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FACULTY OF LAW
SCHOOL FOR ADVANCED LEGAL STUDIES
UNIVERSITY OF CAPE TOWN

**An analysis of the legal regime governing transfer of cases from the
International Criminal Tribunal for Rwanda (ICTR) to the
Rwandan domestic justice system**

Research dissertation presented for the approval of Senate in fulfillment of part of the requirement for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertation, including those relating to the length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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DECLARATION

I, Mackline Ingabire, hereby declare that this research work entitled '**An analysis of the legal regime governing transfer of cases from the International Criminal Tribunal for Rwanda (ICTR) to the Rwandan domestic justice system**', is my original work and has never been submitted anywhere else for any academic qualification. Where other people's work has been used, it is indicated in the footnotes and bibliography.

University of Cape Town

To Uncle Steven Gumisiriza;

Aunties: Jovia Kirijugo, Jane Nyamahinja, Kellen Tumushabe and late Alex Nankunda. I have known your love and care since childhood, and you have changed not. Thanks for loving me unconditionally. For the love and care, and paying for my education, I dedicate this work to you.

University of Cape Town

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LIST OF ABBREVIATIONS

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
LTC	Laws on Transfer of cases
RES	Resolution
Doc	Document
No.	Number
Nos.	Numbers
UN	United Nations
RPF	Rwandan Patriotic Front
NGTs	National Genocide Trials
ECHR	European Convention on Human Rights
G A	General Assembly
R 11	Rule 11
Eds	editions
Para	Paragraph
AC	Appeals Chamber
BH	Bosnia and Herzegovina
(n)	note
UCT	University of Cape Town
ICCPR	International Covenant on Civil and Political Rights
UNDHR	United Nations Universal Declaration on Human Rights
UN	United Nations
ICESCR	International Covenant on Social Economic and Cultural Rights
CESCR	Committee on International Covenant on Social Economic and Cultural Rights
HRC	Human Rights Committee
UK	United Kingdom
USA	United States of America
ICERD	International Convention on Elimination of All Forms of Racial Discrimination

CERD	Committee on Elimination of All Forms of Racial Discrimination
CEDAW	Committee on Elimination of All forms of Discrimination Against Women
ICEDAW	Convention on Elimination of All forms of Discrimination Against Women
CRC	Convention on Rights the Rights of Children
AmCHR	American Convention on Human Rights
ACHPR	African Charter n Human and People's Rights
ECtHR	European Court on Human Rights
OAU	Organisation of African Unity
OAS	Organisation of American States
IACHR	Inter American Commission on Human Rights
IACtHR	Inter American Court on Human Rights

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CHAPTER 1: GENERAL INTRODUCTION

The International Criminal Tribunal for Rwanda (ICTR), established by the United Nations Security Council¹ was originally set to wind up its affairs in 2010. However, by Resolution 1901 of the Security Council, ICTR's mandate has been extended to 2012.² This will necessitate the transfer of residual cases to national courts for trial after it has closed.³ Rwanda considers itself a suitable candidate for referral, and hence has supported the ICTR Prosecutor's requests (five requests) for referral to its national courts.⁴

Transfer of cases at the ICTR, is governed by Rule 11 *bis* of ICTR Rules of Procedure and Evidence⁵ which lays down a number of requirements that a country requesting a transfer has to fulfil. On the face of it, Rwanda has failed this test as the ICTR has rejected all five applications. On the part of Rwanda, a legal framework that mirrors Rule 11 *bis*, has been adopted to cover the accused persons who will be transferred from the ICTR (hereinafter, transferees).⁶ Some of the guarantees provided by this framework, however, may not apply to all accused persons on trial in Rwanda (the locally accused persons)⁷ although the transfer of cases should have come to cure the inequalities that exist under the concurrent jurisdiction.

This thesis analyses the differential treatment of the accused persons (the transferees and the locally accused) before Rwandan courts promoted under the legal regime on

¹ United Nations Security Council Resolution no. S/Res/ 955(1994) (hereinafter, Resolution 955) establishing the International Criminal Tribunal for Rwanda. Also see Article 1 of the ICTR Statute.

² United Nations Security Council Resolution no. S/RES/1901(2009) at para 1.

³ See United Nations Security Council Resolution no. S/RES/1503 (2003) (hereinafter, Resolution 1503).

⁴ See *Prosecutor v Yussufu Munyakazi* Case no. ICTR-97-36-R11 bis; *Prosecutor v Kanyarukiga* Case no. ICTR 2002-78-Rule 11 bis; *Prosecutor v Ildephonse Hategekimana* Case No. ICTR-00-55B-R 11 bis ; *Prosecutor v Fulgence Kayishema* Case no. ICTR – 01-67- R11 bis; and *Prosecutor v Jean Baptiste Gatete* Case No. ICTR 2006-61 R11 bis.

⁵ ICTR Rules of Procedure and Evidence as amended on 14 March 2008 (hereinafter ICTR Rules of Procedure).

⁶ See provisions of the Organic Law No 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States (hereinafter, the law on transfer of cases).

⁷ The phrase 'other locally accused' or 'other accused persons' in this thesis refers to all persons accused of crime of genocide appearing before Rwandan domestic courts.

transfer of cases (hereinafter, the LTC), juxtaposed to ICTR's goals of punishment. This will be done by examining both international and national laws so as to determine whether such differentiation is justified or not (that is whether it amounts to discrimination). It is however important, to point out that the LTC does uphold the ICTR mission in some respect, by guaranteeing the right to a fair trial for the transferees. The position of this thesis is that while guaranteeing such rights to the transferees, they should be extended to other accused persons in Rwanda. Matters of fair trial rights are however not the main discussion in this thesis as they have been amply covered in the ICTR decisions on transfer of cases some of which are discussed in Chapter two of this thesis but the inequality promoted therein, is the focus of this discussion.

Most criminologists rightly argue that any sentencing institution should have reasons or goals when punishing offenders so that it does not just punish for the sake of it.⁸ It is therefore important for this research to examine the impact of differential treatment promoted under the LTC, on deterrent and reconciliation as some of the goals of punishment envisioned by both the ICTR and Rwanda in punishing perpetrators of particularly serious international crimes including genocide.

The ICTR's goals may be summed up to be: prosecuting perpetrators of genocide – (this can be referred to as retributive goals) and other violations of international humanitarian law thereby 'ensuring that such violations are halted and effectively redressed', as well as restoration and maintenance of peace and national reconciliation in Rwanda.⁹ The ICTR sought to deter future offenders by taking effective measures to bring to justice persons responsible for the serious human rights violations.¹⁰

⁸ See Jeremy Bentham 'Punishment and Deterrence' in Andrew Von Hirsh *et al* 'Principled sentencing: Readings on Theory and Policy' 3rd ed (2009) 53 – 56 at 55; Emil Durkheim 'What is a Social Fact? and Rules for the Observation of Social Facts' in the Rules of the Sociological Method (1938); Ceasar Bacarria 'On Crimes and Punishments' in John Muncie *et al* (eds) 'Criminological Perspectives: A Reader 12'(1996).

⁹ See *Prosecutor v Nahimana* Case No. ICTR 99-52-T at para 109. Also see Resolution 955 (n 1) at para 7.

¹⁰ See *Prosecutor v Vincent Rutiganda* Case no. ICTR-96-T at para 56. Also see Resolution 955 (n 1) at para 6.

I. The origin and development of transfer of cases

Rwanda made international media headlines in 1994 when nearly a million people were killed in just 100 days.¹¹ The Hutu dominated government instigated the genocide which targeted mainly Tutsis and moderate Hutus although the massacre could have been prevented had the international community reacted decisively and.¹²

The brutality of the massacres did not only stimulate the new government into developing laws and establishing institutions to adjudicate and punish perpetrators, but also galvanized the international community into working towards ending impunity and ensuring that victims got justice. Thus, three transitional justice processes were put in place: the International Criminal Tribunal for Rwanda (ICTR), the National Genocide Trials (NGTs) and the Gacaca Courts.¹³ The ICTR tries those bearing the highest responsibility.¹⁴ At the national level, genocide suspects are put into three categories: category one (those bearing the highest criminal responsibility), categories two and three cover those bearing less and the least responsibility.¹⁵ In the beginning, category one offenders were tried by NGTs,

¹¹ United Nations 'Lessons from Rwanda: the United Nations and Prevention of Genocide.' Available at: <http://www.un.org/preventgenocide/rwanda/neveragain.shtml> [accessed on 10/09/2009]. The United Nations gives a brief account of the genocide: 'The genocide had been part of a long time plan by the successive regimes after 1959 when many Tutsis fled the country due to the massacres organised by extreme Hutu regime. Thus, the minority ethnic Tutsis living in exile, in the neighboring countries sought to return to Rwanda in the 1980s, but were prevented from doing so by the majority ruling Hutu. The Rwandan Patriotic Front (RPF), a largely Tutsi rebel army invaded Rwanda in 1990, forcing their way to return. Tutsis in Rwanda were arrested and harassed as accomplices of the invasion. Extremist radio and print media depicted all Tutsis as helping the invading force... A plane carrying President Habyarimana was shot down on 6 April 1994, triggering the start of the genocide.'

¹² Timoth Gallimore 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda' (2008) 14 2 New England Journal of International and Comparative Law 239 - 263 at 240.

¹³ Philip Kasaija 'Procedural Due Process and the Prosecution of Genocide Suspects in Rwanda' (2009) 11 1 Journal of Genocide Research at 11. The three processes have concurrent jurisdiction but the ICTR has primacy over the national processes. Also see article 8 of the ICTR Statute (n 1).

¹⁴ See UN Doc.S/2003/946 at para 6.

¹⁵ Article 51 of Organic Law no.16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying Perpetrators of the Crime of Genocide and Other Crimes Against Humanity Committed between 1st October 1990 and 31st December 1994 (hereinafter, 2004 Gacaca law). This article elaborates on the categories of genocide perpetrators tried by Rwandan courts:

Category one include: a) persons whose criminal acts or whose criminal acts of participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; b) persons who acted in positions of authority at the national, prefectural,

whereas category two and three offenders were indicted in the Gacaca Courts.¹⁶ However, a recent organic law has expanded jurisdiction of the Gacaca Courts to cover some category one suspects.¹⁷

Crucially, this novel form of concurrent jurisdiction has given rise to disparities in the treatment and punishment of accused persons, an anomaly that has partly motivated this study. Trials at international tribunals generally tend to foster unequal sentencing where developing countries are involved. As Madeline points out, accused persons appearing before international courts are held in better facilities than those processed in national courts: International tribunals are expected to ensure that defendants' rights are protected while national courts may struggle to guarantee this protection due to resource constraints.¹⁸ In addition, judges in the international tribunals use their overarching discretionary powers to impose lenient sentences on convicted persons.¹⁹ I will argue that the arbitral use of these powers results in unequal sentences for the two sets of accused persons. Madeline Morris supports this view and states that:

Under the stratified-concurrent jurisdiction model, all of those advantages go to the leaders, those who were at the helm of the holocaust. This surely is an unintended and an unjust outcome. Yet, these “anomalies of inversion,” in which the most responsible defendants get the least harsh treatment, are not coincidental; they are a predictable, structural problem that will be recurrent under the stratified-concurrent

communal, sector or cell level, or in a political party, who fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts of torture though did not result into death, together with her his accomplices; e) persons who committed acts of rape or torture against sexual organs together with their accomplices; f) persons who committed dehumanizing acts on dead body/ies together with their accomplices. Category two: a) a persons whose criminal acts or criminal participation place them among killers or who committed acts against others causing death, together with their accomplices; b) persons who injured or committed other acts of serious attack with the intention to kill but did not attain his goal or objective, together with her objective; c) persons who committed or aided to commit other offences but without intention to kill, together with their accomplices. Category three: persons who committed offenses against property.

¹⁶ Ibid.

¹⁷ Article 9 of the Organic Law no.13/2008 of 19/05/2008 Amending 2004 Gacaca law (hereinafter, the 2008 Gacaca law).

¹⁸ Morris H Madeline 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1997) 7 Duke Journal of Comparative and International Law 349-374 at 371.

¹⁹ Mark A Drumbl 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 (2) in *Northwestern Law Review* 539 – 607 at 579.

jurisdiction model, in which the international tribunal tries the leaders and the national courts try the rest.²⁰

Although Madeline speaks of ills of concurrent jurisdiction in general, they are more attuned to situations involving international tribunals on one hand, and national courts in developing countries on the other hand, where resources are scarce. A similar situation exists in the context of the Rwandan genocide trials.

Such inequalities, especially the different penalty structure and location of the ICTR had formed basis for objections by the Government of Rwanda during negotiations that preceded the establishment of the tribunal.²¹ But these objections were ignored and the ICTR was located in Arusha, Tanzania and a different penalty structure was put in place. This thesis however, is not concerned with concurrent jurisdiction hence, will not further this discussion.

Nonetheless, it is important to discuss the implications of the Security Council decision to close down the ICTR and, the subsequent transfer of cases to the national justice systems.²² This led to the formulation of Completion Strategy documents and the transfer of cases to national competent jurisdictions to complete cases that had been slated for the ICTR to hear.²³ Note that transfer of cases had not been envisaged when resolution 955 establishing the ICTR was passed as will later be discussed. With this background, I will proceed to state the main problem envisaged by this research.

²⁰ Madeline (n 18) at 371.

²¹ Amelia S Canter “‘For these Reasons, the Chamber: Denies the Prosecutor’s Request for Referral.’ The False Hope of Rule 11 Bis’ (2009) 32 Fordham International Law Journals Fordham University School of Law 1614 – 1656 at 1619.

²² Resolution 1503 (n 3).

²³ *Ibid.* In this resolution it was indicated that cases involving intermediate and lower-rank accused were to be transferred to competent national jurisdictions as appropriate, to allow the ICTR to complete investigations by 2004, all trials by 2008 and all its [ICTR’s] work, by 2010.

II. Statement of the Problem

The ICTR requires ‘minimum standards’ to be met by Rwanda and any other United Nations member State; interested in trying these cases before any transfer can be effected.²⁴ As mentioned earlier, all requests made by the ICTR Prosecutor to refer cases to Rwanda, have been rejected on the basis that these requirements have not been met.²⁵ As a result, some western countries hosting *genocidaires* have also refused Rwanda’s request for extradition of some suspects.²⁶

Rwanda has however reformed its legal framework to specifically cover transfers, built a new prison (of international standards),²⁷ abolished the death penalty,²⁸ and built new court rooms. These initiatives and many more, seem to satisfy requirements of Rule 11*bis*, which are plausible efforts on the part of Rwanda.

However, discrimination which is patently intrinsic in the parallel process could unfold in these efforts. The LTC seems to accord preferential treatment to transferees as opposed to other locally accused persons. This is a violation of the fundamental right to equality and non-discrimination protected by the Constitution of the Republic of Rwanda and other laws both national and international as will be discussed in Chapter three of this work. I further contend that, by according preferential treatment to the transferees, the LTC fails in its efforts to deter future offenders and to reconcile Rwandan people yet; these are indispensable for the attainment of lasting peace in Rwanda.

²⁴ Article 11 *bis* of ICTR Rules of Procedure (n 5).

²⁵ See all ICTR decisions on referral (n 4).

²⁶ The New Times Editorial: no.1851 (09/07/2009). Available at: www.newtimes.co.rw [accessed on 09/07/2009]. In this newspaper, it was reported that different countries refused to extradite genocide fugitives due to ICTR’s decisions on transfer of cases. The New Times specified that it Switzerland refused to extradite a suspect - Gaspard Ruhumuriza, former minister of Environment to Rwanda, by referring to ICTR decisions on referral.

²⁷ See Kanyarukiga’s Trial Chamber Decision on Prosecutor’s Request for Referral to the Republic of Rwanda at para 91, the chamber pointed out that: ‘[I]t follows from the submissions of the Republic of Rwanda that a new prison has been built in Mpanga. It has a special wing with 73 cells built to international standards. Budgetary appropriations have been earmarked and are available to complete the partitioning of the cells to meet requirements set by the ICTR. The Mpanga prison is situated in Nyanza, about two hours drive from Kigali. During trial, the accused will be detained at a custom-built remand facility at the Kigali Central Prison, in close proximity to the High Court and the Supreme Court. It contains twelve cells and six toilets. Each room is equipped with a bed, beddings, closet, reading table and a chair.’

²⁸ Article 1 of the Organic Law no. 31/2007 Relating to the Abolition of the Death Penalty (2007).

Questions this thesis poses and seeks to answer are:

- Does the application of different standards on the accused [transferees and those locally accused], respect the principle of equality of all before the law?
- Can the situation be reversed without jeopardizing efforts to transfer accused persons from Arusha, given its importance to the Rwandan people?
- Should transfer, be a ground to justify discrimination under international law and domestic law?; and
- Lastly, will differentiation of accused promoted under the LTC, achieve deterrent and reconciliatory goals?

