PROTECTION OF WITNESSES IN CASES REFERRED BY THE ICTR TO RWANDA

Submitted in partial fulfilment of the requirements of the degree LL.M (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

By

Ophilia Leonard Karumuna

Student number: S10675630

Mr. Pramod Bissessur

At the Faculty of Law, University of Mauritius

29 October 2010

DEDICATION

This dissertation is dedicated to my family and to all victims and witnesses of gross human rights violations. May God's divine protection be bestowed upon you.

DECLARATION

I, **OPHILIA LEONARD KARUMUNA**, do hereby declare, certify and affirm that this research is my own work and that to the best of knowledge, has not been submitted or is currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof.

SIGNED AT…… THIS……..DAY OF OCTOBER 2010.

……...

OPHILIA LEONARD KARUMUNA

(CANDIDATE)

Email: ophiliahk@yahoo.com

I, **PRAMOD BISSESSUR**, being the supervisor, have read this research paper and approved it for partial fulfilment of the requirements of the Masters of Law Degree, Human Rights and Democratisation in Africa, of the University of Pretoria.

SIGNED AT……..THIS……..DAY OF OCTOBER 2010.

……

MR. PRAMOD BISSESSUR

(SUPERVISOR)

E-mail: p.bissessur@uom.ac.mu

ACKNOWLEDGEMENT

The commitment needed in writing this paper would not have been possible without the support of many people. First and foremost, I would like to thank God for all the blessings that I have received this year. It is by His grace that I am who I am today.

I owe my deepest gratitude to the Centre for Human Rights for giving me the opportunity to be one of the scholars of the programme. Many thanks go to the members of staff who work tirelessly in running the programme. Despite the stress involved in completing countless assignments, the LL.M programme has been a memorable experience worth going through.

I would like to express utmost gratitude to my supervisor Mr. Pramod Bissessur who had created special time to read my drafts. I am grateful for the invaluable assistance, support and guidance he gave me at every stage of the dissertation writing process. His suggestions and feedback were invaluable.

Special thanks go to the University of Mauritius particularly to the coordinator of the LL.M programme in Mauritius Ms. Odile Lim Tung whom, with the assistance of our landlord and his family provided us with necessary resources and facilities for making our research work doable.

Lots of love and gratitude go to my family who has always been there for me throughout the duration of my studies. The endless love, care and support they gave me especially in the process of writing this dissertation is deeply appreciated. To my mom, you are an amazing woman. To my dad, you had always told me that you would shake my hand the day I got a Masters. I cannot wait for the handshake. It had better be a firm one too. I love you all.

I have also benefited from the insights of several people in the preliminary stages of developing my research proposal; to name a few, Prof Frans Viljoen, Prof Michelo Hansungule and Dr Magnus Killander. Special thanks go to Tarisai Mutangi, my tutor for his timely and instructive comments throughout the course of my studies.

Lastly, I convey many thanks and blessings to all those who supported me in every way in the course of the programme. I thank all my friends and loved ones around the world for checking on me from time to time to name a few, Mr. Kwamy, Mr. Kaahwa and Mr. Muganyizi. Many thanks go to my housemates Ajibike, Bubala, Nicola, Rumbidzai and to my classmates. I convey special thanks to Marian who was always there when I needed someone to talk to. May God bless you all abundantly.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCP	Code of Criminal Procedure
DRC	Democratic Republic of Congo
DSRSG	Deputy Special Representative of the Secretary-General
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Court of Human Rights
EU	European Union
GC	General Comment
HRC	Human Rights Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
LRC	Legislative Reform Commission
NSGJ	National Service Gacaca Jurisdictions
IWGIT	Informal Working Group on International Tribunals
IWPR	Institute for War and Peace Reporting
NPPA	National Public Prosecution Authority
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
RAF	Rwandan Armed Forces
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SC	Security Council

SCSL	Special Court for Sierra Leone
SG	Secretary-General
UN	United Nations
UN GA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
USAID	United States Agency for International Development
VWU	Victims and Witnesses Unit
VWS	Victims and Witnesses Section
VWSU	Victims and Witnesses Support Unit
WPP	Witness Protection Programme
WPSU	Witness Protection Support Unit
WPU	Witness Protection Unit
WSO	Witness Support Office
WWII	World War Two/ Second World War

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

In 1994, Rwanda erupted into one of the most appalling cases of mass murder, leading to the death of about 800,000 Tutsi and moderate Hutus. On 8 November 1994, the United Nations Security Council (SC) established the International Criminal Tribunal for Rwanda (ICTR) 'to prosecute persons responsible for genocide and other serious violations of the international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994'.[1]

Resolution 955 did not indicate the time limit for the completion of the mandate of the ICTR. Ten years later, by virtue of Resolution 1503 the SC called on the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY) 'to complete all investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010.'[2] The SC further directed the ICTR to formalize a detailed completion strategy modelled on the ICTY Completion Strategy[3] (ICTR Completion Strategy).

