ICTR.¹⁴⁶ In accordance with article 26 of the ICTR statute regulating the enforcement of sentence, it is clear that the imprisonment imposed by the Court shall be served in a country nominated by the international tribunal from a list of States which have shown to the security council their desire to welcome the convicted persons.¹⁴⁷

This section will consider the issues related to the enforcement of sentences imposed by the ICTR and those that may occur after the sentence have been served, meaning after the enforcement.

3.3.1. The enforcement of sentences

In connection with the enforcement of sentences whether imposed by ICTR or domestic courts, there are three issues which occur and justify my observation in this study. These problems include inequality in terms of the enforcement of sentences, the violation by states of the agreements signed between them and the UN and the issues concerning the control of enforcement of sentences by the Security Council after the ICTR ends its functions.

3.3.1.1. Imbalance in terms sentences enforcement.

Since the sentences are imposed by ICTR, they are expected to be enforced in various countries in agreement with the tribunal. It is obvious that the issue of inequality in the enforcement is very probable to take place. This situation seems to be ineluctable as the execution of sentences has to comply with the laws of the host country.¹⁴⁸ Taking

¹⁴⁶ See article 26 of the ICTR Statute op cit.

¹⁴⁷ Metraux G *International crimes and the ad hoc tribunals* (Oxford University Press 2006) Oxford, at 359.

¹⁴⁸ See the agreement between the government of the Republic of Rwanda and the United Nations on the enforcement of sentences of the international criminal tribunal for Rwanda available online at

an example of this situation, two persons who have been convicted for similar sentences by ICTR; these individuals may be dispatched to different countries to serve their sentences. But because they are entitled to some benefit such as the parole or provisional early release, it may differ substantially just because of the applicable legislation of each country, and it may result therefore for the two individuals to serve in fact two very divergent sentences for the same crime.¹⁴⁹

It is worthwhile to mention that the disproportion of sentences for the reasons that custodial conditions will never be the same in various countries which host the enforcement of sentences handed down by ICTR. In my opinion, it is required that these remarkable gaps within the practice regarding the enforcement of sentences should be halved or diminished. At this point I would suggest that a common denominator legislation regulating enforcement of sentences should be enacted to give a solution that set free to this matter when it comes to an international tribunal to send the convicted individuals in various countries to serve their sentences. The task can be accomplished by the United Nations, which can arrange a working committee of expert to draft and include in its framework such a legal instrument in order to coordinate the practices. That legislation should provide among others the proportion of the punishment through which the commutation of sentences or provisional early release is not allowed. The United Nations should also establish the same conditions applicable to all convicted persons who serve their sentences regardless of states where their sentences are being served.

<http://www.unictr.org/Portals/0/English/Legal/Bilateral%20Agreement/English/rwanda.pdf> [Accessed on 26/11/2013].

¹⁴⁹ Article 26 of the ICTR Statute.

3.3.1.2. Issues attached to the agreement on enforcement of sentences

Before any country that shows interests to host the enforcement of sentences pronounced by ICTR, it has to enter in an agreement with the UN.¹⁵⁰ These agreements have to induce to the concerned country to be dedicated and determined to comply with certain conditions set by the UN. Therefore, should there be any violations of a provision of that agreement by the hosting; they should be subjected to sanctions or legal consequences attached to that breach. Till today no one knows in practice what should be the outcome for the state which violate the provisions set out by the UN in that regard. This is what led to believe that there is a loophole in the workings of UN when it comes to legal consequences attached to the breach of its instruments. This is what occurred in 2002 with the similar tribunal as that of Rwanda, in the case of *Goran Jelusic* convicted by ICTY, when Italy reduced his sentence.¹⁵¹ Here, the Security Council is advised to take necessary measures in advance to limit the ability of States to manipulate sentences as it is in the circumstances of any other violation of international obligation.

3.3.1.3. Issues relating to the control of enforcement of sentences

The provision regulating the enforcement of sentences handed down by ICTR stipulates that ‘imprisonment shall be served in Rwanda or any of the states on a list of states which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda’.¹⁵² The same provision indicates that such imprisonment shall be executed pursuing the legislation of the state

¹⁵⁰ See article 26 of the ICTR Statute.

¹⁵¹ See the case of *Goran Jelusic* who had been convicted and sentenced by the ICTY to 40 years of imprisonment to be served in Italy. After being sent there to serve his sentence, his sentence was reduced by the Italian judicial system to 30 years of imprisonment, for the reasons that it was the maximum sentence applicable in Italy at that period. This reduction has been done without any consultation in advance with the President of the ICTY, which is inconsistent with the ICTY Statute and Rules of the Tribunal. (See *Corte di cassazione Sez.I,5/12/02,dep.14/01/03 n 3785*).