III. Significance of the study

The importance of this study to Rwanda given its troubled history cannot be overemphasised. The fractious and adverse effects of the 1994 genocide are still fresh in the minds of the population hence any attempt at understanding and fostering methods of preventing any future flare-up of a similar magnitude is important to the nation. It is thus necessary to bring to the fore, weaknesses and gaps in the LTC and in the concurrent jurisdiction as discussed earlier in Section II of this Chapter to punish and deter like-minded people from going on a similar killing spree and aide reconciliation. Also, the international community would benefit from the study and ensure that similar loopholes do not occur should it become necessary to mount a similar process in future.

IV. Hypothesis

The LTC discriminates against locally accused persons by according better treatment to transferees. This does not deter offenders of 'high crimes' such as the transferees, given the preferential treatment accorded to them, and thus does not foster reconciliation.

V. Objectives

In view of the gaps identified, the objectives of this research, *inter-alia*, include:

- To provide anticipatory analysis of the likely implications of the current arrangement of the transfer of cases;
- To show the likely adverse effects resulting from this arrangement; and
- To provide any possible suggestions on the way forward.

VI. Methodology

This thesis mainly consists of library- based data and relies heavily on Rwandan laws, ICTR cases and various books and articles on the subject. The study adopted both critical and comparative approaches where the treatment of the transferees, was compared to that of the locally accused.

VII. Delimitations of the study

This research analyses transfers from the ICTR to Rwandan courts thereby analysing decisions on the requests for referral; assesses the principle of equality under both international and Rwandan law, and highlights discrepancies created by the LTC. It is, however, not concerned with extraditions from other jurisdictions, nor does it discuss fair trial matters. It examines the impact of LTC on the principle of equality, deterrence and reconciliation.

VIII. Literature review

The subject of transfer of cases from the ICTR to national jurisdictions has recently attracted a considerable amount of comment in academic literature and a number of articles have been written on the subject. In spite of this, it has not been easy to find literature with a direct bearing on the subject under discussion. There is little analysis of ICTR decisions on the transfer of cases to national courts and I found none

addressing the impact of transfers on equality, deterrence and reconciliation specifically on Rwanda. However, there is an abundance of case law, journals, articles and internet sources.

Timothy Gallimore's article, assesses the legacy of the ICTR; and asserts that the tribunal has contributed to reconciliation in Rwanda in five major ways: creating a factual account of genocide judicial history, affirming that there was genocide against the Tutsi, establishing individual criminal responsibility, giving voice to the victims, and providing re-education and communication to promote respect for human rights and rule of law in Rwanda.²⁹

Although the ICTR's real contribution to reconciliation is postulated and expected, Gallimore did not consider the effect of the differential treatment of the ICTR accused and other locally accused persons before Rwandan courts. Thus, this thesis shows how reconciliation and other goals may be hindered by transfers under LTC due to differentiation of the accused. Gallimore further provides an important explanation on how to achieve deterrent goals. He posits that, mimetic structures of violence that are embedded in the minds of people in places where massive violence occurred should be attacked if deterrent goals are to be achieved.³⁰ He explains that mimetic structures may happen if 'perpetrators of genocide especially leaders who are among the ICTR convicts, become public heroes or gain notoriety among the population who may see them as desirable characters to be celebrated and emulated.³¹

It is the position of this thesis that, transfer of cases to Rwandan domestic justice system, should be carried out and trials conducted in a manner that destroys such structures. This is because leaders, who were planners and initiators of genocide, were admired and respected by the population. This made it easy for them to entrench genocide ideology into the masses to commit such acts thus, if they are brought to trial and punished equally in Rwanda, it is hoped that, similar acts of violence would never recur.

²⁹ Gallimore (n 12) at 239.

³⁰ *Ibid* at 248.

³¹ *Ibid*.

Zorbas Eugenia interrogates what Rwandans understand by reconciliation with the official government's discourse on the concept through an empirical research in the Southern part of Rwanda.³² Her findings reveal areas of both overlap and divergence between what she referred to as 'public' and 'hidden transcripts.' She asserted that there were inconsistencies and hence cautioned against the likelihood of achieving contrary results.³³ Informative as Zorba's research may be, just like Gallimore, she does not concern herself with how differential treatment of the accused may also hinder reconciliation nor does she concern herself with the impact of disparities in punishment of the accused on reconciliation. Her audience or participants are obviously guided by her research questions which eluded things to do with transfer of cases, the actual role of the ICTR in reconciling people and differential treatment of the accused and transfer of cases.

Lars Waldorf's article, examines the tensions between the Rwandan government's discourse on reconciliation and its fight against negationism.³⁴ He warns that, the broad definition and application of genocide ideology would have a negative impact on reconciliation. Importantly for this thesis, he points to concerns raised by Human Rights Watch on the transfer of one accused – Gaspard Kanyarukiga.³⁵ Furthermore, this thesis shows other grounds based on decisions by the ICTR judges to deny referrals to Rwanda.

The classical works of Jeremy Bentham³⁶ informs the study about reasons for deterrence as a theory of punishment. Bentham explains what deterrence means and the type/s of punishment that would achieve it.³⁷ However, the concern is whether deterrence will be achieved in case of transfer of cases while sentencing procedures and laws (LTC) discriminate among the accused. This kind of analysis stems from

³² Eugenia Zorbas 'What does Reconciliation after Genocide Mean? Public Transcript and Hidden Transcripts in Post Genocide Rwanda' (2009) 11 1 Journal of Genocide Research 127 - 147 at 130.

³³ *Ibid* at 127.

³⁴ Lars Waldorf 'Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers' (2009) 11 1 Journal of Genocide Research 101 – 125 at 101.

³⁵ *Ibid* at 112.

³⁶ Bentham (n 8) at 53.

³⁷ *Ibid* at 54. Also see discussion on deterrence in chapter 5 of this work.

the ICTR's and Rwanda's established aims/reasons for punishment which include deterring future offenders, among others.

Warwick McKean in his book 'Equality and discrimination under international law',³⁸ defines the principle of equality and provides its historical development from the time of Aristotle, to the time of writing his book. He affirms the indispensability of the right to equality in any society especially those that subscribe to the principles of democracy.³⁹ Warwick analyses classical cases on equality; for instance, the *South West Africa* case which was brought before the International Court of Justice (ICJ) in 1966.⁴⁰ In this particular case, he seems to have been captivated by judge - Tanaka's dissenting opinions.⁴¹

Judge Tanaka's position was that, the principle of equality qualified as a 'general principle of law' and on its application he was of the view that it required treating what is equal, equally and differently what is different. He [Judge Tanaka] also negated the idea of formal or mechanical equality.⁴² The position of this thesis is similar to Warwick's and Judge Tanaka's dissenting opinion which is that substantive rather than mechanical equality should be promoted.

Oddný Mjöll Arnardóttir's book, analyses the principle of equality and non – discrimination under European system of Human Rights.⁴³ She advocates for a more sophisticated understanding of the principle in the provisions of the European Convention on Human Rights (ECHR) and to a large extent her arguments are based on an analysis of the case law of the European Court on Human Rights (ECtHR) on Article 14 of the ECHR and Protocol 12 to the convention. Her stance is that the 'objective and reasonable justification' test and the traditional treatment of the principle in the scholarly literature are not apt with the new emerging possibilities in

³⁸ McKean Warwick 'Equality and Discrimination under International Law' (1983) at 1.

³⁹ *Ibid.*

⁴⁰ *Ibid* at 258.

⁴¹ *Ibid* at 250.

⁴² *Ibid* at 262.

⁴³ Oddný Mjöll Arnardóttir 'Equality and Non-discrimination under European Convention on Human Rights' (2003) at 1.

the protection against discrimination or explaining the variations in the strictness of review applied by the court.⁴⁴

Though Mjöll deals with the principle of equality and non-discrimination in the European perspective, her analysis greatly informs this study on the understanding of the principle and circumstances under which differential treatment may be justified.

Similarly, the Interights' handbook for practitioners⁴⁵ enriches the researcher's understanding of the principle of equality and non-discrimination under international law. It clarifies the ambiguity that usually exists when distinguishing discrimination from other forms of differential treatment that are justified. This greatly helps the study to analyse the LTC as in to whether its differentiation amounts to discrimination or is a justified differential treatment of the accused. The hand book however, is too general in its analysis as it analyses equality and non-discrimination in all aspects and under international law. This study in some respect, its analysis of the principle narrows to Rwandan law and to the LTC where the groups of analysis are the transferees in comparison with other accused before Rwandan courts.

Amelia S Canter's article⁴⁶ is valuable for the understanding of the subject of transfer of cases from the ICTR. She examines reasons given in two ICTR decisions on transfer. She assesses Munyakazi's (both in trial and appeals chamber) and Kanyarukiga's cases and highlights the confusion within the ICTR as to the level of trust which should be afforded to Rwanda.⁴⁷ Canter argues that 'the ICTR must give Rwanda a greater leeway within its Rule 11 *bis* decisions, both to underscore the Tribunal's own legitimacy and assist with Rwanda's growth as a nation', given the country's developments.⁴⁸

I agree with Canter's suggestion that Rwanda be given 'a greater leeway' due to the importance and contribution the transfers would have on Rwandan society. She however points out that Rwanda faces certain, potentially insurmountable, problems

⁴⁴ *Ibid.*

⁴⁵ Interights 'Hand Book for Practitioners Non – Discrimination under international law' (2005) Edited by Kevin Kitching (hereinafter, Interights Handbook) at 18.

⁴⁶ Canter (n 21) at 1617.

⁴⁷ *Ibid* at 1645.

⁴⁸ *Ibid* at 1648.

in guaranteeing a fair trial which according to her Rwanda cannot fix and the ICTR cannot ‘turn a blind eye to.’⁴⁹ She thus concludes that, the ICTR is promising the impossible by holding out that it may transfer cases to Rwanda in future it meets what is required in face of such impasse. The researcher is however more optimistic than Canter on what Rwanda can do to overcome its problems evidence being the reforms so far as mentioned above although it has come with unequal treatment of the accused. Judging from the decisions on transfers so far, one may be bound to agree with Canter on the point that, the ICTR may be promising the impossible to Rwanda.

Further, ICTR decisions on requests for transfer⁵⁰ not only inform the research with the Tribunal’s views on requirements of Rule 11 *bis* but also expose the confusion in the ICTR on the criteria followed to transfer a case; and on the scope and context of application of Rule 11 *bis*. Rwandan laws also contribute richly to this work, especially the LTC as they are the basis of this research.

Despite the plausible works on the ICTR and transfer of cases in particular, it is notable that the topic on transfer of cases and its impact on equality, deterrence and reconciliation on the Rwandan population has not been discussed by scholars. Thus, it is the reason for consideration of this subject as novel domain of research.

IX. Overview of chapters

Chapter one introduces the study and the context in which it is set. It highlights the basis and structure of the study. Chapter two discusses legal and political issues surrounding the transfer of cases, its importance, and reasons behind it. It also analyses ICTR decisions on transfers. Chapter three analyses the right to equality and non – discrimination under international, regional and Rwandan law. It further discusses states’ negative and positive obligations to ensure the right to equality. It also highlights circumstances under which a state may be justified to treat people in similar situations, differently. Chapter four analyses the LTC in view of the treatment it accords transferees in comparison with other locally accused persons.

⁴⁹ *Ibid* at 1652.

⁵⁰ See decisions on ICTR Prosecutor’s Request for Referral to the Republic of Rwanda (n 4).

Thus, it assesses temporal jurisdiction of ICTR *visa avis* that of Rwanda and what it means for the transferees and other accused; competency of court; composition of the bench; indictment; evidence collection; right to counsel; witness protection; sentences and conditions of detention. Chapter five highlights general implications of the LTC on ICTR goals of punishment. Emphasis is put on what it implies for reconciliation, deterrence and equality. It also consists of a summary of the presentation and the conclusions drawn from the entire study.

CHAPTER 2: THE TRANSFER OF CASES

I. Introduction

This chapter discusses legal and political issues surrounding the transfer of cases, specifically the basis for the transfers, the importance and reasons behind transfers, and critically analyses ICTR decisions on requests for transfers that have so far been made. This analysis helps in showing how and why the LTC evolved.

II. Basis for the transfer of cases from the ICTR

The ICTR Statute does not explicitly provide for the transfer of cases but judges amended the ICTR's Rules of Procedure in 2002, to include provisions enabling transfers⁵¹ for reasons that are discussed in the next section. Rule 11 *bis* provides for the criteria followed by a trial chamber designated to refer a case/s to authorities of a state:

A) If an indictment has been confirmed, whether or not the accused is in the custody of the

Tribunal, the President may designate a trial chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

⁵¹ The Rules of Procedure were amended on the 16 July 2002 by a plenary of ICTR Judges where Rule 11 *bis* was adopted to enable transfer of cases. Rule 11 *bis* has been amended twice since; on the 24 April 2004 and lastly on 21 May 2005.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

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

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

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

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

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

(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

(H) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Trial Chamber whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.⁵²

In deciding whether to refer a case, relevant trial chambers have to satisfy themselves that the accused/transferee will receive a fair trial, and that death penalty will not be imposed as punishment if convicted.⁵³ The ICTR judges are here given a new role by Rule 11bis (C)); of not only applying international criminal law, but also of deciding on issues outside its purview such as assessing whether a national system is equipped to conduct a fair trial.

Note that before applying for a referral, the ICTR office of the Prosecutor reviews an alleged status and extent of participation of the accused in the crimes, the connection that the accused may have with other cases, as well as the availability of evidence and investigative material for transmission to the relevant domestic courts.⁵⁴ Thus, transfer of cases stems from Rule 11 *bis* of ICTR Rules of Procedure.

Prior to the adoption of Rule 11 *bis*, it is important to point out that, the ICTR followed the ICTY's example and adopted an exit strategy and the transfer of cases, is part of it. The ICTY came up with a completion strategy, which it presented to the Security Council in 2000.⁵⁵ The strategy advanced two points: the tribunal was to

⁵² Rule 11 *bis* (A) of ICTR Rules of Procedure (n 5).

⁵³ *Ibid* at (C).

⁵⁴ U.N.Doc. S/2007/323 'ICTR Completion Strategy Report' (31/05/2007) at para35.

⁵⁵ See U.N.Doc.A/55/273 – S2000/777 'The Secretary- General's Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (26/07/2000) as cited in Cecil Aptel 'Closing the U.N International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' (2008)14 2 New England Journal of International and Comparative Law 169- 190 at 170.

concentrate on the prosecution and trial of the most senior leaders, and would transfer other cases involving intermediate and low – ranked accused to domestic courts.⁵⁶ The Security Council welcomed the proposal because it seemed to ease budgetary concerns constraining the international community, and hence encouraged the ICTR to make a similar plan.⁵⁷

In 2003, the ICTR submitted a completion strategy report to the Security Council modelled on that of the ICTY and set similar deadlines for completion of its activities.⁵⁸ The Security Council endorsed the ICTR's completion strategy through resolution 1503 and urged the tribunal to complete all its trials by 2008.

However, there was and still is, a lot of scepticism about ICTR meeting this deadline as it later requested for an extension to 2012 as discussed in Chapter one. The scepticism is also due to the weight of the outstanding workload and the number of unaccountable for fugitives. There are growing fears that the tribunal would need more time to clear its backlog than its allotted timeframe.⁵⁹ The scepticism is also bolstered by the facts that only two referrals have been completed so far; no country other than Rwanda itself, seem to be interested in the transfers; and ICTR seeming not ready to transfer cases to Rwanda as indicated in the five requests. The latter will be expanded on, in a section below.

The Security Council through resolution 1534 demanded that, twice a year, the tribunal provide an overview of the progress on implementation of the completion strategy.⁶⁰ This further compelled the ICTR to make more efforts in finding countries interested in receiving its cases. According to resolution 1503, all countries which ratified the Genocide Convention, and had national legislation harmonised, could start receiving cases from these tribunals. Importantly, the

⁵⁶ *Ibid* at 170.

⁵⁷ *Ibid*.

⁵⁸ U.N.Doc.S/2003/946 on 'ICTR Completion Strategy Report' (6/10/2003).

⁵⁹ Aptel (n 55) at 171.

⁶⁰ See Reports submitted to the United Nations on 14 July 2003 and 29 September 2003, in connection with the General Assembly Resolution 57/289 (2003); Completion Strategy Reports have been periodically submitted to the President of the Security Council on 30 April 2004, 19 November 2004, 23 May 2005, 30 November 2005, 29 May 2006, 8 December 2006, 31 May 2007, 20 November 2007, 13 May 2008, 21 November 2008 and 14 May 2009.