The latest ICTR Completion Strategy report indicates that first instance trials have been completed in respect of 50 accused persons. Judgments at first instance are expected to be disposed of in the course of 2011.[4] By 24 May 2010, appellate proceedings had been concluded in respect of 31 persons. The ICTR anticipates disposing of all appeals by the end of 2013.'[5]

Investigations, prosecutions and judgments are highly dependent on witness testimony. Unfortunately, the ICTR has experienced reluctance by witnesses to testify due to well founded fear of reprisals and risks to their lives and their families' lives. For this reason, the Witnesses and Victims

[1] Resln 955 (1994) of 8 November 1994 S/RES/955 (1994) para 1.
[2] Reslns 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004.
[3] Report on the judicial status of the ICTY and the prospects for referring certain cases to national courts S/2002/678 of June 2002.
[4] The ICTR Completion Strategy (25 May 2010), UN Doc S/2010/259 para 3.
[5] n 4 above, para 25.

Support Unit (WVSU) was established as the main unit responsible for the safety and welfare of the lives of witnesses, their families and property.[6]

Despite the elaborate mechanisms of witness protection at the ICTR through its WVSU, the ICTR has been criticised for its inability to provide protection to witnesses after testifying. The ICTR has not been able to guarantee relocation to all witnesses due to lack of insufficient financial resources. As a result, witnesses agreeing to testify and those who testify face reprisals and serious threats including murder.

In January 1997, the UN Human Rights Field Operation in Rwanda (HRFOR) produced a report detailing killings and other attacks against genocide survivors in 1996.[7] It documented the murder of 227 genocide survivors by members of the former Rwandan Armed Forces (RAF) and the Intarahamwe militia, out of fear of being denounced for acts committed during the genocide.[8] Two witnesses who testified before the ICTR in the Jean-Paul Akayesu case and the Obed Ruzindana case were killed after testifying.[9] In September 1996, the ICTR estimated 10 individuals who had agreed to testify to have been killed before they had the chance to tender their testimony. Numerous other genocide survivors scheduled to testify before the ICTR were killed in Rwanda before making it to Arusha.[10]

The failure to provide adequate protection to witnesses has also been attributed to ICTR's internal administration. The ICTR registry has at some point violated witness protection procedures, for instance, by sending information involving protected witness residing in Rwanda to the Rwandan Prosecutor General and other ministries. In addition to that, members of the office of the Prosecutor were found in violation of more than one witness protection orders including intimidation of witnesses.[11]

---

[6] The ICTR Rules, rule 34.

[7] Status Report (24 January 1997), HRFOR/STRPT/33/24 Jan 1997/E.

[8] As above.

[9] UN Doc A/52/582 S/1997/868 of 1997 para 51.

[10] Coalition for women's human rights in conflict situations 'Witness protection, gender and the ICTR' para 3 available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php (accessed 2 July 2010).

[11] A Turner 'ICTR witness protection?' A paper presented at the ICTR defence conference in The Hague, Netherlands (14-15 November 2009) 1 available at http://www.ictrlegacydefenseperspective.org/papers/Allison_Turner_ICTR_Witness_Protection1.pdf (accessed 2 July 2010).

To date, eleven fugitives still remain at large.[12] The Prosecutor intends to file applications for the referral of eight of the remaining 11 fugitives' cases to Rwanda under Rule 11(bis) of the ICTR Rules of Procedure and Evidence (ICTR Rules).[13] However, the ICTR Completion Strategy does not contain a comprehensive strategy for witness protection in national jurisdictions. It mentions in its residual issues about a schedule for training new staff of the witness protection programme and the review of witness protection orders with a view to withdrawing or varying those that are no longer necessary.

1.2 Problem statement

One of the main responsibilities of the ICTR is to provide physical and psychological protection to witnesses who have well-founded and reasonable fear for their lives and of their families' lives.[14] However in practice, witnesses have been exposed to both physical and psychological attacks.[15] It is assumed that witnesses testifying in transfer cases would be accorded the same standard of protection as those provided by the ICTR. If this is the case, one concern arises: Whether Rwanda is prepared to provide witnesses with adequate protection in accordance with minimum international standards similar to the ICTR.

1.3 Objectives of the study

This dissertation seeks primarily to explore the capacity of Rwanda to provide adequate protection in accordance with minimum international standards to witnesses testifying in transfer cases. Preliminary to the above concern, this dissertation will outline the international measures for the protection of witnesses as enumerated in various international instruments. The dissertation will analyse the legal and institutional framework of witness protection in national jurisdictions drawing experience from countries of the former Yugoslavia. The findings of this research aim at educating people on the importance of witness testimony and to provide recommendations for the inclusion of witness protection measures in national criminal justice systems.

[12] The ICTR Completion Strategy (n 4 above) para 3.
[13] n 4 above, para 60.
[14] The ICTR Statute, art 21 & the ICTR Rules, rule 34.
[15] See background to the study para 5.

1.4 Significance of the study

This paper interrogates Rwanda's preparedness to receive cases referred by the ICTR particularly on its ability to provide adequate protection to witnesses that would testify in transfer cases. The findings of this study intend to expound the significance of establishing specific programmes for the protection of witnesses in securing their participation in criminal proceedings.

1.5 Research questions

This research will focus on answering the following questions:

a. Does the international criminal justice system provide the legal basis for the protection of witnesses?

b. Does the ICTR Completion Strategy provide any guidance on witness protection in respect of cases that would be transferred to Rwanda?

c. Does Rwanda's legal framework meet the minimum international standards on the provision of witness protection?

d. Are Rwanda's institutions prepared to provide effective protection to witnesses in cases referred by the ICTR?

