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# Human Rights Enforcement through Domestic Courts: A Critical Analysis of International Law Implications on Rwandan Genocide

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**ABSTRACT**

*It becomes evident that international law has moulded the functioning of the Rwandan domestic courts. Rwanda opted to pass legislation that allowed international crimes to be prosecuted. This signalled the intention of the Rwandan state to hold responsible and accountable those involved in the human rights that were grossly violated during the genocide.*

*The author seeks to establish the role that domestic courts play in international proceedings through a case study on the Rwandan genocide. The question this research paper aims to answer is whether: domestic courts effectively deal with international crimes. In order to answer this question, the author first looks into the general role of international courts and brings in the complementarity principle. The next section of the paper introduces the genesis of the Rwandan genocide and its implications. The final aspect that the author explores is with respect to if the domestic courts of Rwanda could deal with the international crimes.*

***Keywords****: Domestic Law, Human Rights, Legislation, Prosecution.*

## I. INTRODUCTION

The role that domestic courts play in cases where the subject matter is criminal nature is widely contested.[3] While there are proponents of domestic prosecution there are also others who support international prosecution. Supporters of international prosecution believe that domestic courts are not equipped to deal with international crimes. The International Criminal Court ("ICC") bridges this disparity by preferring domestic procedures as long as it is conducted bona fide. This principle is coined as the Principle of Complementarity.[4] This principle recognises

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[3] Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 *Emory Int'l L. Rev.* 213, 272-75 (2000).

[4] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993).

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the ICC as an institution that plays a role subsidiary in nature.[5] The court steps in only when the national court fails in conducting criminal proceedings. Thus, the Principle of Complementarity is the crux of the ICC statute. While, the statute does not define complementarity verbatim, the term has been adopted to refer to norms governing the relationship between the ICC and national jurisdiction.

Following the end of the primary war, the Belgians were granted rule over Rwanda by the League of Nations in 1946, making Rwanda a Belgian dominion of the global organisation.

The Belgians preferred the Tutsi tribe over the Hutu and Twa tribes in Rwanda because of their European appearance and skin tone. The Belgians granted them the right to share political power and permitted them to continue their mwami rule.[6] Despite allowing the mwami rule to require half, the Belgians ruled over individuals in absolute autocracy and treated them horribly. Individuals began to band together in support of their country's independence. This infuriated the Belgian colonial power.

With increasing political conflict between the Bantu and Bantu Kingdom of Belgium drastically switched its alliance with the Tutsi aristocracy to the majority Hutu that junction rectifier to Rwanda's independence and also the clear-cut ethnic divisions among the tribes in Rwanda from 1959 to 1962.

## II. THE GENESIS OF THE RWANDAN GENOCIDE

Any account on the Rwandan genocide should acknowledge the role that domestic pressure and external forces played in manipulating the resolution. The nature of the Rwandan state was central. The genocide's genesis can be traced to be under the government's aegis. The state was formed by both colonial and precolonial policies.[7] As a matter of fact, the nature of state was autocratic and the general public were averse towards the government. By the 1990s, the state due to threats towards its stability retaliated by orchestrating a genocide as a last resort. The Rwandan genocide's patterns were in consonance with other genocides such as the Nazi Holocaust.

The Twa was thought to have been the first to settle in what is now Rwanda, followed by the Hutu, most likely between the 5th and 11th centuries, and then by the Tutsi, most likely

[5] Michael A Newton, 'Comparative Complementarity: Domestic Jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) Mil. L Rev 167, 20 - 27 5 Jonathan Charney, 'International Criminal Law and the Role of Domestic Courts' The American Journal of International Law (2001) 95(1) 120 at 120.
[6] Brief History of Rwanda," Government of Rwanda, http://www.gov.rw/History.
[7] The Legacy of Rwanda's Community Based Courts, https://www.hrw.org/reports/2011/05/31/justice-compromised-o.

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beginning in the 14th century. A long process of Tutsi migrations from the north culminated in the 16th century with the establishment of a small nuclear kingdom in the central region ruled by the Tutsi minority, which lasted until Europeans arrived in the 19th century.