¹⁵² Article 26 of the ICTR Statute.

concerned as highlighted above. This is done while preserving the important role to be played by the ICTR in enforcing sentences.¹⁵³

Regarding the pardon and commutation of sentences, Article 27 of the ICTR Statutes stipulates that according to the applicable law of the hosting country, the incarcerated person is entitled to apply for pardon or commutation of sentence by another sentence. This provision reaffirms that the state in question is obliged to inform the International Tribunal for Rwanda accordingly. It is further highlighted that the pardon or commutation of a sentence by another sentence is granted only after the President of the ICTR has exchanged the views with the judges of the Court and decided that the grant is in the interests of justice and the general principles of law.¹⁵⁴

Thus, from the wording of these provisions, it can be seen that the closure of the ICTR is going to generate a legal vacuum specifically regarding the legal issues pertaining to the enforcement of sentences. Ordinarily these are the issues for which the ICTR used to serve as a source of information or a model for domestic enforcement agencies. Although the resolution establishing the completion mechanism has suggested a solution to those issues; it seems that in practice the remedies proposed to that problem are still inefficient and legally flawed. The decision that has been taken in regard to this matter is that after the permanent closure of ICTR, the supervising role pertaining to the enforcement of sentences as provided by the ICTR statute (articles 26 -27) shall be conducted by Security Council.¹⁵⁵

Nevertheless it gives impression that this type of strategy is difficult in practice since it takes time based on how demanding it is to call a meeting of the Security

¹⁵³ Ibid.

¹⁵⁴ See Article 27 of the ICTR Statute supra note 1.

¹⁵⁵ See the RPE of the ICTR supra note 54. Its Rule 104 states that: 'All Sentences of imprisonment shall be served under the supervision of the tribunal or a body designated by it'. The designated body here seems to be the UNSC as the agreement in terms of sentences enforcement is signed by the UNSC as a body of UN but through the tribunal. This makes us to conclude that after the tribunal closes its doors the supervision will remain in the hands of UNSC.

Council. Looking at how the meetings of the UNSC are convened, it appears that even in its regular meetings require a long and complex process to seize the council.¹⁵⁶ This process requires first the communication to all member States of the UNSC and organs of the United Nations and of course necessitates that the agenda be adopted by way of voting.¹⁵⁷ In view of the above and the workload on the table of UNSC, it seems that Security Council members are presumably to attribute a very minimal interest to meetings whose a list of items to be discussed relates to the matter of deciding on pardon or commutation of sentence of an individual or simply not vote for the matter brought to their attention. Another challenge is that, normally the process of deciding on pardon or commutation of sentences is a judicial process; it is a wonder how the UNSC will have the power to take decision on such matter as it is not a judicial body. Technically it is another flaw in the procedure.

In my understanding, the approach taken by the UNSC concerning the ICTR was not suitable in this issue. I would rather suggest that this task should be given to the hosting states which have signed the enforcement of sentences of the ICTR with the UN. These countries need to be given entire emancipation to conduct the enforcement of the sentences and the power to commute them after the Court complete permanently its activities. On top of that, the Security Council must elaborate safeguards or restrictions through which the concerned countries would not surpass. Depending to these restrictions, the Security Council's function would be also discharged instead of being convened on whatever occasions there a sole case involving pardon or commutation of sentences to resolve.

¹⁵⁶ See the provisional rules of procedures of the security council of the United Nations available online at <http://www.un.org/en/sc/about/rules/chapter2.shtml> [Accessed on 27/11/2013]. If one analyses these provisional rules of procedures of the Security Council, chapter one regulating the meetings articles 1 to 5 and chapter two regulating the agenda articles 6 to 12, it shows how each adoption of agenda must be communicated to all states members and organs of the United Nations before their adoption. This long process may hamper the judicial process in the case the adoption is not reached by the UNSC.

¹⁵⁷ See article 9 of the provisional rules of procedures of the UNSC.

Such restrictions should describe the circumstances under which a convicted person cannot be subjected to pardon or the commutation of sentences and dictate the minimum of sentences under which the commutation cannot be applicable. On top of these limitations, the countries should be given a leeway to apply their respective laws in this regard as it is the situations where cases are tried in their own courts. This will be less undermining to the sovereignty of states in a such a way that domestic authorities will perform that task without restrictions for the issues they have voluntarily endorsed.

3.3.2. Issues arising after the enforcement: the review procedures.

Among other issues stemming from the situation of concurrent jurisdiction of ICTR and national courts is the issue of review procedure. It is among things subjected to the approval of the Security Council of the United Nations after the completion of the ICTR. The principles of criminal law determine that the criminal decisions that are not subjected to appeal and other review procedures are presumed to represent the expression of the judicial truth. The international principle of '*res judicata pro veritate habetur*' whose purpose and legal certainty is the essence that expresses this presumption.¹⁵⁸ This principle entails that after all judicial remedy, a judgement rendered by a tribunal is considered as the law itself. However, it may be that a decision has the force of '*res judicata*' is vitiated by an error of fact or law, when all avenues of appeal have been exhausted. Then revision can be defined as an extraordinary remedy for challenging criminal judgments that are definitive in principle. Its objective is to cancel a decision that has been reputed final. Review therefore bears a direct attack on the authority of the case decided.¹⁵⁹ It aims to correct a miscarriage of justice which would be unfair to maintain.¹⁶⁰ The court may have erred in acquitting a guilty or in condemning an innocent individual. Applying this process to the current situation

¹⁵⁸ Theofanis R 'The doctrine of Res Judicata in International Criminal Law' *International Criminal Law Review*, volume 3, (2003) at 196.