1.6 Literature review

A number of books and artides have written on the protection of witnesses in international tribunals and developed countries. However, there is almost no literature on the protection of witnesses in Africa.

The authority of the ICTR to grant measures for the protection of witnesses arises from the provisions of the Statute of the ICTR (ICTR Statute) and ICTR Rules. The ICTR Statute, Rules and jurisprudence show that the right of an accused person to a fair trial is not absolute because it takes into consideration the protection of victims and witnesses.[16] The decision of the ICTY in the case of Prosecutor v Dusko Tadic a.k.a 'Dule' (Tadic case) provides guidelines to courts and tribunals on how to balance the protection of witnesses without affecting the right of an accused to a fair trial.[17]

[16] The ICTR Statute, arts 20(2) & 21.

[17] *Prosecutor v Dusko Tadic a.k.a 'Dule'* Decision on the Prosecutor's motion requesting protective measures for victims and witnesses (10 August 1995), Case No IT-94-1.

Morris[18] explains that even before the outbreak of genocide, Rwandan courts had very little power. This was because judges and magistrates lacked formal training and rule of law was not observed. He explains that the destruction that took place in Rwanda went along with the devastation of the country's judicial system.

In 1996, Rwanda enacted a law providing its courts with jurisdiction to prosecute the crime of genocide and crimes against humanity (Organisation of Prosecutions Law) in its courts.[19] According to Musungu and Louw, the prosecution of suspects under the law is slow. The authors criticize the Organisation of Prosecutions Law for not guaranteeing fair trials and link its weaknesses to Rwanda's practical and financial incapacity.[20]

In order to address the challenge of backlog of cases in courts, the government enacted a law establishing gacaca courts (Gacaca Law)[21] to complement the work of Rwanda's ordinary courts. Musungu and Louw view that despite Rwanda's achievements, the existing and planned initiatives have not been able to deal with the magnitude of the overloaded judicial system.[22]

Schotsmans[23] argues that reluctance of victims to testify in gacaca courts is most prominent in communities where detainees are strongly represented. The Gacaca Law provides an option of hearings conducted in camera where it is in the interest of public order or good morals.[24]

---

[18] MH Morris 'The trials of concurrent jurisdiction: The case of Rwanda' at 351 cited in SF Musungu & L Louw 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 7 *East African Journal of Peace & Human Rights* 205.

[19] Organic Law 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990.

[20] SF Musungu & L Louw 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 7 *East African Journal of Peace & Human Rights* 205.
209-210.

[21] Organic Law 40/2000 of 26 January 2001 Setting up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed between 1 October 1990 and 31 December 1994 as modified and completed in subsequent years.

[22] Musungu & Louw (n 20 above) 214.

[23] M Schotsmans 'Listening to the survivors: Research on the survivors' perception of their present situation' (2000) 57-60 cited in EH Thelle 'The Gacaca jurisdictions: A solution to the challenge of the Rwandan judicial settlement?' (2001) *Human Rights in Development Yearbook* 90.

[24] *Gacaca* Law (n 21 above) art 24.

1.7 Methodology

This research will make use of primary sources of information including international instruments, resolutions of the SC and of the General Assembly (GA), case law and primary documents of the ICTR.

Secondary sources of data collection will involve desktop and library research. Among the documents that will be used include books, journal articles, commentaries, press releases, reports and any other relevant documentation.

1.8 Delimitation of the study

This paper will analyse the legal and institutional framework for the protection of witnesses in various national jurisdictions but will focus more on Rwanda as a case study. The choice of Rwanda is justified by it being the only country that has jurisdiction and is currently willing to take up the eight cases that have been identified for referral from the ICTR.[25]

This paper will neither discuss in depth nor provide an exhaustive historical account of the genocide that took place in Rwanda in 1994. It limits itself in the most part, to the experiences of witness protection at the ICTR and Rwanda. The paper outlines the challenges that are likely to be faced by Rwanda in protecting witnesses and provides recommendations on the measures the country should take as it prepares itself to receive cases from the ICTR.

1.9 Overview of the chapters

This dissertation consists of five chapters. Chapter one provides outlines the structure of the entire study. Chapter two defines the basic concepts underlying witness protection and outlines the legal framework for protection of witnesses in international instruments and international criminal tribunals. Chapter three provides an analysis of the ICTY Completion Strategy on which the ICTR Completion Strategy is modelled on and provides a summary of the legal and institutional framework of witness protection in the Balkans.[26] Chapter four evaluates Rwanda's preparedness to take up cases from the ICTR. Chapter five sums up the findings of the entire study and provides recommendations.

---

[25] The ICTR Completion Strategy (n 4 above) para 80.

[26] Countries found in South-East Europe forming the former Yugoslavia which consisted of the Republics of Slovenia, Macedonia, Croatia, Serbia, Montenegro, Bosnia-Herzegovina & 2 separate regions of Kosovo and Vojvodina. Available at http://www.icty.org/sid/322 (accessed 26 September 2010).