Security Council pointed out that Rwanda and the former Yugoslavia should continue the work of the ad hoc tribunals after closing down.⁶¹

III. Why transfer cases

First of all, the ICTR is an ad hoc tribunal. Although the Security Council that established the ICTR did not set a time frame for it to finish its work, the fact that it was an ad hoc tribunal meant that; it's 'lifespan was short.'⁶² Thus transferring cases to national jurisdictions is a plausible way of winding up the work of the tribunal. Secondly, the budget of the ICTR, like that of the ICTY, was becoming burdensome to the member countries⁶³ and thus the tribunal was forced to wind up its work because countries were starting to prioritise other areas for finance. The international community became increasingly impatient with the ad hoc tribunals for focusing on low ranking offenders rather than concentrating on those who bore the greatest responsibility for the genocide. The tribunals were accused of being slow and inefficient.⁶⁴ Thus formulating exit strategies through which intermediate and low-ranked offenders would be transferred to national jurisdictions was a response to such demands.

Furthermore, cases are transferred from international tribunals to national jurisdictions due to the advantages expected: transferring cases to national jurisdictions is aimed at achieving educational and general deterrence goals. For instance, in *Prosecutor v Bagaragaza*⁶⁵ one of the arguments advanced by the ICTR Prosecutor to exclude Rwanda as a country of destination was that a strong public policy favoured the involvement of other countries in the prosecution of the accused, as a manner of educating people in other countries on the lessons learned from the Rwandan genocide and would promote the development of ideas to prevent similar tragedies. I would however argue that, the ICTR ought to test educational and deterrent goals through transfer of cases to Rwanda first, since it is the victim state

⁶¹ Resolution 1503 (n 3) at para 9.

⁶² Aptel (n 55) at 173.

⁶³ *Ibid* at 170.

⁶⁴ *Ibid*.

⁶⁵ *Prosecutor v Micheal Bagaragaza* Case no. ICTR-2005-86.R 11 *bis*, Decision on the Prosecutor's Motion for Referral to the Kingdom of Norway (19/05/2006) at para 7.

before targeting other countries. The transfer of cases would also achieve deterrence on the national level because mimetic structures of violence discussed by Gallimore are destroyed.⁶⁶ Those who planned the genocide will be punished in their home area; hence will cease to be ‘heroes’ to the population.

The transfer of cases to Rwanda may achieve reconciliatory goals. It should be recalled that, the Rwandan population especially survivors of genocide, have always been disgruntled about the fact that they do not see their perpetrators being punished due to the location of the tribunal;⁶⁷ as such, the transfer of cases would enable them to see their perpetrators tried and thus accelerate reconciliation process. The general perception in Rwanda on the transfer and what this can do in as far as reconciliation is concerned is demonstrated in the extract from one of the Rwanda’s leading newspaper:

The process of arresting and trying Genocide suspects is not just a justice-craving thing for Rwandans, as has been repeatedly pointed out in various fora. It is also a process of reconciliation, of forgiving and uniting. It is a process that wants to unravel all the dirt that took place in 1994, and subsequently put it behind.... So, the trial of Genocidaires is more than a trial to Rwandans on their road to understanding one another, and for putting up strong enough barriers to withstand any other gusts of genocide ideology. That is why it is important to all Rwandans that the pending cases be brought here so that justice is not only done, but is seen to be done – which can hardly be said for the Arusha-based UN court.⁶⁸

The above position is supported by Cherif Bassiouni as he argues that the goal of international criminal justice is not exclusively the internationalization of criminal justice but rather the nationalization of the Process.⁶⁹ He further posits that, international justice rendered by international tribunals ought to translate into sustainable national justice systems capable of continuing international/mixed efforts. Mark Drumbl adds that international criminal law interventions - such as

⁶⁶ See Gallimore (n 12) at 348.

⁶⁷ See Canter (n 21) at 1618 where she pointed out that; ‘for the most part, the trials in Arusha were inaccessible to those in Rwanda and subsequently, have minimal impact on the local population.’

⁶⁸ New Times Editorial ‘Ki-moon’s backing of ICTR cases for Rwanda well-founded.’ Available at: www.newtimes.co.rw [accessed on 31/01/2008].

⁶⁹ Cherif M Bassiouni ‘International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice’ in Antonio Cassese ‘The Oxford Companion to International Criminal Justice’ (2009) 131 – 142 at 139.

those of the ICTR, would do well to engage with practices that actually reflect customs, mores and procedures of those affected by the violence.⁷⁰ The researcher concurs with Bassiouni that failure to translate into national systems, the ICTR and ICTY will not leave any legacy to national systems.⁷¹ Efforts to transfer cases however, could be one way of doing so.

In addition, nationalisation of the international criminal justice as suggested by Bassiouni entails strengthening of national jurisdictions. This was also recommended by Resolution 1503 and was considered crucial to the rule of law by the Security Council.⁷² Paragraph one of Resolution 1503, calls upon the international community to assist national jurisdictions in improving their capacity to prosecute cases transferred from the ad hoc tribunals. By this, it is evident that national jurisdictions may benefit from these efforts geared towards completion strategies which will in the end enable them to try other cases in their own jurisdictions. This cannot be possible if ICTR continues to hesitate to refer cases. An offshoot of the refusal of transfers would be that Countries like Rwanda will not benefit from the ICTR's experience and expertise in adjudication of international crimes which would be crucial when dealing with genocide cases.

Transfers may also give legitimacy to the work of the ICTR. Nils Christie posits that 'the root problem of the system is that conflicts were stolen from their legitimate owners, the victims, and became the property of professionals rather than people'.⁷³ Drumbl also finds it paradoxical, for a society 'reeling from violence to be disenfranchised from the redressing of that violence which, instead, becomes a task suited to the technocratic savvy of the epistemic community of international lawyers'.⁷⁴

Justice rendered by the ICTR from Arusha risks to be labelled as described by Drumbl and Christie. Transfers may however reverse this because Rwanda, as a

⁷⁰ Drumbl (n 19) at 549.

⁷¹ Bassiouni (n 69) at 139.

⁷² Preamble of Resolution 1503 (n 3) at para10.

⁷³ Nils Christie as cited in Fattah E 'Victimology: Past, Present and Future in Criminology' (2000) 33 1. Available at: <http://www.erudit.org/revue/crimino/2000/v33/n1/004720a.html> [accessed on 28/11/2009].

⁷⁴ Drumbl (n 19) at 597.

victim state may be given the opportunity to fully own all decisions from genocide trials. Through the transfers, victims of genocide will have more access to ICTR's past and present work unlike when in Arusha, Transfers, kind of bring the conflict back to its 'owners' – Rwandans, who should resolve it.

As Cassese argues, the best judicial forum for prosecution of crimes is the court of the territory where crimes have been committed.⁷⁵ Reasons for prosecution to take place in the territory where crimes were committed include : 'the crime has breached the values and legal rules of the community existing in that territory, and has offended against the public order of that community; it is there that the victims of crime or relatives normally live; it is there that all, or at least most, evidence can be found; the trial is conducted in the language normally shared by the defendant, his defence, the prosecutor and the court;'⁷⁶ and the international criminal tribunals take excessive length proceedings⁷⁷ hence prosecution should be there. This is also based on the 'territoriality principle' – a state has a right to prosecute and try crimes committed on its territory.⁷⁸ Thus, the above reasons may have influenced the decision of transferring cases from the ad hoc tribunals, to national jurisdictions.

IV. Requests for transfer

This section analyses ICTR decisions on the Prosecutor's request for transfer of cases to national courts. It analyses decisions in each case and reasons for denial or granting the request.

1. *Prosecutor v Micheal Bagaragaza*

The first attempt to transfer a case from the ICTR was made in 2006 - in *Prosecutor v Micheal Bagaragaza*.⁷⁹ The country of destination identified by the ICTR Prosecutor was Norway. However, the trial chamber found no material jurisdiction⁸⁰

⁷⁵ Antonio Cassese 'The Oxford Companion to International Criminal Justice' eds (2009) at 123.

⁷⁶ *Ibid* at 123.

⁷⁷ *Ibid* at 129.

⁷⁸ See Article 2 of the Decree Law No. 21/77 of the Criminal Code of 18/08/1977(hereinafter, Criminal Code)

⁷⁹ *Prosecutor v Micheal Bagaragaza* (n 65).

⁸⁰ *Ibid* at para 16.

despite defence's argument in favour of the transfer.⁸¹ Note that Rwanda at this time also considered itself eligible for the transfer but the chamber considered the ICTR Prosecutors' position and declared that it was not.⁸² The main point of contention was that Rwanda still had the death penalty in its criminal laws.⁸³

Subsequently, the Netherlands was identified as a country of destination to receive Michael Bagaragaza's case and transfer was in fact granted by the ICTR's trial chamber stating its satisfaction on all areas of concern as spelt out in Rule 11 *bis*.⁸⁴ The Netherlands however, later withdrew its interest to try Bagaragaza and declared that it had no jurisdiction to try the transferee for genocide. The ICTR Prosecutor subsequently requested for revocation of the referral.⁸⁵

The Dutch Prosecutor in a letter to the ICTR supported the Prosecutor's request for revocation by referring to a decision of a District Court in The Hague in a case of Joseph Mpambara of 24th July 2007 in which it (the district court) stated that, it did not have jurisdiction to try him for genocide.⁸⁶ The Dutch Prosecutor thus argued that he had intended to assert same jurisdictional bases to try Bagaragaza for genocide as it had for Mpambara and as a result of that decision [Mpambara's]; it suspended proceedings against Bagaragaza.⁸⁷ This was rather strange given the informed judges' justification and satisfaction in the chamber that had granted the request for referral of Bagaragaza to the Netherlands. Another strange thing in these proceedings for revocation is the defence's arguments. The defence opposed revocation of the case from the Netherlands and motivated that its concerns were the possibility of referring the accused to Rwandan jurisdiction after the revocation is granted.⁸⁸

⁸¹ *Ibid* at para 2.

⁸² *Ibid* at para 7. The Trial Chamber summarized the Prosecutor's position which was that, while the Republic of Rwanda was the State where the crimes were committed (Rule 11 bis (A) (i), the prosecution recalled the provisions of Rule 11 bis (C) containing two other requirements – the absence of death penalty and the guarantee of a fair trial – and declared that none of the requirements can be met at the time.

⁸³ See 2007ICTR Completion Strategy Report (n 54) at para 35.

⁸⁴ *Prosecutor v Micheal Bagaragaza* Decision on the Prosecutor's Motion for Referral to the Kingdom of Netherlands (31/01/2007).

⁸⁵ *Prosecutor v Bagaragaza* Decision on the Prosecutor's Extremely Urgent Motion for the Revocation of the Referral to the Netherlands (17/08/2007) at para 7.

⁸⁶ *Ibid* at para 3.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 9.

Although the chamber dismissed such fears as being speculative, it is an indication of the preconception defence has on Rwanda. This is because at that point, the chamber was not deciding on whether to refer the accused to Rwanda but on revocation, nor was the ICTR Prosecutor requesting for it, it's as though the defence would rather have the accused tried/transferred anywhere else, but not Rwanda irrespective of whether there is jurisdiction to try such accused or not.

2. Prosecutor v Laurent Bucyibaruta & Prosecutor v Wenceslas Munyeshyaka

It took the ICTR Prosecutor more than a year, after Bagaragaza's case to make other requests for transfer. The prosecutor requested that Laurent Bucyibaruta⁸⁹ and Wenceslas Munyeshyaka be transferred to France.⁹⁰ These requests were granted with ease and no much struggle on part of France, unlike Rwanda as discussed below.

3. Prosecutor v Yusufu Munyakazi

The first case to be decided upon for referral to Rwanda was that involving Yusufu Munyakazi.⁹¹ The trial chamber in Munyakazi raised three concerns as basis for denial of the referral; the trial chamber feared that the accused would not be tried by an independent and fair court if transferred to Rwanda because of the system of a single judge.⁹² It argued that international crimes such as those the suspect was accused of, are not supposed to be tried by a single judge and that if that was allowed to happen, there was a latent danger of violating the right to be tried by an independent tribunal.⁹³

⁸⁹ *Prosecutor v Laurent Bucyibaruta* Case no. ICTR-2005-85-I Decision on the Prosecutor's Request for the Referral of Laurent Bucyibaruta's Indictement to France (20/11/2007).

⁹⁰ *Prosecutor v Wenceslas Munyeshyaka* Case no. ICTR-2005-87-I Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictement to France (20/11/2007).

⁹¹ *Prosecutor v Yusufu Munyakazi* Case no. ICTR-97-36-11 *bis* Decision on the Prosecutor's Request for Referral to Republic of Rwanda (28/05/008).

⁹² *Ibid* at para 40.

⁹³ *Ibid* at para 49.

Secondly, Munyakazi Trial Chamber was not satisfied that the penalty structure in Rwanda was adequate as it feared that the accused would be sentenced to life imprisonment in isolation as provided in the Law on the abolition of the death penalty which in the chambers opinion was applicable to the transferees as well.⁹⁴ Rwanda and the prosecution contested this view stating that transferees were governed by the law on transfer of cases which provided that the maximum punishment is life imprisonment and not life imprisonment with special measures. However, the chamber was not convinced that such kind of punishment would not apply to Munyakazi.

Lastly, the Trial Chamber was not convinced that the accused's right to a fair trial; to obtain the attendance of, and to examine defence witnesses under the same conditions as witnesses called by the Prosecution, could be guaranteed at the time in Rwanda.⁹⁵

The Appeals Chamber upheld the Trial Chamber's decision on the penalty structure and witness protection⁹⁶ but questioned and reversed the decision on the independence of the judiciary and held that it is not necessary to have more than one judge for a trial to be fair.⁹⁷ Clearly, divergent views emerge at this point over what constitutes a fair trial in the ICTR for cases to be referred.

4. *Prosecutor v Gaspard Kanyarukiga*

Another case that was considered for referral to Rwanda was that of Gaspard Kanyarukiga.⁹⁸ Kanyarukiga Trial Chamber, just like that of Munyakazi's before it, was not satisfied that the indictee would receive a fair trial if referred to Rwanda. Thus raised three concerns:

- i) that Kanyarukiga would not be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial;

⁹⁴ *Ibid* at para 32.

⁹⁵ *Ibid.*, at para 66.

⁹⁶ *Prosecutor v Yussufu Munyakazi* Decision on the Prosecutors' Appeal Against Decision on Referral under Rule 11 bis (08/10/2008).

⁹⁷ *Ibid* at para 26.

⁹⁸ *Prosecutor v Kanyarukiga* Case no. ICTR 2002-78-Rule 11 bis Decision on Prosecutor's Request for Referral to the Republic of Rwanda (6/06/2008) at para 104.

- ii) that the defence would face problems in obtaining witnesses residing in Rwanda because they would be afraid to testify; and
- iii) that there is a risk that Kanyarukiga, if convicted to life imprisonment in Rwanda, may risk solitary confinement.⁹⁹

The Appeals Chamber dismissed all grounds of appeal and upheld trial chambers decision.¹⁰⁰ The plausible issue in Kanyarukiga's chambers is that they overcame confusion that existed in Munyakazi's chambers on the composition of the bench in relation to a fair trial. The chambers did not find a single judge system problematic and hindrance to a fair trial.

5. *Prosecutor v Ildephonse Hategekimana*

The ICTR Prosecutor also requested for the referral of Ildephonse Hategekimana's case to Rwanda.¹⁰¹ Just like the previous chambers before, it had concerns on witness protection, the accused risking life imprisonment in isolation, and lack of a robust legal framework to criminalise command responsibility under Rwandan law.¹⁰² The last concern raised is rather new, compared to concerns raised by other chambers before. The Trial Chamber noted that Hategekimana's amended indictment sought to hold him responsible for individual criminal responsibility under article 6(1) and for command responsibility under article 6(3) of the ICTR Statute for crimes of genocide, or alternatively, complicity in genocide, as well as murder and rape as crimes against humanity.¹⁰³

The chamber however noted that the Rwandan Penal code provides for the prosecution of principal perpetrators and accomplices for instigation, preparation and planning, commission, direct and public incitement, provision of instruments or

⁹⁹ *Ibid* at para 104.

¹⁰⁰ *Prosecutor v Kanyarukig* Decision on Prosecutor's Appeal Against Decision on Referral under Rule 11bis (30/10/2008) at para 39.

¹⁰¹ *Prosecutor v Ildephonse Hategekimana* Case No. ICTR-00-55B-R 11 *bis* Decision on Prosecutor's request for the Referral of the case of Ildephose Hategekimana to Rwanda (19/06/2008).

¹⁰² *Ibid* at para 78.