¹⁵⁹ Stefani G, Levasseur et al *Procédure pénale* Dalloz, Paris, 17ème édition, (2000) at 888 para 960.

¹⁶⁰ Ibid.

whereby the ICTR is closing and forecast on how this process will be in the future, I think that there will be a negative aspect in practice.

As mentioned earlier for the procedures relating to commutation of sentences and pardon, the consequences seem to be shared and dangerous for the review procedure. This is evidenced by the working of Security Council of the United Nations itself. It appears to be an impediment to the delivery of justice without undue delays because of its system of making decision sometimes known as to go slower and more rigid with the possibility of blockage for reasons of the veto system¹⁶¹ Furthermore, the workings within the Security Council are known to be motivated by political reasons which can constitute an obstacle to the course of process. Another justification could be that the application for review is open to the Court which issued the contested decision and none the other.¹⁶² With all these reasons I wonder how the action of review will be lodged, examined and decided as long as the tribunal that decided the initial case has closed. Lastly, it is clear that the significant delay in this procedure may arise at any moment in the future because of the reasons highlighted above. By way of solution, I argue that this kind of privilege accorded to the Security Council to approve review proceeding should be circumvented and be given to the judicial body. This will avoid damages resulting from delays for the benefit of the convicted person who may be innocent.

3.4. Conclusion

This chapter sought to analyse the legal issues arising from the competing jurisdiction between ICTR and national Courts in the context of Rwandan genocide. It has focused on the aspects respecting the Rwandan situation and other countries where suspects can be tried and serve their sentences. Concerning those issues, proper attention has been paid to the prosecution of transferred cases in Rwanda and other countries as

¹⁶¹ See article 9 of the provisional rules of procedures of the UNSC. See also Fasulo L, An insider `s guide to the United Nations, 2nd Edition, February (2004) at 156.

¹⁶² See article 25 and 26 of the ICTR Statute.

well. It shows that there is a noteworthy contradiction with regard to cases to be referred to Rwanda vis à vis to those referred to other countries. Regarding the 'post closure issues', its findings indicate that the issues of enforcement of sentences imposed by ICTR require reconsideration by the UNSC because of the imperfections within the Security Council functioning when it comes to adopt a resolution. It shows that the process is undemocratic and it may lead to the prevention of adoption of the council resolution. Preferably, the chapter finds that the task ahead after ICTR completion should be given to a judicial body of the domestic courts concerned.

CHAPTER 4: LEGAL ISSUES INTRINSIC TO THE RWANDAN NATIONAL JUSTICE SYSTEM.

4.1. Introduction

Looking at the particularity of the criminal justice system of Rwanda in regard to the prosecution of the crime of genocide, a few crucial issues arise. This is due to the dualistic nature of national jurisdiction in regard to hearing of genocide matters in Rwanda, whereby there is the existence of conventional courts together with Gacaca courts, both of which deal with the crime of genocide.

Two types of issues will be examined in this chapter. The first are issues related to the intrinsic structure of Gacaca courts and the second are those associated with the relationship between Gacaca courts and conventional courts. It is important to recall that Gacaca courts closed their doors in 2012 but most of the cases they decided on are recurring in formal courts. These cases are often brought by the defendants who were not happy with the judgements rendered by Gacaca courts and opt to apply for review of judgements. Before I go any further, it is worthwhile to provide a brief overview of the Rwandan judicial system.

4.2. A Brief Overview of the Rwandan judicial system

Rwanda has two forms of justice.¹⁶³ This system comprised of conventional courts and Gacaca courts.¹⁶⁴ For the purpose of this dissertation the concept ‘conventional’ or ‘formal’ courts points to those courts established on the basis of conventional procedural rules imposed by human rights standards and known as a component of the judiciary system. In contrast, Gacaca courts are ‘a combination of a

¹⁶³ This overview has been made from the relevant provisions of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date, the Organic Law No 01/2004 of 29/01/2004 on the organization, functioning and competence of the Supreme Court and the Organic Law No 51/2008 of 9/9/2008 on the organization, functioning and competence of courts.

¹⁶⁴ See chapter 5 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date.

retributive and restorative justice system’¹⁶⁵ and not considered on the organization chart of the judiciary but under the executive arm of government.

Gacaca courts constitute part of the community justice system established in 2001. The judiciary of Rwanda encompass also military courts and commercial courts as classified within ‘formal Courts’.¹⁶⁶ Thus, the formal courts of the Rwandan judiciary encompass ‘ordinary’ courts and tribunals competent to try civilians and military courts competent to try offences committed by military personnel and their civilian accomplices. It is important to note that the military courts are exclusively competent in criminal matters only while ordinary courts are competent for both civil and criminal cases. In the situation whereby the criminal conducts are committed by civilians without the military accomplices, they are entitled to be held responsible by common courts. The general overview of Rwandan courts is being described below for a better understanding of the Rwandan judiciary structure.