A majority of Rwandans are Hutus, while the Tutsis are a minority. However, the Tutsi have dominated the country for ages. The Hutus in 1959 staged a coup and overthrew the Tutsi monarchy. A few Tutsi exiles gathered to form a rebel group, the Rwandan Patriotic Front ("RPF"). The RPF invaded Rwanda and there was much hostility until a peace deal was agreed upon in 1993.

However, things took a turn in 1994 when the then president Juvenal Habyarimana was killed due to his plane being shot down. Hutu extremists held the RPF responsible and proceeded to persecute the Tutsis.[8] The RPF responded by saying that Hutus proceeded to blame the RPF as pretext for the genocide. The UN as well as Belgium had forces stationed in Rwanda. However, the UN did not have a mandate to stop the genocide.

The French being an ally of the Hutu government sent a special force for the purpose of evacuating citizens. The French were still condemned for their lack of intervention which ultimately escalated the genocide. The RPF were backed by the army of Uganda. They annexed a part of the capital, Kigali, in July 1994. Human rights groups observed that RPF while usurping power killed thousands of Hutu civilians. This was vehemently denied by the RPF.

## III. AFTERMATH OF THE GENOCIDE

Rwanda's interest for domestic application of international law, particularly criminal law, stems from the genocide's aftermath.

### (A) Lack of judicial capacity

The initial repression and prosecution of international crimes against crimes pertaining to humanity and faced two challenges that could not be faced by the legal landscape or setting of Rwanda. This was owing to the fact that the capacity of the judicial system was not adequate to prosecute alleged perpetrators effectively. State inspired violence targeting civilians perpetuated for a long period and no attempt to prosecute the perpetrators was made. The Rwandan citizens became victims of the culture of impunity.[9] Taking this into account, the current government has adopted a justice system from scratch. In spite of the newly adopted system, the attempt to raise the standards of the judicial mechanism has been lauded at both the

[8] *Id.*
[9] *Supra* note 7.

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regional as well as international level.

### (B) Failure of the state to abide by the genocide convention

While challenges persist, they do not negate the progress and success of the Rwandan judiciary system. Rwanda assented to the genocide convention of 1948 and was thereby a party to it. The convention was not a self-executing convention. In addition to this, Rwanda did not succeed in enacting the enabling legislation as mandated by the Genocide Convention.[10] This was because of the assumption that crime falls under the purview of law provisions that are ordinary. Prosecution of the acts constituting genocide such as murder would be subject to the statute of limitations. International core crimes on the other hand are not bound to the statute of limitations.[11]

### (C) Application of international law for prosecution of the alleged

As Dr A.K Myoboke pointed out, this legal challenge was overridden by the application of the doctrine of dual incrimination.[12] On the basis of this doctrine, genocide was criminalised under the Genocide Convention. This led to the alleged perpetrators being tried under other international treaties that Rwanda ratified and the Genocide convention. The applicability of international law in Rwanda due to the lack of judicial capacity. Taking this into consideration it is evident that the judicial personnel was vested with the duty of judging and prosecuting international crimes. However, the lawyers went through a rather rushed training on procedural and substantive law in order to deal with the ongoing situation. Thus, the legal intricacies of international criminal law were foreign to them.[13] Rwanda has undoubtably had some key takeaways from the international law being applied in its domestic law.

### (D) Challenges faced during prosecution

The challenges that the prosecution faced during the prosecution following the genocide hinted Rwanda to put in place a judicial system and a legal landscape with the capacity of dealing with core international crimes. In the current scenario, war crimes, genocide and crimes against humanity are legislated for.[14] The acts that amount to a genocide are reproduced in the Rwandan Penal verbatim. This includes the remaining four Geneva conventions and the protocols for war crimes and their penalties. The reformation of the judicial system aims to build a judiciary that is competent enough to deal with international crimes under both universal and territorial

[10] *Id.*
[11] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, 26 November 1968.
[12] *Supra* note 9.
[13] *Id.*
[14] *Supra* note 11.