CHAPTER TWO

DEFINITIONS OF BASIC CONCEPTS AND THE LEGAL FRAMEWORK FOR WITNESS PROTECTION

2.1 Introduction

Successful investigations and prosecutions are dependent upon the wilful cooperation of prosecution and defence witnesses. As such, various laws and declarations have been adopted guaranteeing adequate protection to witnesses testifying in criminal proceedings. This chapter outlines the international and regional sources for the protection of witnesses. The chapter first defines the basic concepts underlying witness protection. Towards the end, the chapter draws experiences of the framework for the protection of witnesses in the Balkans.

2.2 Definitions of key concepts

2.2.1 The concept of witness

The general understanding of the term witness is a person who sees something. The concept of witness is so wide that it encompasses those who testify in courts of law to those who simply attest to legal documents. Thus the definition will vary depending on the circumstances of each case.

Black's Law Dictionary defines a witness as 'one who sees, knows or vouches for something. Or one who gives testimony under oath or affirmation in person, by oral or written deposition or by affidavit.'[27]

A witness can also be defined as

> a person, other than the defendant, having knowledge of a fact (possessing information) to be ascertained in criminal proceedings or summoned by the judicial authority to provide testimony on that fact.[28]

Witnesses testifying in court can be classified according to the roles they play such as expert witnesses, victim-witnesses and justice collaborators. Witnesses can further be classified on the basis of entitlement to special protection either before, during or after they testify.

---

[27] Black's Law Dictionary 7(1999) 1596.

[28] G Vermeulen *Protecting witnesses of serious crime: Training manual for law enforcement and judiciary* (2006) 204.

2.2.2 The concept of victim

Various authors and legal instruments incorporate victims in the group of people requiring protection. It should be noted that, even though most victims would assume the role of witnesses when they testify in court, it should not be concluded that all witnesses are victims of crimes. Reference to victims in this paper refers to victims testifying as witnesses in courts.

According to Black's Law Dictionary, a victim is 'a person harmed by a crime, tort or other wrong.'[29] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration), defines victims of crime as

> Persons who individually or collectively, have suffered harm, including physical or mental injury, emotionally suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative in member states including those laws proscribing criminal abuse of power.[30]

The Rules of Procedure and Evidence of the International Criminal Court's (ICC Rules) definition of victim includes natural and legal persons. Victims are defined as

(a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of any court

(b) organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historical monuments, hospitals and other places and objects for humanitarian purposes.[31]

2.2.3 The concept of witness protection

Protection of witnesses is an important tool for securing testimony. The fear and unwillingness of witnesses to testify has to a large extent been caused by threats and intimidation imposed on witnesses. This has necessitated the introduction of programmes guaranteeing protection to witnesses.

Vermeulen defines a witness protection programme as

[29] Black's Law Dictionary (n 27 above) 1561.
[30] Victims Declaration Resln 40/34 of 29 November 1985 A(1).
[31] The ICC Rules, rule 85.

> A programme regulated by legislation, aimed at the protection of witnesses and victims in cases of serious intimidation, which cannot be addressed by other protection measures, and where the testimonies of such witnesses are of special significance for criminal proceedings.[32]

At the ICTR, protection of witnesses is explicitly provided for in the ICTR Statute and Rules. The general rule governing witness protection states that 'a judge or chamber may order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the right of the accused.'[33] It should however be noted that protective measures may only be granted in exceptional circumstances to victims or witnesses who may be in danger or at risk.[34]

2.2.4 Witness protection and the right of the accused to a fair trial

Human rights occupy a prominent part of the criminal justice system as well. The UN GA (General Assembly) has in several occasions adopted resolutions stressing on the importance of mainstreaming human rights in the administration of justice.[35] States have an obligation of ensuring that all persons, including witnesses enjoy equal protection of rights at all stages of criminal proceedings.

On the one hand, protection of witnesses falls within the realm of human rights. Member states of the United Nations (UN) reaffirmed their determination to promote and encourage the respect for human rights and fundamental freedoms.[36] Each member state has the responsibility to protect, promote and respect human rights which are enshrined in among others, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economical, Social and Cultural Rights (ICESCR).

On the other hand, one cannot talk about witness protection without understanding how it affects the right of the accused to a fair trial. An accused person is entitled to certain minimum guarantees one of them being the right to 'examine, or have examined, the witness against him'[37] It is therefore imperative to understand how the two concepts relate.

---

[32] Vermeulen (n 28 above) 204.
[33] The ICTR Rules, rule 75(A).
[34] The ICTY & ICTR Rules rule 69(A).
[35] UN General Assembly reslns 45/166 of 18 December 1990, 44/162 of 15 December 1989, 43/153 of 8 December 1987, 42/143 of 7 December 1987, 41/149 of 4 December 1986, 40/146 of 13 December 1985 & 39/118 of 14 December 1984.
[36] The UN Charter art 1(3).
[37] The ICCPR, art 14(3)(e).

For a trial to be considered fair, certain minimum standards have to be upheld throughout the judicial process. Galligan[38] describes the concept of procedural fairness in three ways

> First, legal procedures are fair procedures to the extent that they lead to or constitute fair treatment of the person or persons affected. Secondly, within each type of legal process, there are authoritative standards based on the tiers of values relevant to that process which constitute the standards of fair treatment … Thirdly, the basis for such treatment being fair treatment is the promise of society that they will be treated in that way.