Both the Rwandan Constitution and the organic law determine the organization, functions and jurisdiction of courts and prescribe the classification of courts in Rwanda.¹⁶⁷ Their provisions stipulate that there are established ordinary and specialized courts. The first category of ordinary courts includes the Supreme Court which is the highest Court in the country, the High Court, Intermediate Courts and Primary Courts. The second category consists of specialized courts, such as Gacaca courts under the executive power organically, Military Courts, Commercial Courts and others that may be determined by an organic law.¹⁶⁸

¹⁶⁵ Jennifer op cit at 3.

¹⁶⁶ In Rwanda there are two military courts: the Military Tribunal (first instance) and Military High Court (Appeal Court).

¹⁶⁷ See article 143 of the Constitution of the Republic of Rwanda op cit. See also article 2 of the organic law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts.

¹⁶⁸ Ibid.

4.3. Issues related to Gacaca courts structure.

This part of the dissertation will focus on the rationale behind the creation of Gacaca courts, their objectives, their functioning in practice and the assessment.

4.3.1. Rationale for establishing Gacaca Court

After the genocide in 1994, trials to bring offenders to book at national and international level were conducted. All these trials were unsuccessful in dealing efficiently with the enormous number of suspects that were waiting to face justice.¹⁶⁹ After the genocide from the year 1995 to 2000 the *specialised chambers* that were created within the formal courts of Rwanda prosecuted only six thousand accused for genocide out of 120 000 incarcerated suspects.¹⁷⁰ At this speed, it was realised that the process would take many years to prosecute all genocide cases. This concern which was becoming more crucial led to the creation of Gacaca mechanism.¹⁷¹ It must be noted that many suspects who were at large that time were later on arrested and tried. At the time of closure Gacaca courts had tried about 2 000 000 people.¹⁷² Gacaca courts were set up as a way of dealing with the issue of backlog of genocide trials but also to serve as the best way to achieve reconciliation because it was designed after the model of Rwandan traditional system of conflict resolution. During the set-up of Gacaca courts, the main objectives were assigned to that system. These objectives aimed to:

- i. establish the truth on genocide and eradicate the culture of impunity;
- ii. to accelerate the genocide trials which involved a high number of suspects;

¹⁶⁹ Constitution of Rwanda.

¹⁷⁰ Cecile Aptel op cit at 329.

¹⁷¹ Ibid.

¹⁷² See the interview of BBC with Rwandan government officials available online at <http://www.bbc.com/news/world-africa-18490348>. They said that about two million people went through the process of Gacaca.

- iii. to unite and reconcile Rwandans after the atrocities by involving them in solving their own problems.

4.3.1.1. Initiate the truth on genocide

The establishment of the Gacaca courts has served as a best opportunity to achieve the truth about what happened in genocide. The law number 40/2000 of 26/01/2001 establishing these courts, stipulated that ‘[c]onsidering that such offences were publicly committed before the eyes of the population, which thus must recount the facts, disclose the truth...’¹⁷³ This law requires ordinary citizens to participate and tell the truth about who organized, perpetrated the crimes and how they were capable to do so. This process of telling the truth helps to prevent the recurrence of future atrocities.¹⁷⁴

4.3.1.2. Suppression of a culture of impunity

For a long time, from the time of independence to the period of the 1994 Tutsi genocide, the country was characterized by recurrent ethnic violence. There were numerous killings in the years 1959, 1962, 1973 and in the 1990 which all led to the 1994 genocide. Most of these atrocities went unpunished, as none of the perpetrators were ever been punished for their deeds but they were granted amnesty. This illustrates how perpetrators of atrocities were exempted from punishment for a long time in the Rwandan society that even during the 1994 genocide nobody was being held liable for his conducts. Removing that culture of impunity was one of the Gacaca objectives.

¹⁷³ See the preamble of the Law No 40/2000 of 26/01/2001 setting up Gacaca jurisdictions and organizing prosecution for offences constituting the crime of genocide or crimes against humanity committed between October, 1, 1990 and December 31, 1994.

¹⁷⁴ Clark P *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, Cambridge (2010) at 34.