¹⁰³ *Ibid* at para 18.

other assistance to principal perpetrators, and for harbouring or aiding perpetrators which in the chamber's understanding, covers crimes under Article 6(1) of the ICTR Statute but note those under Article 6(3).¹⁰⁴ Thus the chamber feared that Hategekimana could be acquitted for crimes committed under article 6(3) of the ICTR Statute since Rwanda did not cover command responsibility as a mode of criminal liability. The prosecution appealed but the Appeal's Chamber upheld lower chamber's decision.¹⁰⁵

6. *Prosecutor v Fulgence Kayishema*

Fulgence Kayishema's case was also considered for referral to Rwanda.¹⁰⁶ The accused person is still at large and so the chamber sought to know if transferred, whether he would be tried in absentia. Thus, the chamber was satisfied that the accused will not be tried in absentia as provided by Article 13(7) of the law on transfer of cases.¹⁰⁷ However, other accused persons in Rwanda can be tried in absentia as per the Rwandan Criminal Code of procedure.¹⁰⁸ The exception is therefore, for the transferees. According to Kayishema's defence, the accused was high ranking official therefore not supposed to be transferred to Rwanda as per Security Council resolution 1503 and 1534.¹⁰⁹ Thus, demanded that the Prosecutor define criteria for choosing to transfer Kayishema. The Accused is alleged to have been the inspector of police of a *commune* but in the trial chamber's reasoning he did not qualify for a high ranking official as defined in the ICTR's jurisprudence and so decided that it was appropriate to refer the case.¹¹⁰

The chamber however, referring to the ICTR's jurisprudence denied the transfer on the basis that the accused risked being imprisoned in isolation if convicted by

¹⁰⁴ *Ibid* at para 18.

¹⁰⁵ *Prosecutor v Ildephose Hategekimana Decision* on Prosecutor's Appeal against the Decision on Referral of the case of Ildephose Hategekimana to Rwanda under Rule 11 *bis*'(04/06/ 2008).

¹⁰⁶ *Prosecutor v Fulgence Kayishema* Case no. ICTR – 01-67- R11 *bis* Decision on the Prosecutor's Request for Referral of case to the Republic of Rwanda (16/12/2008).

¹⁰⁷ *Ibid* at para 8.

¹⁰⁸ See Article 198 of the Law no. 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure Modified and complemented by the Law no. 20/2006 of 22/04/2006(hereinafter Code of Criminal Procedure).

¹⁰⁹ Kayishema (n 106) at *bis* para 11.

¹¹⁰ *Ibid* at para 16.

Rwandan courts.¹¹¹ The chamber also had concerns on witness protection especially of the defence just like other chambers before it.¹¹² Kaishema's Trial Chamber however, takes on a contradictory tone when it accepts and states its satisfaction with the monitoring bodies- African Commission on Human and People's rights in case of violation by the government of Rwanda after the referral has been granted;¹¹³ but again indicates its dissatisfaction in regard to witness protection and risk of solitary confinement.¹¹⁴ This however leaves the researcher wondering about what would in fact be satisfactory to enable transfers, if monitoring referred cases cannot be relied on.

7. *Prosecutor v Jean Baptiste Gatete*

The last case considered for referral to Rwanda is that involving Jean Baptiste Gatete.¹¹⁵ The trial chamber first clarified its tasks in as far as decisions on referral are concerned. It refers to the reasoning of *Bagaragaza's* Appeals Chamber and states that, a trial chamber designated in accordance with Rule 11 *bis*, its task is to consider whether the state in question has a legal framework which criminalizes the alleged conduct of the accused, and if it provides an adequate penalty structure.¹¹⁶

Further, the chamber seemed determined not to interfere with national courts' matters but to do its task as mentioned above while responding to Human Rights Watch submissions: Human Rights Watch submitted that Rwanda lacked 'potential subject matter jurisdiction' because the transfer law did not define crimes Gatete was accused of and that there is a general lack of clarity on which law would be applied if transfer was effected.¹¹⁷ The Trial Chamber held that it was not the competent authority to decide in any binding way which law applied if the case was referred and held that, it is the Rwandan High Court and Supreme Court to do so.¹¹⁸

¹¹¹ *Ibid* at para 26.

¹¹² *Ibid* at para 39.

¹¹³ *Ibid* at para 54.

¹¹⁴ *Ibid* at para 55.

¹¹⁵ *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 (17/11/2008).

¹¹⁶ *Ibid* at para 8.

¹¹⁷ *Ibid* at para 10.

¹¹⁸ *Ibid* at para 11.

Contrary to the first clarifications made by this chamber in regard to what its tasks are in such a matter, while ruling on whether Rwandan courts would ensure a fair trial or not, it departed from that position. The chamber accepted the fact that Rwanda had a sufficient legal framework that mirrors article 20 of the ICTR Statute on guarantees of rights of accused and fair trial¹¹⁹ but argued that the issue presented to it, was not only whether the Rwandan law contained the required guarantees but other information relevant, such as the practice.¹²⁰ On the other hand, the chamber recognised that there was no practice to be considered yet, since prosecutors requests were based on transfer regime and there wasn't any case that had been transferred to Rwanda.¹²¹

In regard to witness protection for the defence, the Trial Chamber did not find defence witnesses testifying in transfer proceedings generally at risk given the fact that many witnesses had testified in the ICTR and returned home.¹²² The chamber correctly added that no judicial system, be it national or international, can guarantee absolute protection to witnesses.¹²³ In a way, the chamber was departing from other chambers' positions that seemed to demand absolute protection from Rwanda and yet this could not be met in other systems not even at the ICTR.

Concerning witness protection in relation to genocide ideology issues, Gatete's Trial Chamber was rather not certain in its ruling. Human Rights Watch and the defence argued that some witnesses in Rwanda may not be able to testify for fear of being accused of genocide ideology due to an expansive interpretation given to it in Rwanda. Despite other facts available to the chamber, such as guarantees in the transfer law and the fact that defence witnesses have always testified in Rwanda and ICTR, it held that '... [it] cannot exclude that some potential defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring "genocidal ideology"'.¹²⁴ This implies that no transfers may ever be made since there will always be certain witnesses suspected not willing to testify due to such fears and

¹¹⁹ *Ibid* at para 31.

¹²⁰ *Ibid* at para 31.

¹²¹ *Ibid* at para 32.

¹²² *Ibid* at para 60.

¹²³ *Ibid* at para 60.

¹²⁴ *Ibid* at para 62.

hence a promise for future transfers, being a false hope as earlier argued by Canter.¹²⁵

The above ruling on witness protection seems to be contrary to the earlier findings in *Gatete* as indicated above. The chamber had held that, it ‘did not find defence witnesses testifying in transfer proceedings generally at risk given the fact that many witnesses had testified in the ICTR and returned home.’¹²⁶ Secondly, there is no evidence showing that witnesses residing in Rwanda refuse to testify in transferred proceedings for fear of being accused of genocide ideology, hence it is my considered conclusion that this argument is just speculative. Thirdly, just like the ICTR Prosecutor argued in *Ildefonse*, referrals are governed by the transfer law and no cases have so far been transferred to Rwanda¹²⁷ to legitimize such speculation. A ‘greater leeway’ as suggested by Canter ought to be afforded to Rwanda.

The government of Rwanda responded to Human rights Watch allegations and suggested that witnesses outside Rwanda, who may not be willing to come, testify by video-link. *Gatete*’s Trial Chamber, acknowledged the use of video-link as it is used in many international and national tribunal including the ICTR but held that it would be unprecedented if most witnesses for the defence testified by video-link.¹²⁸ The argument advanced here is rather less convincing because, being unprecedented in itself is not being unfair and besides, it was aimed at solving the problem of witnesses unwilling to travel to Rwanda.

The chamber thus denied referral raising concerns similar to those raised by other chambers before and these are:

The Chamber is not satisfied that *Gatete* will receive a fair trial if transferred to Rwanda. First, it is concerned that he will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial. Second, it accepts that the Defence will face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. Third, there is a risk that *Gatete*, if convicted to life

¹²⁵ Canter (n 21) at 1652.

¹²⁶ *Prosecutor v Jean Baptiste Gatete* (n 115) at para 60.

¹²⁷ *Prosecutor v Ildephonse Hategekimana* (n 101) at para 36.

¹²⁸ *Prosecutor v Jean Baptiste Gatete* (n 115) at para 70.

imprisonment there, may risk solitary confinement due to unclear legal provisions in Rwanda.¹²⁹

V. Analysis and conclusion

The ICTR judges seem not to be clear on the criteria and what their role in proceedings for referral is. The issue is whether they should decide on national jurisdictions' capacity to ensure a fair trial or not. In *Hategekimana*, the Trial Chamber opined that a chamber designated under rule 11 *bis* is authorised to judge on such matters while responding to the prosecutor's argument. The Prosecutor argued that the chamber's task is to determine whether there are laws applicable to the proceedings against the accused [*Hategekimana*] in Rwanda that would ensure a fair trial or not.¹³⁰ The chamber disagreed and stated that; 'the chamber acknowledges that it is not required to look beyond the relevant legislation, but considers that it is authorized to do so, as sub- Rule 11 *bis* states that, the chamber's task is to satisfy itself that the accused will receive a fair trial in the courts of the State concerned.'¹³¹

What is apparent though is the fact that ICTR judges have no consensus on which tasks a chamber designated under Rule 11 *bis* is required to perform. The Appeals Chamber in *Bagaragaza* and the Trial Chamber in *Gatete* indicated that: the chamber's task is 'to consider whether the state in question has a legal framework which criminalizes the alleged conduct of the accused, and if it provides an adequate penalty structure.'¹³² As discussed earlier, most judges did not consider this as the only task, not even *Gatete*'s Trial Chamber which had set out to define its tasks.

Apparently, ICTR judges seem to apply double standards when deciding on referrals, a view also shared by Canter. Rwanda is required to do a lot more than what is

¹²⁹ *Ibid* at para 95.

¹³⁰ *Prosecutor v Ildephonse Hategekimana* (n 101) at para 34. Here, the ICTR Prosecutor also referred to ICTY case; *Prosecutor v. Željko Mejačić, et al.*, Case No. IT-02-65-AR11*bis*.1 Decision on Joint Defence Appeal against Referral Decision under Rule 11 *bis* (07/04/2006) at para 69. This chamber (Mejačić's) ruled that the Referral Bench did not err by focusing on the legal framework in Bosnia and Herzegovina.

¹³¹ *Ibid* at para 35.

¹³² *Prosecutor v Jean Baptiste Gatete* (n 115) at para 8.

required of other countries that were considered for referral.¹³³ For instance, the Trial Chamber in the referral of Bagaraza to the Netherlands had indicated its satisfaction according to Rule 11 *bis* requirements despite the contrary as was indicated later as to revoke the referral.¹³⁴ Similarly, the chambers that referred two accused (Munyeshyaka and Bucyibaruta) to France were easily satisfied that they would be tried in accordance with Rule 11 *bis* requirements.¹³⁵ What France did in Bucyibaruta and Munyeshyaka's trial, was only to indicate legal guarantees existing in French laws.¹³⁶ This is however different for Rwanda as judges in *Prosecutor v Hategekimana* and other chambers argued that they had to go beyond legal provisions to seeing what is done in practice.¹³⁷

In addition, the issue of witness protection in these two cases guaranteed by France did not go beyond anonymous testifying and closed session at trial but the chamber was satisfied that they would be protected.¹³⁸ This is however different for Rwanda, as it is required to fulfil a whole lot more, as discussed above.

Furthermore, the chambers that authorized transfers to France, did not take note of the fact that France has a single judge system (in the tribunale de police)¹³⁹ nor did Human Rights Watch or defence raise any concerns to that effect. However, a single judge system, as discussed earlier and pointed out by the Munyakazi Trial Chamber was a bar to the referral because it could not ensure a fair trial.¹⁴⁰ Here again, ICTR judges have no consensus on what constitutes a fair trial in case of referral. In one chamber a single judge system affects the independence of the court and so infringes the right to a fair trial, in another it does not.

¹³³ See Canter (n 21) ; where Canter was comparing the ICTR referral procedures of two accused to France with those referring accused to Rwanda, she concluded that 'the underlying message is that there is a different standard for African nations' and; asserts that 'It is unlikely, for example, that the ICTR would hesitate to transfer a case to the United States, irrespective of whether the defendant would be tried before a single judge.

¹³⁴ See Decision on Bagaraza's Revocation from the Netherlands (n 85) at para 7.

¹³⁵ See *Prosecutor v Laurent Bucyibaruta* (n 89) and *Prosecutor v Munyeshyaka* (n 90).

¹³⁶ *Ibid.*

¹³⁷ See *Prosecutor v Ildephonse Hategekimana* (n 101) at para 34.

¹³⁸ *Prosecutor v Laurent Bucyibaruta* (n 89) at para 28.

¹³⁹ Canter (n 21) at 1651.

¹⁴⁰ *Prosecutor v Yussufu Munyakazi* (n 96) at para 40.

Again, various ICTR chambers on referral despite prosecutor's and Rwanda's submissions and assurances in the law on transfer that various bodies would be allowed to monitor transfer proceedings, indicated their dissatisfaction that the accused if transferred to Rwanda would have fair trial and would not be imprisoned in isolation. On the other hand, France did show that there are no legal provisions to allow monitoring of proceedings in accordance to Rule 11 *bis* D (V), but simply promised in its briefs that it would be possible if the request is made through the *Procureur de la République*.¹⁴¹ The two transferees (Munyeshyaka and Bucyibaruta) were later released on bail and reasons for this is not clear to the Rwandan people.¹⁴² Although there is no such legal interest or duty on the country of destination (country which receives cases from ICTR) to justify decisions of its courts on transferred cases, for purposes of fostering reconciliation, such proceedings should be made known to the victim state.

In this chapter, I have argued that that the ICTR should, in Canter's words, give Rwanda 'greater leeway' by facilitating the transfer of cases in view of strides that Rwanda has taken. This will also go a long way towards enabling the ICTR achieve its goals. As Druml posits: 'When justice is externalised from the afflicted societies which it is intended, it then becomes more difficult for any of the proclaimed goals of prosecution and punishing human rights abusers – whether denouncing radical evil, expressing rule of law, voicing retribution or preventing recidivism – take hold.'¹⁴³ The ICTR's version of justice in many respects is externalised justice and so, for it to gain legitimacy among those it is meant for, it should allow more cases to be transferred to Rwanda for trial.

¹⁴¹ *Prosecutor v Laurent Bucyibaruta* (n 89) at para 30.

¹⁴² New Times Editorial, Rwanda's leading newspaper of 24/11/2009. Available at: www.newtimes.co.rw [accessed on the 24/11/2009].

¹⁴³ Druml (n 19) at 602.

CHAPTER 3: EQUALITY AND NON - DISCRIMINATION ANALYSIS

I. Introduction

The claim to equality before the law is considered as most fundamental of all rights available to man, and a starting point of all other liberties.¹⁴⁴ In international law, the principle of equality is stated in the negative form, as of non – discrimination.¹⁴⁵ This chapter analyses this important principle of equality and non – discrimination under international, regional and Rwandan law. It also defines concept of equality and discrimination in the legal terms. It further analyses states’ negative and positive obligations to ensure this right. It also analyses circumstances under which a state may be justified to treat people differently in similar situations/cases.

II. Defining and identifying the principle of Equality

It is widely accepted that equality and non-discrimination are positive and negative statements of the same principle.¹⁴⁶ Equality implies an absence of discrimination while non-discrimination implies the attainment of equality.¹⁴⁷ Furthermore, equality before the law demands that every person is entitled to equal protection and treatment before the law and its processes.¹⁴⁸ Importantly, the principle of equality before the law in sentencing requires that sentencing decisions treat offenders equally, irrespective of their wealth, race, colour, sex, employment or family status.¹⁴⁹

Warwick asserts that a ‘belief in equality’, is a deep-rooted principle in human thought and that one man should not be preferred to another unless there is a reason recognized as sufficient by some identifiable criterion.¹⁵⁰ In sentencing, Ashworth adds that the principle of equality hardly needs any justification, ‘for it is surely

¹⁴⁴ Warwick (n 38) at 285.

¹⁴⁵ *Ibid* at 285.

¹⁴⁶ Mjöll (n 43) 7.

¹⁴⁷ Rose R ‘New dimensions of democracy and citizenship.’ Available at: <http://www.eurofem.org/02.info/22contri/2.04.en.gend.htm> [Accessed on 03/08/2006].

¹⁴⁸ Andrew Ashworth ‘Sentencing and Criminal Justice’ (1992) at 171.

¹⁴⁹ *Ibid* at 77.

¹⁵⁰ Warwick (n 38) at 285.

unjust that people should be penalised at the sentencing stage for any of these reasons'¹⁵¹ such as wealth, race, colour, sex, employment or family status.

The principle has been identified in various literature and law to form a basis of most legal principles. Warwick quoting judge Manley Hudson points out that equity is a principle of law and that 'equality is equity.'¹⁵² Further, it is argued that the principles of equality are general principles of law – which are regarded as 'juridical truth' as they are found in most constitutions of civilized nations.¹⁵³

Warwick further argues that those principles underlying punishment and suppression of certain crimes such as genocide and slavery are recognized by civilized nations as binding on states without any conventional obligation – *jus cogens*.¹⁵⁴ He thus asserts that slavery and genocide are the extreme examples of the denial of the right to equality and that if such practices are considered to be contrary to *jus cogens*, then it is reasonable to consider other examples of denial to be contrary to the doctrine.¹⁵⁵ The United Nations Charter under article 1(3) obligates states to ensure human rights equally thus to establish and enforce any distinction would be a flagrant violation of the charter. Equality takes on two conceptual frameworks both under international and national law: Formal and substantive equality.