The right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in article 14 of the ICCPR. The press and public may be excluded from proceedings in certain circumstances including where it is in the interest of morals, public order and where publicity would prejudice the interests of justice.[39]

Whereas states may be allowed to make reservations on parts of article 14 of the ICCPR, the UN Human Rights Committee (HRC) prohibits states from making general reservations that limit the right to a fair trial as a whole.[40] In interpreting the right to fair trial the HRC stressed that, 'the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non derogable rights.'[41]

At the regional level, the right to a fair and public hearing by an impartial court or tribunal is guaranteed in article 7 of the African Charter on Human and Peoples' Rights (ACHPR).[42] The ACHPR does not provide circumstances in which the right to a fair and public trial may be derogated from.

The ICTR concept of fair trial is rather controversial given that the right of an accused person to a fair trial extends to the protection of victims and witnesses. Whereas article 20(4) of the ICTR Statute lists the minimum judicial guarantees that an accused person is entitled to, they are subject to the protection of victims and witnesses.[43]

---

[38] DJ Galligan *Due process and fair procedures: A study of administrative procedures* (1996) 52.

[39] As above.

[40] The HRC GC No 32 UN Doc CCPR/G/GC/32 para 5.

[41] n 40 above, para 6.

[42] The ACHPR adopted 27 June 1981 OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 art 7(1)(d).

[43] Art 20(4) read together with arts 20(2) & 21 if the ICTR Statute.

The Tadic case outlined five relevant factors to be considered when granting anonymity to witnesses while balancing the right of the accused to a fair trial. It was held that:

> First and foremost, there must be real fear for the safety of the witness or her or his family … Secondly, the testimony of the particular witness must be important to the Prosecutor's case … Thirdly, the trial chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy … Fourthly, the ineffectiveness or non-existence of a witness protection programme at the domestic level… Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.[44]

The fulfilment of the above criteria entitles a witness to anonymity but does not take away the right of an accused to examine or have examined the anonymous witness. The defence has to be given sufficient opportunity to examine the anonymous witness and once the reason for granting anonymity is no longer there, the identity of the witness has to be released.[45]

2.3 International legal framework for the protection of witnesses

Since the end of the Second World War (WWII), the international community has been determined to end impunity for gross violations of international humanitarian law. The establishment of ad hoc criminal tribunals and ultimately a permanent criminal court is an indication of the determination to end the culture of impunity. Various declarations, conventions and legal instruments have been put in place to ensure that witnesses are adequately protected.

2.3.1 The United Nations Convention against Transnational Organised Crime

The UN Convention against Transnational Organised Crime[46] urges state parties to provide effective protection to prevent witness intimidation and retaliation. The recommended measures include witness relocation, non-disclosure of identity, information and whereabouts of witness and the use of evidentiary rules that ensure safety of witnesses. State parties are encouraged to strengthen international cooperation in order to facilitate adequate protection. Victims are entitled to protection in so far as they are witnesses.[47]

---

[44] *Tadic* (n 17 above) paras 62-66.
[45] n 17 above, paras 67 & 71.
[46] Convention against Organised Crime General Assembly resln 55/25 of 15 November 2000.
[47] n 46 above, art 24.

2.3.2 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The Victims Declaration recommends measures that should be taken at national, regional and international level to provide assistance to victims of crime and the steps to be taken to prevent victimisation that is linked to abuse of power. Among the measures that are recommended in judicial and administrative processes include the protection of victim privacy, victim safety and the prevention of intimidation and retaliation to witnesses testifying on behalf of victims.[48]

2.3.3 The United Nations Convention against Corruption

The Convention against Corruption obligates state parties to take appropriate measures within their means and domestic legal systems to provide effective protection to witnesses including expert witnesses from potential retaliation or intimidation.[49] Witnesses are entitled to protective measures provided they do not prejudice the rights of the accused. Such measures include relocation, non-disclosure or limitation of disclosure of information indicating the identity and whereabouts of witnesses, the use of communication technology and other adequate means to ensure the safety of witnesses.[50] The protective measures are applicable to victim-witnesses as well.[51]

2.3.4 The United Nations Economic and Social Council resolution 2005/20

The Economic and Social Council adopted Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Guidelines)[52] which provide a framework for assisting states in enhancing the protection of child victims and witnesses in criminal justice systems. The Guidelines are to be implemented in accordance with national legislation and procedures depending on the legal, social, economic, cultural and geographical circumstances of each member state.[53]

[48] Victims Declaration (n 30 above) art 6(d).
[49] Convention against Corruption art 32(1).
[50] n 49 above, art 32(2).
[51] n 49 above, art 32(4).
[52] Adopted on 36th plenary meeting of the Economic and Social Council on 22 July 2005.
[53] Objectives 1 & 2 of the Guidelines.

2.3.5 Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime

The UNODC Good Practices is a manual consisting of information to assist UN member states in the establishment and operation of effective witness protection programs. The manual summarizes the main elements of the measures developed from the organisation, practice and jurisprudence of the ICTR and the ICTY which are largely reflected in the Rome Statute establishing the ICC (Rome Statute).[54] The manual also gives an account of the main elements of witness protection programs from different national jurisdictions and directs member states on how to set up a witness protection programme. The manual offers practical options suitable for adaptation and incorporation in the legal systems in accordance with the social, political and economic circumstances of member states.