4.3.1.3. Hasten the genocide trials

One of the key aims of establishing these courts was to accelerate the proceedings of genocide trials. With the intention to address the issue of backlog of cases and avoiding to fall in the ‘justice delayed, justice denied’ trap, a large number of Gacaca courts were created all over the country as an easy way to deal with many cases in a reasonable time. It is in that regard that law number 16/2004 of 19/06/2004 put in place an overall number of 12 103 courts among whom 9 013 were Gacaca courts of cells, 1 545 Gacaca courts at Sectors level and 1 545 courts to deal with cases of Appeal.¹⁷⁵

4.3.1.4. Unity and reconciliation of Rwandans

Gacaca as a type of restorative justice which strives to achieve reconciliation requires healing, justice, truth and reparation of harm.¹⁷⁶ With these courts, it might be said that all these goals are possible. For the three last goals, it is very easy to draw directly from the functioning of Gacaca courts, but for unity and reconciliation, it is required to describe how these Courts contributed to the healing of the Rwandan community. Gacaca Courts have presented an advantage for both the victims and the accused person. For the victims, Gacaca process has enabled them to be aware where the remains of their relatives were thrown and be given a chance to bury them with great respect. The system of ‘guilty plea’ has contributed somehow to the mental healing of the victims. Regarding the accused persons who plead guilty, they were granted considerable reduction of sentence. In that way the accused is then discharged from shame and self-accusation just because he feel he has redressed his offence through the

¹⁷⁵ See the law No 16/2004 of 19/06/2004 establishing the organization, competence and functioning of Gacaca courts, in J.O, No Special of 19/06 2004.

¹⁷⁶ See ‘Reconciliation after violent conflict’ chap. 2, 3 and ‘Truth, justice and reparations: challenges for democracy and social coexistence’ in the *IDEA Handbook* available at <http://www.idea.int> [Accessed on 21/02/2014].

punishment imposed and that he was not subjected to the severe penalty that he deserved.

4.3.1.5. Promote the population in solving their own problem

The fact that the atrocities committed in Rwanda, have been perpetrated at the eyesight of the entire international community without any intervention, taught the Rwandans a lesson. They were saddened that they were abandoned by the international community during the genocide. To find their own way of resolving problems, Rwandans established Gacaca as a system through which they wanted to avoid waiting for the same international community to find solutions for the problems caused by genocide.

4.4. Gacaca Courts functioning in practice.

Gacaca Courts systems were operating throughout the entire territory of Rwanda in various localities. The system operated at three levels: at the cell level, at the sector level and the court of Appeal. These courts are presided over by judges called *Inyangamugayo*.¹⁷⁷ These are the laymen chosen among the population of Rwanda on the consideration of their reputation as reliable and trustworthy persons.

Gacaca sessions were conducted in public and it was a civic obligation for every citizen to participate in proceedings. In this regard, each citizen had the right to involve oneself by posing questions, charging or defending the accused person. It is important to note that the accused was not assisted by a defence counsel.

¹⁷⁷ The term *Inyangamugayo* means trustworthy and honest people in Kinyarwanda, Rwanda national language.

The system of Gacaca was based on the defendant's classification and plea agreement arrangement.¹⁷⁸ The category of accused corresponded with the competence of the courts whereby persons set in the first category were tried by the formal courts, while lesser categories were tried by the Gacaca courts. In a categorization, if a person placed in the category of a civilian he/she will be prosecuted before ordinary Courts and by military tribunals if he/she was a soldier at any rank level.

4.5. The relationship between Gacaca courts and conventional courts in Rwanda.

The connection between the Gacaca courts and national formal courts has been divided in two ways. The relationship in regard of transfers of cases from Gacaca to formal courts and conversely.

4.5.1.1. Cases from Gacaca courts to formal courts: categorization.

The classification of genocide suspects was done depending on the level of culpability and the position the suspect occupied at the time of atrocities. At the beginning of the Gacaca process, suspects were classified into four categories. Later on they were reduced to three.

According to the Organic Law no 08/96 of 30/08/1996, the primary category included leaders, planners and organizers of the genocide and perpetrators of heinous murder or sexual torture.¹⁷⁹ Category two encompassed all perpetrators who committed homicides, while perpetrators of grave assaults against the person not emanating in death

¹⁷⁸ See the law establishing Gacaca courts op cit.

¹⁷⁹ Article 2 of the Organic Law No 08/96 of 30/08/1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990 in JO No17 of 1/9/1996.

were in category three. And perpetrators who committed property crimes such as pillaging and others in relation with genocide were arranged in category four.¹⁸⁰

Afterwards, categories two and three were combined and because of consecutive legislations on Gacaca which follows, the content and classification of categories was reviewed. In the assessment of categories, certain acts were moved from one category to another and acts which were not defined by foregoing legislations were instituted and classified. An example is a case that involved dehumanising acts on dead bodies which was in category one under the Organic Law No 16/2004 of 19/06/2004.¹⁸¹

It is clear that from various amendments of laws which occurred at the time proceedings were on-going, certain cases were moved from Gacaca to formal Courts. This resulted from the mistakes initially made in categorization of suspects in the wrong category, through which new information discovered revealed that the case deserved to be transferred from Gacaca to formal courts.

4.5.1.2. Cases from formal national courts to Gacaca courts.

At the time Gacaca courts were completing all the cases falling in their competence, they also assumed control over the cases that were outstanding in formal Courts. All these cases that remained unsettled within formal courts by 19 May 2008 were transferred over to Gacaca courts.