III. Formal equality

Formal equality implies that individuals in like situations should be treated alike.¹⁵⁶ Formal equality is said to be characterized by a 'symmetrical equal treatment of what is considered equal in the definition of prevailing groups.'¹⁵⁷ It focuses on equal treatment based on the appearance of similarity regardless of the broader context. Thus, laws or practices which give different treatment to individuals in similar

¹⁵¹ Ashworth (n 148) at 77.

¹⁵² Warwick (n 38) at 266.

¹⁵³ *Ibid* at 277.

¹⁵⁴ *Ibid* at 281.

¹⁵⁵ *Ibid* at 282.

¹⁵⁶ Interights Handbook (n 45) at 19.

¹⁵⁷ Mjöll (n 43) at 5.

situations may result in direct discrimination.¹⁵⁸ Formal equality has however been criticized for being indeterminate in that it requires consistency of treatment but makes no demand on the content, that it does not explain who are equal and those who are unequal for purposes of its application, that it uses a comparator (i.e. that one should claim a violation if there is another person in similar situation who is treated better or differently from the one alleging mistreatment but this may be hard to prove in cases where there is discrimination but with no exact comparative group/situation), and that it is uncritical of structural disadvantages meaning that they may be maintained under formal equality.¹⁵⁹

IV. Substantive equality

Substantive equality entails treating individuals in different situations, differently and those in similar situations, similarly.¹⁶⁰ In other words, substantive equality focuses more on ‘asymmetrical’ application of equality and non – discrimination law where attention is paid to the context in which discrimination takes place especially the history of the socially disadvantaged groups.¹⁶¹ Substantive equality is lauded for achieving equality of results, correcting past discrimination, allowing positive measures, and for taking into account diversity.¹⁶² The general view on the principle of non-discrimination is hence that, it does not require absolute equality or identity of treatment but its relative application.¹⁶³ Thus, this thesis largely advocates for substantive equality.

V. Discrimination

In 1949, the United Nations General Secretary – Trygve Lie defined the term discrimination as any ‘conduct based on distinction made on grounds of natural or social categories which have no relation either to individual capacities or merits or to

¹⁵⁸ Interights Handbook (n 45) at 19.

¹⁵⁹ Mjöll (n 43) at 22.

¹⁶⁰ Interight Handbook (n 45) at 19.

¹⁶¹ Mjöll (n 43) at 5.

¹⁶² *Ibid* at 25.

¹⁶³ Warwick (n 38) at 286.

concrete behaviour of the individual person.¹⁶⁴ The term connotes a negative treatment of an individual in comparison with others, in a similar situation. This view is said to have been depicted when a proposal to the Human Rights Commission to add the word ‘arbitrary’ to ‘discrimination’ was rejected on the ground that the term already meant ‘invidious distinction’ and that had a ‘derogatory meaning of unfair, unequal treatment.’¹⁶⁵ The Human Rights Committee (HRC) – a body that oversees state party compliance with the International Covenant on Civil and Political Rights (ICCPR), interpreted the prohibition of ‘discrimination’ under Article 2 and Article 26 of the ICCPR to include both direct and indirect discrimination, and stated that:

The Committee believes that the terms ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁶⁶

Thus, discrimination is clearly negative and a violation of the fundamental rights of man which should not be mistaken to be just differentiation as indicated above.

VI. Direct and indirect discrimination

Direct discrimination is said to be based on the idea of formal equality and is defined as ‘less favourable or detrimental treatment of an individual or group of individuals on the basis of a prohibited characteristic or grounds such as race, sex, or disability.’¹⁶⁷ Indirect discrimination on the other hand is said to occur, when a law, practice, requirement or condition seems neutral but impacts disproportionately upon particular groups.¹⁶⁸

¹⁶⁴ *Ibid* at 286.

¹⁶⁵ *Ibid* at 286.

¹⁶⁶ HRC General Comment No. 18 on ‘Non-discrimination’ in ICCPR (1989) at para 7 (hereinafter, HRC General Comment no.18).

¹⁶⁷ CESCR General Comment No. 20 on ‘Non- Discrimination in ICESCR, article 2’ (2009) at Para 10 (a) (hereinafter, CESCR General Comment no. 20).

¹⁶⁸ *Ibid* at para 10(b).

States may under both international law and national law, make certain distinctions with regard to the enjoyment of human rights and fundamental freedoms without violating the right to equality. The general stipulations in Article 4 of International Covenant on Economic, social and Cultural Rights (ICESCR) give guidance on when the right to non-discrimination may be limited; it states that ‘...the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare of a democratic society.’¹⁶⁹

There are instances where a differential treatment cannot be claimed but preferential treatment in analogous similar situation. The ECtHR in the case of *Building Societies v the United Kingdom*¹⁷⁰ declared that preferential treatment was unjustified. The complainant argued that a particular legislation prevented Building Societies from claiming reimbursement of taxes, but did not apply to another building company - Woolwich Building Society.¹⁷¹ The problem was that the general stipulations of the legislation did not reach Woolwich, and that the successive piece of legislation expressly exempted Woolwich. Preferential treatment was established as payments had been made to Woolwich.¹⁷² Thus, like the ECtHR held in *Building Societies*, it is the position of this thesis that discrimination or preferential treatment should not be dismissed on the ground that the LTC does not explicitly state in its provisions that certain guarantees enjoyed by the transferees are not to be extended to the locally accused persons. Where certain treatment is extended to transferees and not transferees, a contest against preferential treatment is hence justified.

VII. Equality under international law

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights.¹⁷³

¹⁶⁹ Article 4 of the ICESCR (1966).

¹⁷⁰ *Building Societies v the United Kingdom* (23/10/1997) in Mjöll (n 43) at 80.

¹⁷¹ Mjöll (n 43) at 80.

¹⁷² *Ibid.*

¹⁷³ Office of the High Commissioner for Human Rights ‘General Recommendation No. 14 on Definition of Discrimination (Art. 1, par.1) of the International Convention on Elimination of All forms of Racial Discrimination’ (1993) at para 1 (hereinafter, CERD General Comment no.14).

Non-discrimination and equality clauses in the Universal Declaration of Human Rights (UNDHR) clearly state that, human rights apply to all people without distinction of any kind.¹⁷⁴ Note that principles (including the principle of equality) in the UNDHR by a widespread and constant recognition by the majority of states have crystallised into international customary law.¹⁷⁵ Evidence of this is the fact that UNDHR has become part of most constitutions of the world (state practice or *opinio juris*). Hence Rwanda has an international legal obligation to ensure the right to equality accruing from international customary law as it has not persistently objected to it¹⁷⁶ so as to relieve itself of this obligation but rather, Rwanda has recognised the right to equality in its various laws as will be discussed later on.

The United Nations Charter also proclaim the principle of equality and calls upon state parties to create conditions under which justice and international obligations arising from international treaties and other sources of international law may be respected.¹⁷⁷

The ICCPR amply expound on the principle of equality.¹⁷⁸ Particular attention is paid to article 14 and 26 of the ICCPR due to its relevancy to the subject under consideration in this thesis. The former speaks of equality of all before courts and tribunals while the later, prohibits discrimination with regard to all rights and guarantees recognized by the law. The HRC in *Broeks v the Netherlands*¹⁷⁹ held that if a state passes legislation in its sovereign power, it should be consistent with article 26. The HRC also clarified the scope of discrimination covered by the ICCPR in reference to article 26, it stated that, ‘open ended’ by the phrase; ‘or other status’ and interpreted it to mean that discrimination was prohibited on additional grounds to those specified in the article.¹⁸⁰

¹⁷⁴ Article 1, 2 and 7 of the UNDHR (1948).

¹⁷⁵ Warwick (n 38) at 274.

¹⁷⁶ Jack L Goldsmith and Eric A Posner ‘A Theory of Customary International Law’ (1999) 66 The University of Chicago Law Review 4 1113 – 1117 at 1114.

¹⁷⁷ See the Preamble of the United Nations Charter (1945) at paras 2 and 3, Articles 1(3), 55, 56, 62(2) and 76.

¹⁷⁸ See Articles 2, 3, 6, 14, and 26 of the ICCPR (1966).

¹⁷⁹ See *Broeks v the Netherlands*, No.172/1984 at para12.4, in Interights Handbook (n 45) at 31.

¹⁸⁰ Interights Handbook (n 45) at 3.

The ICESCR also protects the right to equality in its various provisions.¹⁸¹ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) specifically protects and promotes the right to equality.¹⁸² Its implementation is monitored by Committee on Elimination of all forms of Racial Discrimination (CERD). The protection of ICERD is limited to the specified grounds of ‘race, colour, descent, or national or ethnic origin.’¹⁸³ However, article 5 of ICERD provides for equality of all before the law and thus seems to give general protection against all forms of discrimination.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is another treaty that protects against discrimination.¹⁸⁴ Its implementation and compliance by state parties is monitored by the Committee on the Elimination of All forms of Discrimination against Women- CEDAW. Protection against discrimination in CEDAW is limited to ‘discrimination against women.’ Article 1(1) refers only to one ground of discrimination, sex discrimination.

The Convention on the Rights of the Child (CRC)¹⁸⁵ also protects against discrimination in regard to children. The Committee on the Rights of the Child is the monitoring body. Protection against discrimination under the CRC is also limited to children. However, the “other status” language in Article 2(1), reflecting identical language in the ICCPR and the ICESCR, indicates that the CRC is open-ended as to the grounds of discrimination covered.

The right to equality is well protected under international law and there is a duty to protect this right by states which are party to the human rights instruments discussed above. As discussed below, Rwanda is a party to all these instruments and hence has the duty to uphold them.

¹⁸¹ See Articles 2, 3, and 7 of the ICESCR (n 169).

¹⁸² See general provisions of ICERD (1965).

¹⁸³ *Ibid* Article 1

¹⁸⁴ See Articles, 1, 2, 3, and 4 of CEDAW (1979).

¹⁸⁵ Articles 2, 5, and 30 of the CRC (1989).

VIII. Regional systems on human right and the principle of equality

At regional level, the European Convention on the Protection of Human Rights (ECHR), the American Convention on Human rights (AmCHR) and African Charter on Human and People's Rights (ACHPR) are discussed in relation to the right to equality and non – discrimination.

1. European Convention on the Protection of human Rights (ECHR)

The ECHR was created by the Council of Europe and almost every State in Europe is a full member of the Council and a party to the ECHR.¹⁸⁶ The European Court of Human Rights (ECtHR) is the body charged with enforcing the rights and freedoms protected under the ECHR. Articles 1 and 14 of ECHR specifically cover the right to equality. The equality of rights provided by these provisions concerns only rights provided in the convention. According to ECtHR jurisprudence, discrimination under Article 14 occurs when there is different treatment of persons in 'analogous or relevantly similar situations and if that difference in treatment has no objective and reasonable justification'.¹⁸⁷ 'Objective and reasonable justification' is said to be established when the treatment in question has a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹⁸⁸

2. African Charter on Human and People's Rights (ACHPR)

The African Charter on Human and People's Rights was adopted by the Organisation of African Unity (OAU) in 1981 and entered into force in 1986.¹⁸⁹ The African Commission on Human and Peoples' Rights (African Commission)¹⁹⁰ and more recently, the African Court on Human and People's Rights (ACtHPR) are the bodies that oversee state compliance with the charter. The African Commission has the

¹⁸⁶ Interights Handbook (n 45) at 44.

¹⁸⁷ See *Belgian Linguistics case* (Nos. 1474/62, 23/07/1968) at para 10.

¹⁸⁸ *Ibid* at para 10.

¹⁸⁹ African Charter (1981).

¹⁹⁰ *Ibid* at Article 30.

power to investigate and consider ‘communications’ from States and individuals regarding violations of the Charter.¹⁹¹ However, its recommendations are not binding and its proceedings take place in private.

Articles specifically protecting equality in the ACHPR include: article 2, 3, 13 and 19. Article 2 ensures equality only in regard to the rights provided in the charter whereas article 3 extends protection to all rights provided by the law. Unlike other international and regional instruments that focus only on the individual protection against discrimination, Article 19 of the ACHPR expressly prohibits domination or discrimination of one group of people by another group. This group rights focus extends to Article 22, which promotes the right of a people to economic, social and cultural development.

The African Commission in the case of *Legal Resources Foundation v Zambia*¹⁹² emphasised the right to equality by stating that: ‘The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.’

3. The American Convention on Human Rights (AmCHR)

The American Convention on Human Rights (AmCHR) was adopted by the Organization of American States (OAS) in 1969 and entered into force on 18 July 1978.¹⁹³ The OAS had created the Inter-American Commission on Human Rights (IACHR) to promote and protect human rights in the region. Since 1965, the IACHR has been expressly authorised to examine individual complaints or petitions regarding human rights violations under the American Declaration. The adoption of the AmCHR in 1969 granted additional powers to the IACHR to consider individual complaints under that instrument.

¹⁹¹ *Ibid* at Article 47.

¹⁹² *Legal Resources Foundation v Zambia* Communication no. 211/98 at para 63.

¹⁹³ American Convention on Human Rights (1969).

The AmCHR also created the Inter-American Court of Human Rights (IACtHR) as a supplementary enforcement organ for the AmCHR. Articles in AmCHR specifically protecting the right to equality include; articles 1, 3, 24, and 26. Article 27 of the AmCHR, like Article 4 of the ICCPR, provides that derogations by a State in time of war, public danger, or other emergency that threatens its independence or security must not discriminate on the grounds of race, colour, sex, language, religion, or social origin.

Rwanda is only a party to the ACHPR and so has the obligation to protect and promote rights in the charter. Although Rwanda is not a state party to the American and European systems of human rights, lessons can be drawn from them.

IX. Equality under Rwandan law

Rwanda is a state party to most international human rights treaties and is thus obliged to respect and promote rights in these instruments.¹⁹⁴ Having inherited a civil law tradition, international treaties duly ratified by Rwanda automatically become part of its municipal law without any other act of parliament domesticating them .i.e. monism. It is important to note here that treaties duly ratified by Rwanda; rank number two after the Constitution in importance.¹⁹⁵ Thus any act or law of the state that is contrary to these treaties is a violation of both national and international state legal obligations. In this section however, I will discuss some of the Rwandan laws (exclusively domestic) that supplement international provisions in protection of the right to equality.

The Rwandan Constitution, just like in many other countries, is the supreme law in the country.¹⁹⁶ Importantly, it protects the right to equality in its various provisions. The Rwandan constitution in its article 9, considers the right to equality as one of the fundamental principles. This reaffirms Warwick's assertions mentioned earlier, that the right to equality is a general principle of law. Article 11(1) of the Constitution

¹⁹⁴ Rwanda is a state party to: UN Charter, ICCPR, ICESCR, CEDAW and CRC. These are some of the international treaties duly, ratified by Rwanda.

¹⁹⁵ Article 190 of the Rwandan Constitution as amended to date, *O.G.R.R*, special n° of 04/06/2003.

¹⁹⁶ *Ibid.*

goes further than stating that the right to equality is just a fundamental principle of law; to stating that it is a right which everyone is entitled to, and forbids discrimination of any kind in the enjoyment of all rights protected by the Constitution.¹⁹⁷ This provision may be construed to be limiting the right of equality to only rights stipulated in the Constitution.

However, Article 16 and 45(2) of the Rwanda Constitution extends the protection. The former provides for the right to ‘equality for all before the law’ while the later states that everyone should have equal access to public services. Meaning that, all/any guarantees provided by the Rwandan laws or institutions or policies should be available to all without any distinction.

The Rwandan Constitution just like the African Charter does not only guarantee rights but also spells out duties for the citizens. Article 47 of the Constitution gives citizens a duty to safe guard equality and article 46 before it, gives a corresponding right, to relate to others without discrimination. Putting a seal to the above and several other provisions in the Constitution, Art 48 stipulates that ‘in all circumstances everyone has the duty to respect the Constitution.’ Thus, the right to equality is a constitutional right which should be respected at all times. Other laws are bound to be consistent with the provisions of the Constitution¹⁹⁸ and in case of violation of a Constitutional right by any organic laws, laws, decree- laws, international treaties and agreements; the Supreme Court is the competent court to hear such matters.¹⁹⁹

In criminal proceedings, the right to equality of all the parties involved in a case is guaranteed by Article 1 (2) of the Rwandan Code of Criminal Procedure.²⁰⁰ The right to equality is therefore protected under Rwandan law, regional and international law and so the state has no justification to defy this right.

¹⁹⁷ *Ibid* at article 11 (1).

¹⁹⁸ *Ibid* at article 93 (2).

¹⁹⁹ *Ibid* at aarticle 145 (3).

²⁰⁰ Article 1 (2) of the Code of Criminal Procedure(n 108).