2.4 Witness protection in international criminal tribunals

2.4.1 The military tribunals

Prosecution of war crimes dates back to 1945 with the creation of the International Military Tribunal at Nuremberg (IMT)[55] and the International Military Tribunal for the Far East at Tokyo (IMTFE).[56] The IMT and IMTFE were the first criminal tribunals to be established for the prosecution of crimes constituting violations of international humanitarian law committed during WWII.

The Nuremberg tribunal

Governments of the victorious Allied Powers[57] concluded and signed the IMT Agreement also known as the London Agreement establishing the IMT in 1945 which was later acceded to by nineteen other states.[58] The IMT had jurisdiction to prosecute and punish major war criminals of the European Axis countries[59] who had committed crimes against peace, war crimes and crimes against humanity.[60] The

[54] Doc A/CONF183/9 of July 1998 entered into force on 1 July 2002.

[55] Established in 1945 by the London Agreement of 8 August 1945 82 U.N.T.S 279 59 Stat. 1544 through which the IMT Charter was appended.

[56] Established in 1946 through a special proclamation IMTFE Charter T.I.A.S 1589.

[57] The major Allied powers were the United States of America, the French Republic, Great Britain and Northern Ireland and the Union of Soviet Socialist Republics (USSR).

[58] MC Bassiouni 'Former Yugoslavia: Investigating violations of international humanitarian law and establishing an international criminal tribunal' 18 *Fordham International Law Journal* (1994-1995) 1195-1196.

[59] The major Axis powers were Germany, Japan and Italy.

[60] The IMT Charter art 6.

main defendants of the Nuremberg Trial were German leaders responsible for the extermination of about six million European Jews.

In prosecuting perpetrators of war crimes, the Allied Powers made use of documentary evidence such as official government papers, secret documents tracing Germany's wartime Jewish policy, records of the National Socialist Party and other records that had been confiscated immediately after the war.[61]

The Tokyo tribunal

In 1946, the IMTFE was established through an order and Special Proclamation promulgated by General Douglas MacArthur who was the Supreme Commander of the Allied Powers. The IMTFE had jurisdiction to prosecute and punish Far Eastern criminals charged with crimes against peace, conventional war crimes and crimes against humanity.[62]

The IMTFE Charter and Rules were very restrictive in terms of the nature of evidence that could be admitted. Evidence in favour of the defence was not considered admissible. Pritchard explains that evidence favourable to the defence was disregarded and potential defence witnesses were denied the opportunity to testify due to obstacles from Allied governments.[63]

The two tribunals lacked units dealing with protection of witnesses. This is because the prosecutors did not rely much on testimonial evidence. Since the Allies had access to most of the documentation confiscated from the conquered states, testimonial evidence was not as important as it came to be in subsequent criminal tribunals.

2.4.2 The International Criminal Tribunal for Yugoslavia

In response to reports of widespread violations of being committed in the territory of the former Yugoslavia the SC, acting under Chapter VII mandate of the UN Charter established the ICTY.[64] The ICTY was the first war crimes court to be created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.[65]

---

[61] M Weber 'The Nuremberg trials and the Holocaust: Do the war crimes trials prove extermination?' *Institute for Historical Review* para 48 available at http://www.ihr.org/jhr/v12/v12p167_Webera.html (accessed 31 August 2010).

[62] The IMTFE Charter art 5.

[63] RJ Pritchard 'Genocide and crimes against humanity: Tokyo Trial' available at http://www.enotes.com/genocide-encyclopedia/tokyo-trial (accessed 31 August 2010) paras 26 & 28.

[64] Resln 827 (1993) of 25 May 1993 UN Doc S/RES/827(1993).

[65] ICTY website available at http://www.icty.org/sections/AbouttheICTY (accessed 29 September 2010).

The SC adopted the Statute of the ICTY (ICTY Statute) empowering judges to promulgate procedural and evidentiary rules for inter alia, the protection of victims and witnesses.[66] Unlike the first two military tribunals which had access to documentary evidence, the ICTY relies heavily on witness testimony. In a fact-finding visit to the ICTY, Gardetto observed that ICTY judges base their rulings mainly on oral testimony.[67]

The ICTY established a Victims and Witnesses Section (VWS) within the authority of the Registrar.[68] The ICTY is the first tribunal to set up a unit for the protection of victims and witnesses in the context of international prosecution of crimes.[69] The VWS is responsible for recommending protective measures to victims and witnesses and providing counselling and support to victims of rape and sexual assault.[70] The VWS has been proactive in developing a number of policies and programmes which provide support measures to witnesses.

Rule 75(B) of the ICTY Rules outlines protective measures that a trial chamber may order for purposes of protecting the identity of witnesses from the public and the media. The ICTY has a programme of relocating witnesses whose lives are most threatened to third countries. By 2009, the ICTY had entered into witness relocation agreements with 13 countries.[71] Research has revealed reluctance of receiving states in accepting witnesses to their countries. In other countries it takes a long time to conclude relocation agreements.[72] Unfortunately, the ICTY lacks financial resources of guaranteeing protection to witnesses after testifying.