Among the cases transferred from formal courts to Gacaca, is the case of Major General *Laurent Munyakazi*¹⁸² transferred from Supreme Court. This case is worthwhile

¹⁸⁰ Ibid.

¹⁸¹ See article 5 of Organic Law No16/2004 op cit.

¹⁸² The case file No RP/Gén/0002/05; TM/Gén/0002/05; RPA/Gén/0001/07/HCM and RPAA/Gén/0008/07/CS, case which proceedings started in War Council, Military Tribunal, Military High Court, Supreme Court and closed finally in Gacaca courts.

mentioning because its proceedings has been circulated in various formal courts such as Military Court, the Supreme Court and finally ended up in a Gacaca Court.

This case was initially opened by the general military prosecution in 1997 under a military court case No RP/Gén/0002/05/TM. The case was decided on 16/11/2006 and Munyakazi was charged and convicted him with life imprisonment. Both the accused and the prosecution were not satisfied with the judgement and appealed to the Military High Court on 24/11/2006 and 29/11/2006 respectively and the judgement of Military High Court was passed on 27/04/2007 and confirmed the impugned decision. On 03/05/2007 the accused exercised his last right of appeal to the Supreme Court (Case no. RPAA/Gén/0008/07/CS), but on 11/02/2008 the court decided that the appeal would not be accepted because of its lack of competence to try the case.¹⁸³ The Supreme Court declared itself incompetent on the grounds that the accused was not in category one as a person who was among planners and organisers of genocide neither a person who was at national leadership level.¹⁸⁴ Thus, it decided that the case be transmitted to Gacaca court of Rugenge Sector in Kigali City on 10/10/2009. The accused was convicted by Gacaca court to life imprisonment with perpetual confinement on 23/10/2009.

The case delayed in formal Courts and it took almost ten years but since it was transferred in Gacaca by Supreme Court, it has been tried and closed in only ten days. This delay is due basically to the judicial reform of 2004 which has resulted in numerous postponements of hearings just because there was unavailability of defence lawyers. This illustrates how various human rights of the accused may obstruct each other. In the situation of Rwanda, the right to be assisted by a defence lawyer may in some circumstances become an impediment to the right to be judged in a reasonable time. In

¹⁸³ See *Prosecutor v Major General Laurent Munyakazi*, case No RPAA 0008/Gén/07/CS of 17 May 2009 at paras 30-36.

¹⁸⁴ See articles 1 and 9 of the organic law N° 13/2008 of 19/05/2007 modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994 as modified and complemented to date

this situation, whereby there are two conflicting rights, it is necessary to estimate and consider which of both rights is more important.

4.6. Assessment of Gacaca system.

Before going further with review of specific criticisms towards Gacaca system, it is first and foremost to make my general assessment of the system drawn from the practice. There are certain aspects of its features which are likely to result in a violation of human rights. For example, cases where the accused does not merit being in the first category but is put in that category by mistake, the consequences to the accused were to lost the right to the reduction of punishment connected to the guilty plea.¹⁸⁵

The fact that the legislation regulating Gacaca courts has been amended on numerous occasions with the purpose to improve its workings, one can say that it may be an origin of human rights violations for some people pertaining to inequality of treatment amongst the accused persons. This is due to six various laws which have been applied to Gacaca Courts from the beginning to the date of their closure.¹⁸⁶

Every amendment of the previous law was made with the intention to improve the loopholes discovered through the implementation of that law in practice. When the new legislation came into force, certain cases were already decided and that new law could not apply to them. In general, the result of the new law was good but it created disadvantages at the individual level because some people suffered under the previous law.

¹⁸⁵ According to the article 56 of the Organic Law No 40/2000 of 26/01/2001 setting up gacaca jurisdictions and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, the persons whose criminal acts or criminal participation place in the first category do not enjoy penalty commutation.

¹⁸⁶ See the Organic Law No 08/96 of 30/08/1996 ; Organic Law No 40/2000 of 26/01/2001; Organic Law No 16/2004 of 19/06/2004; Organic Law No 10/2007 of 01/03/2007 and the Organic Law No 13/2008 of 19/05/2008. All these laws regulating Gacaca courts were amended numerous times.

Besides these considerations, three main criticisms have been generally put forward against Gacaca courts:

- i. the fact that the accused persons do not have a defence counsel;
- ii. the judges who are laymen and
- iii. the lack of independence of Gacaca courts.

4.7. Shortcomings of Gacaca Courts

4.7.1. Right to be assisted by a defence counsel

As highlighted earlier in this dissertation the right to defence counsel in the circumstances of genocide cases tried by Gacaca Courts appears to be disproportionate with the right to be tried within a reasonable time. According to the principle of equality before the law, all the accused persons should enjoy the right of defence. Thus, this right should not be examined at the individual level. In the context of Rwanda, considering the proportion between the number of defence lawyers and the accused persons awaiting the trial in need to be assisted, it was impossible to provide that right to all the accused. That is why the government opted to balance between this right and the right to be tried in a reasonable time as a solution.