X. State obligation in relation to the right to equality

States have the obligation under international law to protect and promote human rights.²⁰¹ These obligations are dispensed in two forms: positive and negative obligation. The negative obligation of the state in relation to equality entails the state refraining from discriminating which may take a form of national legislation.²⁰² The HRC while commenting on the state responsibility in regard to the right to equality stated that, the state has the duty under the ICCPR to respect and ensure individuals' rights without distinction of any kind.²⁰³ The state is the primary responsible organ in case of violations and the Committee on CERD allows individuals to bring claims against public authorities that fail to enforce equality provisions in both private and public realms.

The obligation of the state in relation to the protection of human rights has been clarified as not only of complying with non-discrimination principles itself, but also to ensure that those principles are implemented within the State between private actors.²⁰⁴ These measures have come to be referred to as 'positive obligations' of the state which include 'obligations to implement, to ensure or guarantee rights as well as respecting them.'²⁰⁵ However, such obligations are not explicitly set out in international instruments on human rights but have been developed through case law. The HRC in the General Comment 18 pointed out that; positive obligations of the state under equality provisions entails use of special measures for certain groups of people to ensure substantive equality.²⁰⁶

From the above discussion, it is established that the right to equality and non-discrimination are protected both under international and Rwandan law, and that there is a positive and negative duty on Rwanda as a state to respect and ensure this right.

²⁰¹ Interights Handbook (n 45) at 21.

²⁰² *Ibid* at 23.

²⁰³ HRC General Comment 18 (n 166) at para 1.

²⁰⁴ Interights Handbook (n 45) at 23.

²⁰⁵ *Ibid* at 23.

²⁰⁶ HRC General Comment 18 (n 166) at para 5.

XI. Justification of differential treatment

This section discusses grounds justifying differential treatment both under international law, and Rwandan law.

1. Under international law

Ian Brownlie rightly points out that there is a growing body of legal materials on which discrimination may be distinguished from reasonable measures of differentiation.²⁰⁷ He adds that the principle of equality before the law allows for factual differences such as sex, or age and that it is not based on mechanical conception of equality.²⁰⁸ Thus, this section spells out such measures.

a. Objective, reasonable and legitimate justification

The HRC in General Comment 18 stated that not every differentiation of treatment is tantamount to discrimination. It held that differentiation is justified if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate.²⁰⁹ The HRC added that, it assesses the aim and effects of the measures or omissions in order to determine whether they are legitimate and compatible with the nature of the Covenant rights and are solely for the purpose of promoting the general welfare in a democratic society. Further, that there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects.

Furthermore, CERD has observed that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention.²¹⁰ In considering the criteria that may have been employed, the Committee stated that it acknowledges particular actions that

²⁰⁷ Ian Brownlie 'Principles of Public International Law' (2008) (seventh edition) at 573.

²⁰⁸ *Ibid* at 573.

²⁰⁹ HRC General Comment 18 (n 166) at para 13.

²¹⁰ CERD General Comment 14 (n 173) at para 2.

may have varied purposes and when seeking to determine whether an action has an effect contrary to the Convention, it analyses whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin, or not.²¹¹

For purposes of understanding ‘objective and reasonable and legitimate justification, a classical case earlier cited in the ECtHR context, gives a glimpse of what they are: in the *Belgian Linguistics*²¹² case, the respondent state - Belgian advanced the argument that ‘positive discrimination in favour of the Flemish language was in the public interest and pursued a legitimate aim, that of the protection of the linguistic homogeneity of certain regions in order to prevent the ‘phenomenon of francisation’ in Dutch speaking areas in Flanders.’ The court to a certain extent concurred with the respondent, it held that measures which would ensure that, ‘in a unilingual region, the teaching language of official or subsidised schools be only that of the region are not arbitrary and therefore not discriminatory. However, the court deferred by stating that the measure preventing certain children, solely on the basis of their parents’ residence, from having access to French-language schools in the communes of ‘special status’, was.’²¹³

Just like the HRC held above, the ECtHR further clarified the procedure of establishing such measures:

The existence of such [an objective and reasonable] justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14... is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

It has not been considered enough for a responding state to prove that the differentiation sought a legitimate end but it has also been required to show

²¹¹ *Ibid* at para 2.

²¹² *Belgian Linguistics* case (n 187).

²¹³ *Ibid*.

proportionality of the means employed and the extent to which private interests have been sacrificed for public interest.²¹⁴ There is a need to maintain a balance between general interests and the rights and of individuals.²¹⁵

b. Lack of resources

Some respondent states have used a defence of lack of resources for failure to remove differential treatment. The ICESCR recognizes that due to limited resource, states may not be able to ensure certain rights and so allows states to progressively realize them.²¹⁶ However, the CESCR has stated that, lack of resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.²¹⁷

c. Safety

Differential treatment aimed at achieving physical safety of individuals or groups is another ground considered justifying differential treatment. In the case of *Bhinder Singh v Canada*,²¹⁸ the HRC found no violation of the right to equality due to the fact that measures the applicant was advancing were aimed at his safety. The facts of the case were that Mr Bhinder Singh, was a naturalized Canadian citizen born in India, a Sikh by religion and so he wore a turban on his head.²¹⁹ In 1974, he was employed by the Canadian Railway Corporation which required him like other employees to wear a hard hat to protect him against injuries and electric shock during work. Mr. Bhinder however refused to wear the hat as it was against his religion and so claimed discrimination on the basis of religion. After exhaustion of local remedies he sought redress from the Human Rights Committee.

²¹⁴ Mjöll (n 43) at 48.

²¹⁵ Brownlie (n 207) at 77.

²¹⁶ Article 2(2) of the ICESCR (n 169).

²¹⁷ CESCR General Comment no.20 (n 167) at para 13

²¹⁸ *Bhinder V Canada* case no. 208/1986 ICCPR in Selected Decisions of the Human Rights Committee under the Optional Protocol. Available at: <http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf> [accessed on 11/12/2009].

²¹⁹ *Ibid* at 186.

The HRC held that the legislation which required workers to wear hard hats on the face of it seemed neutral but was discriminatory indirectly given the fact that it was against the people of Sikh religion, as the author claims violation under Articles 18 and 26 of the ICCPR.²²⁰ However, the committee held that requiring employees to wear hard hats was aimed at protecting them from injury and electric shocks even if it is against the Sikh religion and so it is reasonable and directed towards objective purposes compatible with covenant.²²¹

d. Principle of Subsidiarity

The principle of subsidiarity is well developed in the European system of human rights. It has also been invoked as a ground justifying differential treatment. In the *Belgian linguistics* case, in order to determine whether the differentiation was legitimate or not, the court invoked the principle of ‘subsidiarity.’²²² The principle is explained as ‘the freedom retained by natural authorities – states, to choose measures considered appropriate in matters covered by the ECHR.’²²³ The government of South Africa in *Garreth Anver Prince case*,²²⁴ referred to the principle of subsidiarity as a natural delimitation of functions between national authorities of state parties to the African Charter and the Charter itself. Making submissions to the African Commission on Human and Peoples’ Rights, the government of South Africa argued that:

The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. To this end, the African Commission should construct its role as subsidiary, as narrower and supervisory competence in subsequently reviewing a State’s choice in light of the standards set by the provisions of the Charter. In terms of this construction, the African Commission should not substitute domestic institutions in interpreting and application of the national law.²²⁵

²²⁰ *Ibid* at 6.1.

²²¹ *Ibid* at para 6.2.

²²² *Belgian Linguistics case* (n 187) at para 10.

²²³ *Mjöll* (n 43) at 43.

²²⁴ *Garreth Anver Prince v South Africa* Communication no. 255/2002 at para 37.

²²⁵ *Ibid* at para 37.

The principle of subsidiarity may be claimed by state parties to international conventions in regard to the rights covered by such conventions, however, there is a limit to this principle when the 'objective and reasonable' and proportionality test is applied. The subsidiary test can however be easily satisfied when a 'legitimate aim' test is applied.

e. Principle of Margin of appreciation

Another guiding principle that has existed in the European system of human rights is that of 'margin of appreciation.' The practice of recognizing and respecting states' margin of appreciation was derived from the case-law of the Court and European Commission of Human Rights (ECHR), not from the text of the Convention itself.²²⁶ Its relevance can be raised by the Court on its own initiative, or by the contracting parties themselves, by way of a defence to the allegation that they have violated a Convention right.²²⁷ The principle generally refers to the amount of discretion an international/regional court gives national authorities in fulfilling their obligations under the Convention.²²⁸

In *Rasmussen v Denmark*,²²⁹ the ECtHR held that, states enjoy a certain 'margin of appreciation' in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The HRC in the case of *Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius*²³⁰ where a discriminatory measure against married women was at issue, the Committee implied the national margin of appreciation in assessing the scope of protection afforded to family life when it stated that: 'The committee is of the opinion that the legal protection or measures a society or a state can afford to the family may vary from

²²⁶ Howard C Yourow 'The Margin of Appreciation Doctrine in the Dynamics of Europe and Human Rights Jurisprudence' (1996) at 13.

²²⁷ See Herbert Rubasha 'Accommodating Diversity: Is the Doctrine of Margin of Appreciation as applied in the European Court of Human Rights Relevant in the African Human Rights System?' (2006) LLM Thesis at the University of Pretoria, Faculty of Law Centre for Human Rights.

²²⁸ Thomas O'Donnell 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 *Human Rights Quarterly* 474 at 478.

²²⁹ *Rasmussen v Denmark*, 28.11.1984 at para 40.

²³⁰ *Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* Doc. A/36/40,134 in Herbert Rubasha

country to country and depend on different social, economic, political and cultural conditions and traditions'.²³¹

The state parties enjoy a certain but not unlimited margin of appreciation in the matter of imposition of restrictions but the court (ECHR) gives final ruling on whether they are compatible with the convention.²³² The principle is not explicit in the African system of human rights but it is only hoped that the 'claw back clauses' in the African charter can permit the application of the principle of margin of appreciation.²³³

f. Affirmative action

Affirmative/positive action is permitted by almost all international human rights instruments as legitimate differential treatment.²³⁴ The CESCR stated that in order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.²³⁵ It added that such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. The committee further held that positive measures may exceptionally, be of a permanent nature, such as in the interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities.²³⁶

²³¹ *Ibid.*

²³² Brownlie (n 207) at 577.

²³³ Herbert Rubasha (n 227) at 27.

²³⁴ See Article 4 f CEDAW and the language used throughout in the CEDAW (n 184) :. 'The state parties shall take all appropriate measures....' Also see Articles 1(4) and 2(2) of ICERD; and articles 10 (2 and 3) of ICESCR.

²³⁵ CESCR General Comment n.20 (n 167) at para. 2.

²³⁶ *Ibid.*

2. Under Rwandan law

Rwandan law as discussed above, protect and promote the right to equality, however, it does allow differential treatment under specified circumstances.

a. Affirmative action

Firstly, the Rwandan Constitution provides for affirmative or positive action to ensure substantive equality for certain people. For instance, the Constitution provides that special measures should be taken for children²³⁷ and for disabled children in education.²³⁸ Thus differentiation in treatment is justified in respect of affirmative action.

In criminal matters, the Rwandan sentencing laws give guidelines on when persons accused of committing similar crimes may be justifiably sentenced differently as discussed below.

b. Mitigating circumstances

The Rwandan Criminal Code provides that certain circumstances may aggravate, or mitigate or be excused for certain criminal acts.²³⁹ Thus, people who may commit similar crimes under similar circumstances may receive different penalties without violating the right to equal treatment.

The age of the offender is considered at the sentencing stage. Where it is established that the offender in question was a minor, at the time he/she committed a crime, his/her sentence may be reduced.²⁴⁰ This is because when establishing criminal liability, a minor's real criminal intent to commit a crime is said not be fully established so as to apply the full rigour of criminal law on him/her.

²³⁷ Article 28 of the Rwanda Constitution (n 195).

²³⁸ *Ibid* at Article 40(4).

²³⁹ Article 73 of the Criminal Code (n 78)

²⁴⁰ *Ibid* at Article 77.

The Rwandan Criminal Code also considers provocation as a ground for mitigation²⁴¹ and in certain instances; provocation may be accepted as an excuse. This is premised on the ‘culpability principle’ of sentencing which is that one should not penalize offenders for unforeseen results.²⁴² The level of culpability differs and so is the response in terms of punishment for certain conduct. This is usually applied in the retributive model of sentencing where punishment is determined by the level of culpability and the harm or gravity of the offence.²⁴³

The Rwandan criminal code however, does not give a closed list of what mitigating circumstance may include but leaves discretion to the sentencing judge to appreciate other circumstances that may mitigate sentences however, requires him/her to justify his reasoning.²⁴⁴

The Rwandan Code of Criminal Procedure adds another ground for mitigation; - a person who ‘unequivocally admits’ to have committed a crime, his/her sentence may be reduced to a half.²⁴⁵ In regard to genocide cases, most of which are decided by Gacaca Courts, mitigating circumstances include: the accused confessing, pleading guilty and asking for forgiveness before investigation, after investigation or during trial. For an offender who does that, his/her punishment is reduced or commuted depending on the stage (before investigations commenced, during or after they have commence) at which he/she accepted and confessed – the earlier the confession is made, the lesser the sentence.²⁴⁶ Also, the Gacaca Courts consider age as one of the grounds for mitigation especially where one who committed such crimes was still a minor.²⁴⁷

²⁴¹ *Ibid* at Article 77.

²⁴² Eden Erez ‘Intergrating a Victim Perspective Through Victim Impact Statements’(2000) in A Crawford & J Goodey ‘Intergrating a Victim Perspective within Criminal Justice at 167.

²⁴³ *Ibid* at 167

²⁴⁴ Article 82 of the Criminal Code (n 78).

²⁴⁵ Article 35 of the Code of Criminal Procedure (n 108).

²⁴⁶ Article 12 of the 2008 Gacaca law (n 17).

²⁴⁷ *Ibid* at Article 20.

c. Aggravating circumstances

The Rwandan penal code also provides for aggravating circumstances and these include: premeditation, recidivism and concomitance of crimes.²⁴⁸ Gacaca law also considers recidivism, combination of crimes – where a person committed several crimes of genocide, and false confession during a guilty plea to be aggravating circumstances.²⁴⁹

XII. Conclusion

Indeed, the right to equality before the law is the most fundamental of the rights of man, and the basis of all other liberties.²⁵⁰ It is undisputable therefore that states are under both positive and negative obligation to ensure the right to equality. It has been established that, the claim should be to attain substantive rather mechanical equality. This chapter has differentiated between acts of differentiation that are justified from acts of discrimination by states. Distinction in treatment of individuals can be legitimate if it is reasonable and not arbitrary and has objective justification and where there is a reasonable relationship of proportionality between the aim sought and the means employed.²⁵¹ The Rwandan sentencing laws have demarcated areas from which differentiation between the accused persons may be permitted. The next chapter analyses provisions of LTC in relation to the principle of equality and thus will be judged against the facts established in this chapter.

²⁴⁸ See Articles 85, 93, and 94 of the Criminal Code (78).

²⁴⁹ See Articles 18 and 19 of the 2008 Gacaca law (n 17).

²⁵⁰ Warwick (n 38) at 285.

²⁵¹ *Ibid* at 287.

CHAPTER 4: ASSESSING THE LTC IN RELATION TO THE RIGHT TO EQUALITY

I. Introduction

This chapter analyses the kind of treatment, LTC accords transferees in comparison with other locally accused persons. Thus, it assesses temporal jurisdiction of the ICTR *visa avis* that of Rwanda, competency of court, composition of the bench, indictment, evidence collection, right to counsel, witness protection, sentences and conditions of detention.

1. Conflict of temporal jurisdiction

Before the establishment of the ICTR, Rwanda had objected to the restricted temporal jurisdiction of the ICTR.²⁵² Rwanda showed that the genocide was premeditated hence pilot projects for extermination were successfully conducted.²⁵³ The Security Council, however, limited the ICTR's mandate to crimes committed between 1st January and 31st December 1994²⁵⁴ whereas Rwanda maintained its position and so prosecutes genocide and other related crimes committed between, 1st October 1990 and 31st December 1994.²⁵⁵ The law on transfer of cases provides that 'a person whose case is transferred from the ICTR to Rwanda shall be prosecuted only for crimes falling within the jurisdiction of the ICTR.'²⁵⁶

This implies that persons, who committed similar crimes, will be prosecuted differently based on this law. The transferees will be prosecuted for only a few crimes due to this limited time while other locally accused persons face more charges. For instance, Gatete Jean-Baptiste one of those appearing in the ICTR, is alleged to have been involved in most crimes committed between 1990 and 1993 in the Eastern province of Rwanda, but now stands accused only of crimes committed

²⁵² Madeline (n 18). Also see United Nations Doc.S/pv.3453 (1994) at 14; see Article 7 of the ICTR Statute.

²⁵³ Madeline at 15.

²⁵⁴ Article 7 of the ICTR Statute (n 1).

²⁵⁵ Article 25 of the Organic Law no. 51/2008 Determining the Organization, Functioning and Jurisdiction of Courts (2008).