2.4.3 The International Criminal Tribunal for Rwanda

The ICTR was established through resolution 955 of the SC in response to the genocide that occurred in the territory of Rwanda. The Rwandan government through an official letter to the UN President of the

---

[66] The ICTY Statute, art 15.

[67] Jean-Charles Gardetto was appointed by the Committee on Legal Affairs and Human Rights of the Council of Europe to carry out a fact-finding visit to the ICTY on the system of witness protection appearing before the ICTY. Information available at http://assembly.coe.int/CommitteeDocs/2010/AS_Inf_2010_E.pdf (accessed 3 October 2010).

[68] The ICTY Rules UN Doc IT/32/Rev 43 rule 24.

[69] Report of the Secretary-General UN Doc A/50/365-S/1995/728 of 23 August 1995 para 109.

[70] The ICTY Rules, rule 34(A)(i) & (ii).

[71] Committee on Legal Affairs and Human Rights of the Council of Europe 'The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans' of 3 September 2009 Doc AS/Jur(2009)38 para 24 available at http://assembly.coe.int/CommitteeDocs/2009/20090903_ajdoc38.pdf (accessed 2 October 2010).

[72] Committee on Legal Affairs and Human Rights (n 71 above) paras 24, 28, 29 & 30.

SC requested for the establishment of an international tribunal to prosecute perpetrators of genocide.[73] Surprisingly, despite Rwanda's determination of having the international tribunal established, the Rwandese government voted against the adoption of resolution 955 establishing the ICTR. Ambassador Bakuramutsa expressed concerns for among others ICTR's limited temporal jurisdiction which is limited to crimes committed from 1 January 1994 and the composition and structure of the ICTR.[74] Despite these concerns, resolution 955 was adopted on the same day and the government of Rwanda was requested to honour its obligation to cooperate with the ICTR.[75]

Due to the similarity in the nature of crimes committed in Rwanda to those committed in the former Yugoslavia and due to the precedent already created by the ICTY, the SC had suggested for the establishment of the ICTR by way of a single resolution.[76] The proposal was however rejected due to fear that such extension would lead to the creation of a permanent judicial institution.[77] It was finally decided that a separate tribunal be created for the prosecution of the atrocities committed in Rwanda.

The two tribunals adopted similar organisational and institutional links to the extent of sharing one office of the Prosecutor and one Appeals Chamber.'[78] Cecile Aptel asserts that the sharing of the two organs by the tribunals is an indication of the efforts made to ensure the consistency in the operation of the tribunals and serves to prevent the development of different procedures and jurisprudence.[79] The structure of the ICTR has thus been strongly influenced by the ICTY and its Statute is an adaptation of the ICTY Statute having similar provisions with a few amendments reflecting the circumstances of Rwanda.

Protection of witnesses is articulated in both the ICTR Statute and Rules and is considered as one of the minimum standard for judicial fairness. Article 19(1) of the ICTR Statute provides that trial chambers shall ensure that trials are fair and expeditious and due regard will be had for the protection

---

[73] Letter of 28 September 1994 by Rwanda's Permanent Representative addressed to the President of the UN Security Council UN Doc S/1994/1115 4 para c.

[74] UN Representative to Rwanda at the 3453rd meeting of the Security Council held on 8 November 1994 UN Doc S/PV/3453 14-15.

[75] n 78 above, 17.

[76] Report of the Secretary-General pursuant to paragraph 5 of resln 955/1994 UN Doc S/1995/134 2-3 para 7.

[77] P Akhavan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 *The American Journal of International Law* 502.

[78] See Art 15(3) of the original Statute of the ICTR. In 2003 the Security Council through resln 1503/2003 amended Art 15 of the ICTR Statute providing for separate prosecutors for each tribunal.

[79] C Aptel 'The International Criminal Tribunal for Rwanda' (1997) 321 *International Review of the Red Cross* 675.

of victims and witnesses. Article 21 of the ICTR Statute explicitly provides that the protection of victims and witnesses will be provided for in the ICTR Rules.[80]

In implementing the aforesaid provision, a Victims and Witnesses Support Unit (VWSU) was set up within the registry to provide counselling and recommend protective measures for victims and witnesses.[81] In addition to recommending protective measures, the VWSU is tasked with the responsibility of developing short and long term plans for the protection of witnesses who have reasonable fear of threat to life, family and property.