In acting in the same way, the right to be tried in a reasonable time appears to prevail. To be able to know if making the balance between the two rights is allowed; scholars like Clayton and Tomlinson concludes that the right to defence counsel is not absolute. They argue that the right of everyone under Article 6(3) (c) of the European convention on Human Rights to be effectively defended by a lawyer ... is one of the

fundamental features of a fair trial.’¹⁸⁷ The problem is that this provision does not provide an absolute right for an accused person to choose between obtaining a legal counsel and defending oneself but it does prohibit a state from forcing a person to defend himself in person.¹⁸⁸ In this case of the Gacaca process it cannot be said that the government of Rwanda has forced the accused persons to defend themselves. It would have been the case only if there was another alternative for them to obtain defence counsel. Thus that alternative was not present to say that they were denied their right.

4.7.2. Gacaca courts independence and impartiality

Among the precondition to a sound justice system the right to be tried by an independent and impartial court must be considered. It is so essential that the Human Rights Committee (HRC) has recognized it as a ‘universal right that may suffer no exception’.¹⁸⁹ This right to be adjudicated by an impartial court signifies that judges assigned to that case should have no interest in that case and do not have pre-determined opinions.¹⁹⁰ According to the HRC, impartiality implies that ‘judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties to the case.’¹⁹¹

Among the criticisms against Gacaca courts, is the allegation that these courts were less independent than other Courts. This is said in light of the background and status of the *inyangamugayo*. Since the presiding officer is a layman it is argued that

¹⁸⁷ Clayton R and Tomlinson H *The law of human rights*, Oxford University Press, Oxford (2000) at 666. See also *Pakelli v Germany* (1983) 6 EHRR 1.

¹⁸⁸ Ibid.

¹⁸⁹ *González del Río v Peru* Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992) at para 20.

¹⁹⁰ Amnesty International Fair Trial Manual available at http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_a.htm#1 [Accessed on 29/1/2014].

¹⁹¹ *Karttunen v Finland*, (387/1989), 23 October 1992, Report of the HRC, vol.II, (A/48/40), 1993, at 120, para 7.2 as quoted in Amnesty International Fair trial Rights Manual: http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_a.htm#1 [Accessed 29/01/2014].

they are unprofessional which leads these courts to be more easily subjected to pressure than other courts.¹⁹²

I disagree with this position because as the trials were conducted publicly, these unprofessional judges were on permanent public inspection and monitoring which could be a safeguard. But I don't deny that it can happen that some *inyangamugayo* go awry however this may occur in any other court as to err is human. It has been decided that 'independence refers to independence of the executive power and also towards litigants parties'.¹⁹³ That is why in determining whether a tribunal can be considered to be independent; proper attention should be paid to factors such as 'the manner of appointment of members, their term of office and the presence of guarantees against outside pressures'.¹⁹⁴ In this regard, there have been many hesitations about Gacaca independence because organically, it is placed under the executive power. However, such a perception of independence appropriate to classic concept of separation of powers cannot be applicable to Gacaca. This is because the courts have been labelled as a popular justice where members of the three powers work hand in hand as belonging to a common power.

4.7.3. Unprofessional judges.

Concerning the objections towards the lack of professionalism of Gacaca judges, I do not believe that this is a matter of serious concern. There may be isolated cases whereby a problem might be found; however in most cases there were enough safeguards as the sessions were conducted publically and every participant has the right to rectify anything going wrong. It is important to emphasize that in a popular justice system as it is with the case of Gacaca, the population acts at the same time as judges,

¹⁹² Cecile Aptel, op cit at 331.

¹⁹³ *Ringelsen v Austria* (No1) (1971) 1 EHRR 455 para 95.

¹⁹⁴ *Bryan v United kingdom* (1995) 21 EHRR 342 para 37 noted (1996) EHRLR 184.

prosecutors and defence counsels.¹⁹⁵ Thus, the pressure from outside or any kind of influence which could have happened was dealt and detected easily by the public.

4.8. Analysis of issues arising from the relationship between Gacaca courts and formal courts

As both Courts were handling the same cases on the basis of concurrent jurisdiction, there was no a remedy established in case of conflicts of jurisdiction that may arises between the two courts. The lack of that clarity of which court's decision which might prevail as between ordinary courts and Gacaca Courts created problems in cases decided by Gacaca. The law terminating Gacaca does not provided a viable solution to the pending cases that were under Gacaca jurisdiction and others which may rise after. This includes for example cases subjected to appeal and review proceedings. The law in question stipulates that only cases tried in absentia will qualify for review and appeal. This provision is not based on any legal consideration and violates the rights of certain litigants such as rights to appeal and review of trial, both alternatives set forth in Rwandan legislation. Thus, based on the principles enshrined in Rwandan legislation, the opportunity to appeal or review should be given to all instead of those tried in absentia only.