²⁵⁶ Article 3 of the transfer law (n 6).

from the 1st January – 31st December 1994.²⁵⁷ Gatete and several others indicted by the ICTR held positions of power in the period of 1993 and 1994 and so, some crimes may have been committed under their command but under the LTC, those they commanded will be prosecuted for crimes committed between 1993 to 1994 but they (transferees) will not, themselves. Applying the test of ‘reasonable and objective’ justification for differentiation discussed in the previous chapter; to this form of differentiation among the accused, it neither passes as ‘reasonable’ nor as ‘objective’ but rather as unfair. It does not also pass as a mitigating or excuse ground under Rwandan sentencing laws discussed in chapter three. This is because, the moral culpability of the transferees for crimes of genocide surpasses that of the locally accused as earlier discussed- they (transferees) bear the highest responsibility.²⁵⁸

2. Competent court

An accused person has a right to be tried by an impartial and competent court.²⁵⁹ Thus the High Court of the Republic of Rwanda is the court to hear cases concerning transferees on the first instance and appeals in the Supreme Court.²⁶⁰ People being prosecuted in local courts falling in category one discussed earlier²⁶¹ save those tried by Gacaca Courts, are tried by the Intermediate Courts on the first instance.²⁶² Contentions here may be that the High Court and Supreme Court are the highest courts in Rwanda and so, judges in these two courts are more senior to other judges in the lower courts.²⁶³ This means that transferees are likely to have more professional hearings than those appearing before lower courts. The logical counter

²⁵⁷ *Prosecutor v Gatete Jean-Baptiste* (n 115) Decision on Defence Preliminary Motion (29/03/2004) at para 6. Also see The New Times ‘Murambi Survivors Recount Gatete’s Reign of Death’ Wednesday 28/10/2009. Available at: <http://www.newtimes.co.rw/index.php?issue=14062&article=21762> [accessed on 28/10/ 2009]. The New times elaborates that Gatete was ‘a district leader and one of the master minds of genocide in his home area. He is accused of having dug holes and ditches, raped women, brutally killed people in masses et cetera.’)

²⁵⁸ See (n 14).

²⁵⁹ Article 7 (1) b of the African Charter (n 188).

²⁶⁰ Article 2(1) of the law on transfer of cases (n 6). Also see Article 149(2) of the Constitutional (Rwandan Constitution) as amended on 13/08/2008 .

²⁶¹ See Article 51 of the 2004 Gacaca law on categorisation of genocide suspects (n 15).

²⁶² Article 73(II) of OFJC (n 255).

²⁶³ See *Prosecutor v Ildephose Hategekimana* (n 101) Trial Chamber’s Decision on Referral at para 44.

argument however could be that appearing before an experienced judge does not necessarily guarantee a fair trial.

Again, although concerns about equality may be raised due to the fact that persons (transferees and other locally accused) accused of similar crimes may appear before different courts according to the LTC, tribute must be paid to the idea of substantive equality and the defence of 'legitimate aim' discussed in chapter three. This is because, it is not so necessary that the accused be heard by the same court as may be demanded under formal equality but rather, the concern should be whether they all receive a fair trial in the respective courts they appear before.

Again, the LTC can be justified when the 'legitimate test' is used because the government of Rwanda pursues a legitimate aim - having the transfers effected. The ICTR that originally handles the transferees, uses procedures recognised as of an international nature. At national level, the High Court and the Supreme Court are better placed to hear these cases than the lower courts, because the former have more experienced judges as indicated above. In addition, due to the importance given to the transfer and advantages expected from them, it is justified in this case for the LTC to agree to differentiate the transferees from the locally accused, in regard to the courts each would appear before.

3. Composition of the bench

In *Prosecutor v Munyakazi*,²⁶⁴ the Trial Chamber denied request for transfer of the accused to Rwanda because the system there, allows a single judge to preside over a matter. The Trial Chamber held that the system of a single judge threatened the independence of the judiciary arguing that a single judge may submit to external pressures and hence be impartial. It suggested a bench of three at trial and five on appeal.²⁶⁵ Following this judgment, Rwanda amended the law on transfer of cases to

²⁶⁴ *Prosecutor v Yusuf Munyakazi* (n 4) at 48.

²⁶⁵ *Ibid* at 49.

indicate that transferees may be tried by a bench of three or more judges.²⁶⁶ This arrangement does not automatically apply to other accused-none transferees.²⁶⁷

However, in light of the Appeals Chamber's ruling in *Munyakazi*' having a number of judges presiding at a hearing does not guarantee that a trial will be fair. Arguably though, supposing that such fears are founded, it follows that the other accused (locally accused) will appear before a single judge and yet crimes are the same as those of transferees. This violates the rule of equality before the law as; one is exposed to the risk while the other is protected.

4. Mode of indictment

The law on transfer provides that the Prosecutor General of the Republic of Rwanda may adapt indictments to make them compliant with the Rwandan Code of Criminal Procedure.²⁶⁸ This is supported by *Hategekimana* Trial Chamber²⁶⁹ which held that, adapting the indictment to national laws is necessary to effectuate transfer and cites jurisprudence of the ICTR and ICTY. This provision if followed, would have solved the issues contended in this research but it turns out to be a false promise. It contradicts other provisions of the law on transfer because of variations in terms of penalty, temporal and subject matter jurisdiction as discussed in this chapter. The issue is therefore not of discrimination but legal contradiction or inconsistency of article 4 of the law on transfer of cases with other provisions of the same law as was raised in *Prosecutor v Ildephonse Hategekimana*.²⁷⁰

5. Evidence collection

Article 7(1) of the law on transfer of cases provides that evidence collected in accordance with the ICTR Statute and Rules of Procedure will be used in the High

²⁶⁶ Article 1(4) of the law No. 03/2009/OL of 26/05/2009 Modifying and Completing the Organic Law No.11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States.

²⁶⁷ Article 14 of OFJC (n 255).

²⁶⁸ Article 4 of the law on transfer of case (n 6).

²⁶⁹ *Prosecutor v Ildephonse Hategekimana* (n 101) at para 20.

²⁷⁰ *Ibid* at para 19.

Court.²⁷¹ The ICTR is modelled on international law which in some respects different from that of Rwanda. For instance, the ICTR Rules of Procedure explicitly provide that the accused/defence can; demand the disclosure of exculpatory and other relevant material in possession of the prosecution.²⁷² This applies to transferees according to Article 1 of the law on transfer of cases. On the other hand, the Rwandan Code of Criminal Procedure which applies to the locally accused does not indicate that the defence may have access to documents the prosecution has against the accused.²⁷³

Although it may be argued that the right to have these procedures extended to the locally accused may be inferred from the general provisions of Article 19 of the Rwandan Constitution on the right to a fair trial, the possibility of judges having such broad interpretation powers that have not so far been established in case law, is runcertain. It may be difficult to claim for redress in case such procedures are denied to the locally accused persons than it would be for the transferee.

A form of contradiction also arises on how evidence should be given under LTC. It is provided that the High Court cannot convict a person (transferee) solely on written statements of witnesses who did not give oral evidence at trial.²⁷⁴ The provision however does not take into account the exceptions provided by the general provisions of rule 92 *bis* especially paragraph (C) of the ICTR Rules of Procedure where written statements may be admissible.²⁷⁵ The protection provided here supersedes what is provided by the ICTR but conforms to the Rwandan procedural law on Evidence production.

The Rwandan law on evidence provides that ‘... evidence is based on all grounds, factual or legal provided that parties have been given a chance to be present for cross-examination.’²⁷⁶ However, Article 14 *bis* of the law on transfer of cases further allows a different mode of testifying from what is provided for in laws that

²⁷¹ See Article 7(1) of the law on transfer of cases.

²⁷² Rule 66 A (I, ii) and B and Rule 67 of ICTR Rules of Procedure (n 5)

²⁷³ See the Rwandan Code of Criminal Procedure (n 108).

²⁷⁴ See Article 7(2) of the law on transfer of cases (n 6).

²⁷⁵ Rule 92 of ICTR Rules of Procedure (n 5).

²⁷⁶ Article 119 of the Criminal Code (n 78).

apply to the locally accused.²⁷⁷ Here differential treatment cannot be raised but preferential treatment can be contested. This is because, by according such protection to the transferees and not extending it to other accused, shows preferential treatment. This position is supported by the European Court on Human Rights findings in *Building Societies v the United Kingdom*²⁷⁸ discussed in chapter three.

6. Witness protection

Although Rwanda gives general protection to witnesses and has a victims and witness protection unit under the Public Prosecution Authority, in the case law, there is a preferential treatment of transferees' witnesses to those of the locally accused. The ICTR jurisprudence on referral; indicate that witnesses for transferees are exempted from being prosecuted for genocide ideology: in *Hategekimana*, the Trial Chamber considered Human Rights Watch's submissions that Rwanda's campaign against genocide ideology is a threat to defence witnesses residing outside Rwanda, and hence held that it is a bar to the referral.²⁷⁹

On appeal, the government of Rwanda filed an amicus brief in which it gave an assurance to the defence witnesses stating that none of them would be charged for genocide ideology.²⁸⁰ This is contrary to article 9 of the Rwandan Penal Code, which provides that all Rwandans living abroad, and who may commit acts considered as crimes by Rwandan laws shall be prosecuted and judged by Rwandan courts.

This also runs foul the *ligalitäts prinzip* (principle of legality) that demands mandatory prosecution of crimes where it has been conclusively established that a crime was committed, and general character of criminal law – which is that it applies to all.²⁸¹ The status of being a witness for the transferee seems to extinguish the moral culpability and a relief of the duty to prosecute them, in cases where crimes

²⁷⁷ Article 14 *bis* of the law on transfer of cases provides that testimony of witnesses who may be unwilling or unable for good reasons to physically appear before the High Court to give testimony, the judge upon request by the interested party take the testimony by:

Deposition in Rwanda or in a foreign jurisdiction, taken by a presiding judge, magistrate or other judicial officer appointed/commissioned by the judge for that purpose;

By video-link hearing taken by the judge at trial;

By a judge sitting in a foreign jurisdiction for the purpose of recording such *viva voce*.

²⁷⁸ *Building societies v the United Kingdom* (n 170).

²⁷⁹ *Prosecutor v Ildephonse Hategekimana* (n 101) at para 67.

²⁸⁰ *Ibid* at para 19.

²⁸¹ See article 1 of the Criminal Code (n 78).

stated above are committed. In comparison, witnesses of the locally accused persons and anyone for that matter, in Rwanda, where there is a prima facie case that such crimes are committed, no protection can be claimed or extended to him/her. Thus, this does not only amount to direct discrimination but also violation principle of *nullum crimen sine lege* principle.

7. The right to counsel

The right to a counsel of one's choice is guaranteed by the Constitution²⁸² and by the law on transfer of cases.²⁸³ In Kanyarukiga referral, the government of Rwanda in its brief indicated that, it had solicited funds - 500,000 US dollars for legal assistance for those who would be transferred to Rwandan.²⁸⁴ However, in an interview held in 2000 with prisoners' judicial committee, representing accused persons tried in Rwanda for genocide, the underlying concern was that they did not have proper representation as opposed to those tried in Arusha.²⁸⁵

Although this study was carried out almost 10 years ago and the fact that Rwanda has greatly improved its judicial system, resource constraints may still limit full realisation of this right. Failure to uphold this right then, and even now, could be due to financial constraints on the part of the government, and the big number of genocide suspects. Hence, considering the principle of 'progressive realisation' under the ICESCR²⁸⁶ and the economic status of Rwanda, it could be justified. However, on the event that transferees will be afforded effective representation, a defence of lack of resources will no longer hold and as suggested by the CESCR, every effort should be made to use all resources that are at the State's disposition in an effort to address and eliminate the discrimination, as a matter of priority.²⁸⁷

²⁸² Article 18 (3) of the Constitution (n 195).

²⁸³ Art 13(6) of the law on transfer of cases (n 6).

²⁸⁴ See Rwanda's Amicus brief in *Prosecutor v Kanyarukiga* (n 98)

²⁸⁵ Munyangaju Damascene 'Legal Contradictions between the ICTR and the National Courts-Case study: Concurrent Jurisdiction (2001) .

²⁸⁶ Article 2(2) of the ICESCR (n 169).

²⁸⁷ CESCR General Comment no.20 (n 167) at para 13.

8. Sentencing

Although there had been a moratorium for quite some time, in 2007 Rwanda passed a legislation abolishing the death penalty - a step that was applauded by the international community given the fact it was such a short time after genocide and so it was expected that the general public still approved of a severe punishment. The death penalty was substituted with life imprisonment or life imprisonment with special measures.²⁸⁸ Most applications for the transfer of cases to Rwandan jurisdiction were denied by both ICTR trial and appeals chambers due to the existence of life imprisonment with special measures which were said to be inconsistent with the right to dignity of a person.²⁸⁹

In what appears like a response/reaction to ICTR denials on requests for transfer, the Rwandan parliament passed an act amending the law on abolition of the death penalty. The law reads: 'however, life imprisonment with special measures shall not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other states...'²⁹⁰ Life imprisonment with special measures is, however, imposed on other accused persons appearing before Rwandan courts including those tried by Gacaca courts (who are said to bear the least responsibility compared to those tried by the ICTR).²⁹¹

Under Rwandan sentencing laws offenders who may have committed similar crimes may justifiably, be sentenced differently based on aggravating and mitigating circumstances. In this case however, it appears that being a transferee is a mitigating circumstance while not being one, could be a non - mitigating one. Even if one is not

²⁸⁸ Article 3 of the Organic Law on Abolition of the Death Penalty (n 28); Article 4 provides what life imprisonment with special measures entails :1) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty(20) years of imprisonment; 2) a convicted person is kept in isolation.

²⁸⁹ See *Prosecutor v Munyakazi* (n 91) at para 30. Also see Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 (1994) at 30 para 6: in assessing whether solitary confinement will amount to a violation of an individual's right to humane treatment which respects his or her inherent dignity, human rights bodies have considered factors such as the duration of the isolation and its physical and mental effects. See *Achutan and Amnesty International v. Malawi*, African Commission on Human and People's Rights, Comm. no.s 64/92, 68/92, and 78/92 (1995) at para 7.

²⁹⁰ Organic Law no. 66/2008) of 2008 Modifying and Completing Organic Law No 31/2007 of 2007 Relating to the Abolition of the Death Penalty.

²⁹¹ See *Prosecutor v Ntamabyariro* case no.RP/Gen.0081/04/TP/KIG of 19/01/2009. Also see Gacaca case (19 July 2009) of Hategeka Augustin and Pascal Muberuka they were sentenced to life imprisonment with special measures (had not been published at the time of research).

a convert of the ‘just desert’ theory of punishment, it is reasonable to say that the severity or less of it, of any form of punishment, be proportionate to the gravity of the crime committed.²⁹² But LTC seems oblivious to such basic principle of criminal law.

9. Conditions of detention

The law on transfer of cases guarantees any person transferred to Rwanda to be detained in accordance with the minimum standards of detention as provided in United Nations Body of principles for the protection of all persons under any form of detention or imprisonment.²⁹³ A prison has been built specifically for this purpose in the southern part of the country and another in Kigali city.²⁹⁴ It is also provided that transferees in the preventive detention, inmates will be entitled to special meals.²⁹⁵ Other detainees and prisoners in Rwanda however, do not have such guarantees.²⁹⁶ The differentiation among the inmates of Rwandan prisons would have been justified in cases of sickness, age or safety of a particular prisoner that would be threatened when is treated or incarcerated with other prisoners. In this case, it is a matter of being a transferee and the other being not.

II. Conclusion

From the above discussion, it is apparent that LTC differentiates between the transferees and persons accused locally. To a limited extent, the distinction is justified on the ground of the legitimate aim, which Rwanda aims at when transfers

²⁹² Andrew Von Hirsh ‘Proportionate Sentences: A Just Desert Perspective’ in Hirsh *et al* (n 8) at 118.

²⁹³ Article 23 of the law on transfer of cases (n 6).

²⁹⁴ Mpanga prison meets the required standards according to the trial chamber in *Prosecution v Kanyarukiga* Rwanda’s amicus brief (n 27) at para 91.

²⁹⁵ Rwanda’s amicus brief in *Prosecutor v Kanyarukiga* (n 98) at 90.

²⁹⁶ See *Prosecutor v Ildephonse* Trial Chamber’s Decision at para 29. The defence raised concerns on general detention conditions in Rwanda which it says are characterized by overcrowding, unsanitary conditions and insufficient food for the inmates. Also see, All Africanews ‘ICTR under Spotlight as Sierra Leone Convicts Arrive in Rwanda.’ Available at <http://allafrica.com/stories/200911020002.html> [accessed on 2/11/2009]. On all Africa, a commentator, Mota pointed out that though Mpanga prison meets the international standards and has received convicts from Sierra Leon, ‘about 60’000 inmates are living in dire conditions in the rest of the country’s prisons...’

are effected. It is also justified by the principle of substantive rather than formal equality. Another justification that could be advanced on some guarantees could be that of resources and hence the principle of progressive realisation can as well be evoked. It is a sincere hope however, that some guarantees afforded only to the transferees especially where procedures do not require funds or any of the justified grounds discussed, be extended to cover every accused before Rwandan courts.