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jurisdiction.

### (E) Role of *gacaca* courts

Gacaca courts were used to settle family disputes in precolonial times. The courts were held outside, and the judges were the heads of households. The government's decision to use that method of justice would result in the establishment of thousands of local courts to handle some genocide suspects accused of minor crimes such as arson as well as capital crimes, while suspects accused of more serious crimes would be tried in higher courts. In addition to clearing the backlog of cases, it was hoped that the gacaca courts would bring to light some of the previously unknown details of the genocide, provide closure, and foster Rwandan reconciliation.

The courts were set up in January 2002 and started operating in phases over the following years, with the first trials beginning in March 2005. The success of the courts, which was frequently subjective, varied from trial to trial. Although some courts were found to be fair and objective, others were accused of pursuing a political agenda and delivering harsh sentences that were not proportionate to the evidence presented.

The gacaca courts were only supposed to be open for a limited time, but their closure was repeatedly postponed.[15] The gacaca courts had prosecuted approximately 1.5 million cases by 2010. The local community members were accountable to speak out about the defendants' actions during the genocide. The judges who were elected by the population with no prior legal training were to try cases in front of the local community members. Trials held by traditional courts for nearly two years came to halt as the government established the gacaca model which was a complex and time-consuming task. In 2002, a gacaca pilot phase began. However, the functioning of the gacaca courts did not begin until 2005.

### (F) Speedy trial system

The Rwandan parliament criminalised genocide in 1996 by enacting a law. While Rwanda ratified the genocide convention in 1975, punishment for these crimes were not included. Thus, it became rather difficult for Rwanda to adjudicate cases domestically until the legislation was enacted.[16] The 1996 law brought in guilt-plea and confession program. Through this program the detained individuals were able to reduce their sentences. This also sped up the trials of

[15] A report by the National Service of Gacaca Courts, published in June 2012, states that gacaca courts tried 1,958,634 cases of genocide. The report also provides details of the structure and functioning of gacaca courts. National Service of Gacaca Courts, Gacaca courts in Rwanda, Kigali, June 2012, http://www.minijust.gov.rw/uploads/media/GACACA_COURTS_IN_RWANDA.pdf (accessed March 2014).
[16] *Id.*

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numerous individuals who were hopeful for justice.

### (G) Legal and Judicial Reforms

Given the reform processes undertaken in the legal field since 2001, there has been remarkable progress in building a judiciary that is competent. The International Criminal Tribunal of Rwanda ("ICTR") sanctioned transfer of cases to the Rwandan courts for trial under rule 11 of the ICTR Rules of Procedure and Evidence.[17] This is an achievement in itself.

The decision by the Grand Chamber of the European Court of Human Rights ("ECHR") also represents the realization of the reforms' achievements. The ECHR has also confirmed extraditions from Norway and Denmark to Rwanda. The United States of America has also decided to deport Rwandan genocide suspects.

## IV. ANALYSIS

In this section, the author analyses if the domestic courts in Rwanda have developed judicial capacity such that it becomes possible for them to deal with international law crimes.

### (A) International Cooperation: Treaty obligations and criminal matters

To begin, Rwanda examines the obligations of states to cooperate in order to adjudicate international crimes using their judicial mechanism.

The request for cooperation in criminal matters brings into place two goals, first, extradition to Rwanda, and second, trial in the countries hosting these perpetrators owing to the failure of the extradition.[18] Rwanda has thus continued to remind several countries of their obligations. Three major obligations are mentioned in relation to the crime of genocide.

*a)* Pacta sunt servanda

According to the Vienna Convention on the Law of Treaties, Rwanda is constantly advocating for legal assistance which is mutual in the prosecution of those involved in the 1994 genocide. By doing so, Rwanda is fulfilling its obligation as mandated by the Genocide Convention, which grants jurisdiction primary in nature to National Courts. The doctrine of *pacta sunt servanda* says that states are to carry out the binding obligations of treaties. This means that if Rwanda was unable to extradite genocide fugitives for domestic prosecution there would be a safety net.