4.9. Conclusion

This chapter began with a description of Gacaca Courts and how they operated in practice. This was a particular form of dispute resolution system established after the genocide. The aim was to expedite genocide cases due to the high volume of genocide trial backlogs. The chapter has shown how these courts have operated parallel to ordinary courts over the crime of genocide on the basis of concurrent jurisdiction. Thus,

¹⁹⁵ Clark Phil op cit at 132.

the peculiarity of the Rwandan situation and its judicial system in respect of the genocide trials raised difficult issues. These include, *inter alia*, the question of increasing of application for review of genocide trials tried by Gacaca in ordinary courts, a fact that cases are far from being closed. This is caused by the fact that the law terminating Gacaca courts seems to give limited factors through which a case decided by Gacaca Courts may be subjected for review under pretext of preventing massive trial recurrence. These rights have been accorded to those convicted in absentia instead of being given to all litigants without discrimination. The chapter also dealt with the issues arising from laws on Gacaca, especially the way the categorization was made, in practice; it has been observed an inequality based on treatment among people placed in various categories. Finally, a thorough analysis was conducted to demonstrate that despite the work accomplished by these Courts, the exit mechanism to deal with post closure is not accurate enough to find an effective solution. It applies to certain cases and left out others which violates the rights recognized by national legislations of Rwanda and international human rights instruments as well. Consequently, the government must give a leeway to all potential litigants who wish to continue exercise their rights to do so.

CHAPTER 5: GENERAL CONCLUSION.

5.1. General summary

This dissertation has sought to the debate issues surrounding the application of competing jurisdiction. The study concentrated on the principle of concurrent domestic and international jurisdiction as applied in Rwanda. The paper has shown that the application of the principle includes two legal structures. One at domestic level and another at the international level, both interacting through specific relationships. The relationship between the national and international jurisdiction on one hand and among national jurisdictions on the other hand has some inherent problems whose shape varies with a particular context. In the context of my study, two problems seemed to be more relevant to deserve my analysis: the distribution of defendants among national and international jurisdictions and the transfer of suspects from the ICTR to domestic jurisdictions. About the transfer of the accused persons from the ICTR, I saw challenges in cases to be transferred to Rwanda. My view was that transfer to Rwanda should be allowed to the fullest as it has made considerable efforts to comply with requirements. At this aspect I also realized that third countries where fugitives are hidden or arrested are, as general tendency, not willing in trying suspects living on their soil. I suggest at the same time that the UN should manage to produce encouragement to countries to abandon their passivity.

This research has been conducted at the time when the ICTR is about to close. I endeavoured to anticipate this forthcoming event in the context of my study. Special attention was paid to the loophole left by the ICTR specifically with respect to its supervision role on the enforcement of sentence, the grant of pardon and commutation of sentence and the review proceedings by domestic enforcement agencies. That role will be taken over by the UNSC but I suggest that the way it is expected to play the role be reassessed. I recommended that in place of being mixed up in every single case, the UNSC should elaborate the guidelines serving as restrictions, reference and standards

for countries concerned. Furthermore, beyond these restrictions each country concerned should be free to exert its judicial sovereignty in conformity with its legislations.

This dissertation has also covered the process of dealing with genocide cases by Rwandan courts. I analysed the impact of the split of formal courts and Gacaca courts. Being established as a way to exit from the problem of backlog when formal courts disclosed the inability to provide solution, Gacaca courts served as a mixed character as restorative and retributive justice. In a situation with this nature, it is obviously difficult to avoid any human rights violations. As Morris identified, when it comes to design legal responses in such complex situations surrounding crimes of mass violence she wondered ‘what action will do the most good and the least harm under the circumstances’.¹⁹⁶ I analysed various human rights issues inherent to the nature of Gacaca courts especially those that were unavoidable in the Gacaca process. As Gacaca courts already closed, it is a necessity that some residual issues among whom human rights issues be taken over by the formal Courts. Those issues are inter alia the cases of people who have been convicted in absentia by Gacaca Courts, the review proceedings in case of miscarriage of justice made by Gacaca Courts and the issue of compensation of victims of human rights violations resulting from Gacaca process.

5.2. Recommendations

Before closing this study, it would be important to propose the following recommendation towards the government of Rwanda and the United Nations in order to address the issues left out by the closure of Gacaca and the ICTR.

As it is the responsibility of the Government, for the interests of national reconciliation and healing, it is required to provide compensation to the victims of such

¹⁹⁶ Morris op cit at 361.

violations. It should ensure that those who have been hurt the most be compensated and establish the appropriate way that compensation should be accomplished.

The government should study carefully the residual issues left by Gacaca Courts and provide for their solution. This implies for example for the government to put in place a law relating to compensation for damage resulting from Gacaca process and miscarriage of justice. Such compensation should be on the charge of the State or in case of bad faith; the charge will be on the officer responsible of the damage as it is now.

The performance of a thorough study to identify all possible residual issues to rise after the ICTR completion is really required. Finally, the Rwandan government may continue to persuade the UNSC to order the enforcement of decisions against people tried by the ICTR in Rwanda as an appropriate solution to facilitate reconciliation purposes.

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