To a larger extent, the basis or justification so far, seems to be whether one is a transferee or not. The status of being 'a transferee' has not featured in grounds that justify differential treatment either under international or Rwandan law and so, the allegation is that the right to equality and non – discrimination is largely harmed by the LTC unjustifiably. Thus the following Chapter analyses its implication.

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CHAPTER 5: IMPLICATION OF THE INEQUALITY PROMOTED UNDER THE LTC

I. Introduction

It should be recalled that the ICTR's mission was to render justice by effectively redressing perpetration of crimes committed in Rwanda in 1994, restore and maintain peace, and ensure national reconciliation in Rwanda.²⁹⁷ In addition, by taking effective measures to bring to justice persons responsible for the serious human rights violations it envisaged deterring future offenders as earlier indicated. This chapter will show how this mission may not be achieved due to the inequalities promoted under LTC. I argue that, it fails deterrent and reconciliation motives and negatively affects concepts of consistency, public confidence in public institutions, legitimacy of decisions, and proportionality principles.

II. Deterrence

The wish of any sentencing institution as argued by Bentham is to prevent the occurrence of 'like mischief in future'.²⁹⁸ Thus, the Security Council that established the ICTR was no exception in this regard, just like the international community had decreed after the Jewish holocaust that; 'never again'.²⁹⁹ Deterrence is said to be of two kinds: individual and general deterrence. Individual deterrence is aimed at preventing a particular offender from re-offending and this can be achieved by taking from him/her the physical power of offending (by imprisonment or capital punishment) - incapacitation; taking away the desire to offend; and making him afraid of offending.³⁰⁰

General deterrence on the other hand, is effected by the condemnation of the crime and application of punishment which, serves as an example and stops those of like

²⁹⁷See (n 10) on ICTR mission.

²⁹⁸Bentham (n 8) at 53.

²⁹⁹Daisy Sindelar 'World: Post-Holocaust World Promised 'Never Again...but Genocide Persists' (01/26/2005) Radio Free Europe. Available at: <http://www.rferl.org/content/article/1057096.html> [accessed on 16/01/2010].

³⁰⁰Bentham (n 8) 52.

minds who would want to commit such crime.³⁰¹ There is, however, a lot of debate whether; deterrence can in fact be achieved. Works of some researchers in the field of criminology can be relied on, to argue that it can be achieved.³⁰²

As earlier indicated, the ICTR had a set of objectives among which was; preventing the reoccurrence of acts of genocide that had occurred in 1994 in the territory of Rwanda and elsewhere in the world.³⁰³ However, some people like Jackson Nyamuya think that those who advocate for deterrence would be frustrated by the operation of the ICTR.³⁰⁴

Some of the identified factors that frustrate deterrent efforts are: the fact that the ICTR's indictees are just 'a miniscule' fraction of the entire group of perpetrators of the 1994 Rwandan genocide and as argued, so many victims were killed because there were so many killers; the slowness of the ICTR in its trials, also defeats one of the underlying principles of deterrence theory that the application of any punishment be done swiftly and with certainty for it to achieve deterrence.³⁰⁵

The ICTR had also presumed that its indictees would easily be apprehended and probably be convicted to enable deterrent goals but the fact that some of its indictees are still at large, fails this assumption. Furthermore, the discretion of the ICTR judges, who give varied sentences to people convicted of similar crimes affects the principle of proportionality which then affects deterrence as discussed in Section IV below. The transfer of cases supposedly which should come as a remedy to achieve deterrence, does not do better in view of the inequalities between transferees and the locally accused persons promoted under the LTC. This will be elaborated on later.

Deterrence theory is premised on the assumption that crimes are committed due to the gains expected and that they are prevented when the costs in terms of punishment

³⁰¹ *Ibid* at 54.

³⁰² Andrew von Hirsh *et al* 'Deterrence Sentencing as a Crime prevention Strategy' (1994) in Andrew Von Hirsh, Andrew Ashworth and Julian Roberts 57- 63(n 8) at 60.

³⁰³ Resolution 955 (n 1) at para 3.

³⁰⁴ Jackson Maogoto Nyamuya 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial pitfalls and Brighter Prospects' (2002) *Nordic Journal of International Law* 73 187- 221at192.

³⁰⁵ *Ibid.*, at 92.

are likely to be higher than the gains.³⁰⁶ This thinking is further supported by Richard Posner in his economic analysis of law. He asserts that crimes are committed because the expected economic benefits outweigh anticipated costs.³⁰⁷

Like the theory of retribution, when determining the quantum of punishment for a particular offender, deterrence theorists propose that ‘the greater the mischief of the offence’, the greater should the costs (punishment) be.³⁰⁸ Posner speaks of marginal deterrence which requires that there be a big spread between the punishment for the least and most serious crimes.³⁰⁹ He further posits that if the maximum punishment for murder is life imprisonment, we may want to make armed robbery also punishable by life imprisonment, for then, armed robbers have no incentive not to murder their victims.³¹⁰

This is premised on the reasoning that, if the criminal is to commit a crime, he/she is forced to choose the least, which would cost less in terms of punishment hence achieving deterrence on high or big crimes. This far, the legal regime on transfer and the ICTR sentencing practice, fall flat given that those who committed ‘biggest’ crimes or greatest mischief to use Bentham’s words will receive and from the ICTR jurisprudence have received the least (in terms of treatment and punishment), compared to the accused persons before Rwandan courts who committed the least of crimes or similar but do not receive similar treatment. If offenders were thus to choose in this case, as the theory suggests, they would choose to commit bigger crimes, hence no deterrence for high crimes. Analysing trials of Rwandan genocide perpetrators, it as though one is better off, committing crimes that would put him or her in category one, than those that would put him in category three due to the kind of treatment each set of these perpetrators receive.

³⁰⁶ Bentham (8) at 52.

³⁰⁷ Richard Posner ‘An Economic Theory of Criminal law’(1985) in Andrew Von Hirsh, Andrew Ashworth and Julian Roberts (n 8) 64 – 70 at 64.

³⁰⁸ Bentham (n 8) at 55.

³⁰⁹ Posner (n 306) at 65.

³¹⁰ *Ibid* at 64

III. Reconciliation

Reconciliation was also one of the ICTR's objectives. Reconciliation has been defined as 'renewal of applicable relations between persons who have been at variance.'³¹¹ Gallimore further defines reconciliation as; restoring social relationships and reducing social tension due to past aggressive incidents.³¹² Reconciliation is also defined as 'a technique which goes beyond settling a conflict's material stakes to restoring social relations and healing hearts and minds.'³¹³

When the ICTR was being established, it was expected that prosecution of perpetrators of genocide and other serious crimes committed in Rwanda, would promote reconciliation among the Rwandans.³¹⁴ This view is also shared by the government of Rwanda. As a result, it established Gacaca Courts which aimed at reconciling the people of Rwanda by punishing perpetrators and encouraging plea bargains and asking for forgiveness.³¹⁵ In the 'media case'³¹⁶, the ICTR emphasised that its fundamental purpose is to hold individuals accountable for their conduct and that its intention is to 'contribute to the process of national reconciliation and to restoration and maintenance of peace' and that 'justice should serve as the beginning of the end of the cycle of violence that has taken so many lives...'³¹⁷

As earlier stated, the ICTR's real contribution to reconciliation is postulated because: firstly, as discussed in Chapter of this work, the ICTR is far situated from the victims, and so most of them do not know what the ICTR does; the acquittals of some of the ICTR accused who are believed to be key in the 1994 genocide is also setback; the ICTR in its operation, is concerned with the 'accused' or its convicts, and not with the victims save when they are needed as witnesses; and disparity of punishments of those tried by the ICTR and those tried by the Rwandan courts and the ICTR convicts, continue to deny responsibility, they insist on their innocence

³¹¹ Douglas H as cited in Gallimore (n 12) at 345.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ See paragraph 7 of the ICTR Statute.

³¹⁵ See Rwandan laws regulating Gacaca proceedings (n 15 and 17).

³¹⁶ *Prosecutor v Nahimana* (n 9) at para 109.

³¹⁷ *Ibid.*

and appeal against convictions and sentences.³¹⁸ The LTC ought to correct this, but does not do any better due to the inequalities it carries, and this has negative implications on the basic principles of justice which are discussed below.

IV. Equality

There are various implications that inequality may have on other basic principles of justice

a. Consistency

Discrimination affects consistency in the administration of justice. Equality is sometimes linked with consistency where fundamentally, like cases should be treated alike and different cases treated differently.³¹⁹ Consistency is demanded by the ideal of equal justice.³²⁰ Analysing the nature of LTC and other sentencing laws in Rwanda highlighted in Chapter four, statutes are not harmonised and so harsh anomalies such as inequality have resulted. The principle of consistency proposes that ‘the distinction of some versus others should reflect genuine aspects of personal identity rather than extraneous features of the differentiating mechanism itself- in other words, the institutional mechanism in question should treat like cases alike and ensure a level playing field for all parties.’³²¹

Lack of consistency in a criminal justice system undermines public confidence in such institutions. When principles of justice such as consistency and, equality operate ineffectively or not at all, confidence in society's institutions may be undermined.³²² Yet, one of the goals of any sentencing system should be to foster the perception among offenders upon whom sentences are imposed that these dispositions are just.³²³

³¹⁸ Gallimore (n 12) at 346.

³¹⁹ Ashworth (n 148) at 183.

³²⁰ Marvin E Frankel ‘Criminal Sentences: Law without Order’ (1973) at 7.

³²¹ Maiese Michelle ‘Principles of Justice and Fairness: Beyond Intractability’ (2003) Conflict Research Consortium University of Colorado Boulder. Available at: http://www.beyondintractability.org/essay/principles_of_justice/ [accessed on 28/10/2009].

³²² *Ibid.*

³²³ Julian V Roberts ‘Sentencing Trends and Sentencing Disparity’ (1999) 8 in Julian V Roberts and David P Cole ‘Making Sense of Sentencing’ University of Toronto Press Canada 137 at 149.

Two researches carried out in Canada on the perception of inmates on disparity of sentences gives a hint on dangers of disparity. The authors of these studies noted that: ‘judges did not emerge with the offenders’ confidence...it appears offenders do not operate under the assumption that the judge is neutral, objective arbiter, but instead they ascribe to him or her idiosyncratic decision-making and sentence formation.’³²⁴ Perhaps this should be a lesson to both Rwanda and the ICTR judges because to assume that people’s perception of their decisions is different, would be illusionary. This is not about clearing the judges’ image though, it is about reversing the implications of what that perception would have, on reconciliation and deterrence.

b. Legitimacy

In addition, equality or the lack of it, in public institutions determines legitimacy of any of their decisions. Fair procedures are central to the legitimacy of decisions reached and individual’s acceptance of such decisions and the laws themselves, should also be impartial so that they do not favour some people over others from the outset’.³²⁵ Procedures are crucial in determining the quantum of punishment. As earlier discussed, transferees due to the high protections in the law, they are likely to get less sentences, serve sentence under better conditions of detention as provided in the law than other locally accused persons. It would therefore be naïve to expect all sentenced offenders to accept their particular sentences, when there is widespread cynicism toward a criminal justice system and so one should never hope to accomplish other goals such as reconciliation and deterrence as the ICTR and Rwanda had set out to achieve.

c. Proportionality

Inequality also affects the principle of proportionality in sentencing. On a just desert rationale, equality before the law at the sentencing stage is assured if the principle of proportionality is applied throughout sentencing, and if there are no significant

³²⁴ *Ibid* at 150.

³²⁵ Maiese (n 321).

amounts of unaccountable discretion in practical sentencing.³²⁶ Just like Tallgren argues, ‘the role of punishment in conveying the blame- communicative theory, is distorted when punishment is not commensurate with the blameworthiness of the conduct.’³²⁷ Whether one agrees with the deserts reasoning or not, the transfer regime is yet to account for the lighter sentences (for instance exempting them from solitary confinement) meant for the transferees-who are the master minders of the genocide than what is meant for the locally accused before Rwandan courts who are lowly charged, and those who commit ordinary crimes.

As Tonry argues, ‘even if the community does not expect a sophisticated degree of proportionality in sentencing, it has a common sense concept of fairness which can be threatened by excessive disparity in sentencing.’³²⁸ Offenders who have committed similar offences should receive similar punishment.³²⁹ But the LTC makes the status of being a transferee a justifying factor, to depart from this concept.

V. General conclusion

Despite the fact that there are various provisions both under international and Rwandan law protecting the right to equality and non-discrimination, and specifically, equality of punishment of all individuals accused of similar crimes, the accused persons in Rwanda will receive different penalties when transfers are effected under the LTC. This will depend on whether one is a transferee, or not. It is therefore inevitable for the researcher; not to compare the punishments inflicted on transferees (perpetrators of genocide) and those inflicted on ordinary criminals. In certain instances ordinary criminals may receive more severe penalties than the transferees and yet the crime of genocide according to the ICTR jurisprudence is considered as ‘a crime of crimes’.³³⁰ Normally, genocide convicts ought to be

³²⁶ Ashworth (n 148) at 183.

³²⁷ Immi Tallgren ‘The Sensibility and Sense of International Criminal Law’(2002) 13 3 European Journal of International Law 561 – 595 at 364.

³²⁸ Neil Hutton ‘Sentencing in the New South Africa The Prospect of Reform’ (1997) International Journal of the Sociology of Law 25 315-335 at 327.

³²⁹ *Ibid* at 327.

³³⁰ *Prosecutor v Jean Paul Akayezu* Case No. ICTR-96-4-T at para 10.

punished more severely than any ordinary criminals and not the reverse as may happen under the LTC.

This should however not be interpreted as advocating for severity of punishment or suggesting to punish perpetrators of genocide more severely than they are now, to achieve deterrent results as it is rightly contested by the Kantian theory and several criminologists.³³¹ Rather, I am advocating for equal treatment and punishing equally those accused of similar crimes, and differently, for those who committed different crimes and where differentiation is used, should be based on legally justified grounds discussed in chapter three. It is also not advocating for mechanical equal treatment of the accused but substantive equality. This view is supported by Hood that, ‘...by ‘equality’ we do not mean that each case can be exactly compared with another, and that decisions should be the same for cases ‘alike’ in this sense. By ‘equality’ we mean ‘equality of consideration’, that is, that similar general considerations can be taken into account when a decision is made.’³³²

The main cause for differentiation of the accused on the one hand, seems to be due to the advantages the government of Rwanda expects from transfer of cases as discussed in chapter two, and on the other hand, it is due to the standards set by the ICTR before transfers can be effected. In certain instances Rwanda cannot correct the inequalities in the LTC without jeopardizing efforts at transfer – stakes are high. It appears from the ICTR decisions on transfer, that Rwanda has no choice but to agree to all the requirements as demanded by the ICTR and yet, practically it may not extend these requirements to all other accused persons before Rwandan courts. On the other hand, as stated by Canter, ICTR seems not ready to compromise its position, though according to the decisions on transfer, its judges do not have common position on what exactly these requirements are. Yet, as the Trial Chamber in established in *Gatete* pointed out, no judicial system, be it national or international, can guarantee absolute protection and fair trial rights to the accused.³³³ The ICTR in this regard may need to devise a new strategy on how transfers can be made to Rwanda. For instance creating a chamber in Rwanda (where, international

³³¹ Immi Tallgren (n 327) at 592

³³² Ralph J Henlfam ‘Criminal Justice and Sentencing Policy’ (1996) at 14.

³³³ *Prosecutor v Jean Baptiste Gatete* (n 115) at para 60.

and national judges adjudicate transferred cases), like that created in Bosnia and Herzegovina. In this case, Rwanda may benefit from ICTR budget and human resource and hence ensure rights of the accused; while transferring cases, should take into account other accused persons in Rwanda, to avoid disparity of punishment and procedures of justice as this may be counter productive as discussed above.

The transfer of cases to Rwanda, brings a lot of advantages and may in fact achieve both deterrence and reconciliation as discussed in chapter two, if the implied discrimination promoted under LTC is corrected. Transfer of cases would help to achieve deterrent goals as mimetic structures of violence discussed by Gallimore earlier may be destroyed³³⁴ where those who planned the genocide would be punished at home, and hence cease to be 'heroes' to the population. Reconciliation would also be achieved since victims of genocide would be able to see their perpetrators punished as this has been a long time wish for them. This is unlike judgments handed in Arusha that for all intents and purposes are remote to them. Trials organised and conducted by Rwandan courts, are better placed to ensure reconciliation than those externally designated by the ICTR.³³⁵ The ICTR's final contribution to Rwanda's reconciliation as Gallimore asserts, would be to enable the country to continue with genocide prosecutions by building capacity after the tribunal closes down.³³⁶

³³⁴ See Gallimore (n 12) at 170.

³³⁵ Nyamuya (n 303) at 204.

³³⁶ Gallimore (n 12) at 248.

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