*b)* Erga omnes

Rwanda is also complying with customary international law as required, which imposes a duty

[17] Law N° 08/96 of 31st August 1996 Punishing the Crime of Genocide, War Crimes and Crimes against Humanity.
[18] "UK: Put Genocide Suspects on Trial in Britain: UK Prosecution Preferable to Extradition," November 1, 2007, https://www.hrw.org/news/2007/11/01/uk-put-genocide-suspects-trial-britain.

to punish on the states. In 2004 Kofi Annan who was the UN Secretary General at that time brought in an action plan to prevent genocide. This Action Plan is the crux of Rwanda's commitment towards MLA issues. This five-point action plan calls for the ending of impunity among other things.

This sheds light on the ongoing need for criminal cooperation, thereby establishing the role *erga omnes* in respect of the principle of prohibition. Those accused of international crimes, must be punished and investigated by any state.[19]

*c)* Peremptory norms and Obligations/Jus cogens

The prohibition of genocide is a peremptory norm, and thus the duty to prosecute international crimes is a norm that the international arena must accept. No deviation from this is permitted. According to *aut dedere aut judicare* which is a Latin maxim, the states must ensure that individuals who commit genocide and crimes against humanity are brought to justice.[20] The rule requiring the punishment and prevention of genocide is also regarded as jus cogens by customary international law.

Jus cogens is usually rules known as peremptory norms. These norms are important in nature such that they cannot be overruled by agreement of treaty parties. Any treaty that contradicts a peremptory norm is null and void under the VCLT. States are thus required to punish these crimes. Furthermore, when a country is unable to prosecute an international crime for one reason or another, international law mandates the country in question to extradite the accused so that they would be subjected to domestic adjudication.

*d)* Obligation to punish

Parties who have ratified the genocide convention agree that genocide is an international crime. Thus, they commit to preventing and punishing it under the genocide convention. The Genocide Convention states that those who commit genocide will be punished, irrespective of who they are. Persons charged with genocide should also be tried by a competent tribunal with the required jurisdiction. In order to adjudicate international crimes in the domestic arena, mechanisms to investigate international crimes during the genocide must be established. Numerous countries have reiterated this call to arrest fugitives for extradition and trial.

Some countries rather than arresting fugitive maintain close contact with Rwandan prosecution

[19] *Id.*
[20] *Supra* note 20.

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bodies. They also keep an eye on ongoing investigations with the goal of domestic adjudication.

**(B) Transfer of cases in Rwanda**

The Rwandan law concerning the transfer of cases from the establishes a legal framework for.[21] Elements of that framework are not applicable to other types of criminal proceedings. Since 2012, the new Rwandan Penal Code has also punished these crimes. The transfer law as a reformatory move has touched on some of the following important aspects.

a) Enlarged bench

The most recent legislation governing the Supreme Court's organisation, operation, and jurisdiction grants the Supreme Court absolute discretion to designate a bench as an alternative to the traditional first instance judge. This legislation, passed in June 2012, also addresses the appointment of foreign judges to Rwandan courts, stating that referred or transferred cases shall be tried both at first instance and appeal level by at least a three-judge bench.

This differs from the Transfer Law, which states that the case must be tried by a single judge assisted by the court registrar in the first instance. This provision mentions the President's assessment of the factors to consider when deciding on possible expansion.[22] Complexity and significance can be interpreted in light of various factors such as number of natures of accused, number of charges and so on.

Given the current situation, at least the transfers from the ICTR along with the extraditions from Norway, Canada and Denmark could be given primacy in the sense of expanding the bench. This indicates that there has been an assessment of the case's importance and complexity been made.

b) The rights of the accused

The Transfer Law, is based on the Rwandan Constitution, the ICCPR, and the Rwanda Code of Criminal Procedure. It thereby gives the accused person a guarantee to be transferred to Rwanda with a number of rights, including the right to a fair trial.[23]

Rwanda is currently dealing with cases that fall under the purview of the transfer law; in these cases, trials are underway. In almost all of these cases, the Court has taken into account issues of indigence raised by a few of the perpetrators and has requested that the Rwanda Bar Association must definitely provide legal assistance to them at the cost of the Rwandan

[21] Law and Reality: Progress in Judicial Reform in Rwanda, July 26, 2008, https://www.hrw.org/reports/2008/07/25/law-and-reality, and Justice Compromised.
[22] *Id.*
[23] Supra note 23.

government.[24]

This is one of the accused's fundamental rights to a fair trial, which has been held in high regard. Concerning the issues of adequate time, aforementioned rights and resources for the accused's defence have been respected. There is sufficient assistance for the defence to prepare for the trial through this.

c) Monitoring of transfer cases

In terms of monitors, there is an open-door policy Rwanda; they have access to all trials, all officials, and the prison. Every Rwandan institution is works with monitors, and no instance of lack of cooperation has been reported thus far. Rwanda welcomes monitors given that there is awareness of the intense scrutiny.

Scrutiny comes into play owing to certain commitments towards the ICTR that states that monitors must meet face to face with anyone they want. In addition to this, they must have access to all court records and court records whenever there is a need.[25] Both the prosecution-appointed and court- appointed monitors have been visiting Rwanda to carry out the duties in this regard, and they have done so within the parameters of the rules that govern them. They have access to documents, court proceedings and records pertaining to the case. This also includes detention facilities.

d) Foreign defence counsel

According to the Transfer Law, accused have the right to counsel of their choice. Foreign counsel who are eligible will be able to defend accused in transfer and extradition cases. The Rwandan law establishing the Rwandan Bar also applies to the participation of foreign defence counsel.[26] Both accused and the prosecution have the right to challenge any High Court decision provided that there has been a mistake of law or a mistake of fact or both.

e) Heaviest penalty and detention

Rwanda has abolished the death penalty entirely, not only with respect to the transfer cases. In Rwanda, the most severe penalty imposed on a person convicted is life imprisonment.

According to the Transfer Law, when the ICTR transfers a person to Rwanda, they must be detained in accordance with the minimum standards of detention. This must be done in accordance with the United Nations body of principles for the protection of all persons subjected

[24] Id.
[25] Supra note 25.
[26] *Id.*

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to any form of detention or imprisonment, which was adopted on December 9, 1998 by General Assembly Resolution 43/173. Rwanda has also worked with the Special Court for Sierra Leone. They decided to have convicts serve their sentences in Rwanda at Mpanga Prison from this Court. The courts must have been certified by the UNICTR to meet international standards.[27] These arrangements have paved the way for Rwanda to adjudicate more cases the detention facilities are no more a hindrance to the refusal to transfer.

## V. CONCLUSION

Current international justice systems have failed to meet their expectations. They have their own set of issues, and their impending closure amounted to meaning that national jurisdictions could and should take over and adjudicate such crimes as well. It is the way forward, particularly in the new era of the ICC, which places importance on national jurisdictions willing to prosecute crimes in their own courts. Rwanda's Gacaca system is thereby an example of homegrown solutions that have produced reconciliation among Rwandans and fostered unity.

There lies a need to create legal frameworks that are strong enough to support domestic prosecution of international crimes. They must also be capable of instilling trust in the justice system. Recognizing the challenges that countries emerging from violent conflict or countries experiencing conflict face becomes critical. Rwanda has made great progress in the last 21 years by reuniting a society torn apart by genocide and ethnic hatred, and by establishing independent judicial institutions that are strong having the capability to adjudicate international criminal crimes.

Some laws, such as the genocide ideology law passed in 2008, have been used to prosecute government critics and stifle dissent. In 2013, an improved version of the genocide ideology law was passed. While the new law more precisely defines the offence and mandates evidence of the crime's intent, reducing the scope for prosecutions abusive in nature, it rightly retains language that might used to criminalise free speech, and offences are punishable.[28]

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[27] *Supra* note 27.

[28] Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda, July 26, 2008, https://www.hrw.org/reports/2008/07/25/law-and-reality.

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