Also relevant is the adoption of a gender-sensitive approach in providing support and protective measures to victims and witnesses.[82] Special provisions are provided for in the ICTR Rules in cases of victims of sexual assault. No corroboration is required in a victim's testimony, a defence of consent will be considered by taking into account of other factors vitiating consent and the victim's previous sexual conduct is immaterial.[83]

Rule 75 of the ICTR Rules provides for the measures safeguarding the privacy and security of victims and witnesses. The measures include the holding of proceedings in camera to prevent the media and public from knowing the identity and whereabouts of victims or witnesses, removal of identifying information of witnesses from public records, the use of voice and image-altering devices, assignment of pseudonym, holding of closed sessions, one-way closed circuit television and the control of the manner of questioning to avoid intimidation and/or harassment to witnesses.[84]

2.4.4 The International Criminal Court

The growing need of ending impunity for perpetrators of grave crimes, the international community decided to establish a permanent court. The International Criminal Court (ICC) has jurisdiction over persons responsible for the commission of the most serious crimes.[85]

Loberg[86] argues that the sensitive nature of the ICC's subject matter jurisdiction requires a method of ensuring that witnesses are safe and comfortable because witnesses appearing before the

[80] See also arts 14 & 19(1) of the ICTR Statute, for protection measures see rules 69, 75, 79 & 89 of the ICTR Rules.
[81] The ICTR Rules, rule 34(A).
[82] n 81 above, rule 34(B).
[83] n 81 above, rule 96.
[84] n 81 above, rule 75(B) & (C).
[85] The crime of genocide, crimes against humanity, war crimes & the crime of aggression.

ICC are likely to be inexperienced. He also refers to the adversarial mode of proceedings of the ICC which focuses on open court testimony which is likely to intimidate witnesses who are unfamiliar with criminal trial procedures.[87]

The Rome Statute contains a much more developed framework for the protection of witnesses compared to previous criminal tribunals. Special protective measures are accorded to victims of sexual violence and child victims or witnesses.[88] The protective measures provided by the ICC are governed under Rule 87(3) of the ICC Rules. In order to avoid harassment or intimidation of witnesses, a trial chamber has authority to control the manner of questioning during trial.[89]

A Victims and Witnesses Unit (VWU) is set up within the Registry of the ICC. The VWU is responsible for providing protective measures including security arrangements and counselling to victims, witnesses and other people who might be at risk on account of testimony rendered by witnesses.[90]

In addition to internal measures of witness protection, state parties are required to provide assistance within their national laws for the protection of victims and witnesses in relation to investigations or prosecutions of the ICC.[91]

2.5 Witness protection in national jurisdictions

While the mandates of the ICTY and ICTR are due to wind up soon, a number of indictees still remain at large. In order to reduce the caseload of the tribunals, the international community was called on to assist national jurisdictions in the strengthening of their judicial capacity to prosecute war crimes.[92] So far, 13 cases have been referred by the ICTY to national jurisdictions.[93] This section examines the existing legal and institutional framework for the protection of witnesses in countries where cases have been referred by the ICTY.

---

[86] B Loberg 'The witness protection measures of the permanent International Criminal Court are superior than those provided by its temporary *ad hoc* contemporaries' *Independent Research* (2006) available at http://www.kentlaw.edu/perritt/courses/seminar/brad-loberg-witness%20protection.final.htm (accessed 2 July 2010).

[87] n 86 above, para 8.

[88] The Rome Statute, art 68(2).

[89] The ICC Rules, rule 88(5).

[90] The Rome Statute, art 43(6).

[91] n 90 above, art 93(1)(j).

[92] Resln 1534 (2004) of 26 March 2004 UN Doc S/RES/1534(2004) para 9.

[93] The ICTY has transferred 10 cases to Bosnia-Herzegovina, 2 to Croatia & 1 to Serbia.

2.5.1 Bosnia and Herzegovina

On 9 March 2005, a War Crimes Chamber (WCC) was established within the State Court of Bosnia-Herzegovina and the State Prosecutor's Office to investigate crimes and prosecute persons involved in serious war crimes committed in Bosnia-Herzegovina during the 1992-1995 conflict.[94] The WCC prosecutes and tries cases referred to it by the ICTY and other locally instituted cases.

Two units were established within the State Court to provide protection to witnesses. The Witness Protection Support Unit (WPSU) which is established within the Court Registry works to ensure that witnesses are accorded appropriate protection when required. The Witness Support Office (WSO) provides psychological support to witnesses and in its own initiative provides financial assistance to witnesses with special needs.[95]

2.5.2 Serbia

In June 2003, a special War Crimes Panel (WCP) was established within Serbia's Belgrade District Court and a War Crimes Section within the Office of the Prosecutor. The WCP prosecutes and tries cases referred to it by the ICTY.[96] A law was adopted by the Serbian Assembly in September 2005 providing for witness protection measures and a WPU was established within Serbia's Ministry of Interior. The new Criminal Procedure Code of Serbia allows courts to grant measures of maintaining witness anonymity through assignment of pseudonyms, change of identity and witness relocation within and outside the country.

2.5.3 Croatia

In 2003, war crime chambers were established in Croatia in the county courts of Zagreb, Osijek, Rijeka and Split.[97] According to a report of Amnesty International,[98] Croatia has not been very cooperative in the prosecution of war crimes cases. As of 2009, only one case was under prosecution in one of the four

---

[94] B Ivanisevic 'The war crimes chamber in Bosnia-Herzegovina: From hybrid to domestic court International' (2008) *Center for Transnational Justice* 5.

[95] HRW report 'Looking for justice: The War Crimes Chamber in Bosnia and Herzegovina' (2006) 18 No 1(D) 31 & 33 available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-lookingforjustice.pdf (accessed 27 September 2010).

[96] Institute for War and Peace Reporting 'International justice-ICTY: Introduction to Balkan war crimes courts' available at http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts (accessed 6 October 2010).

[97] ICTY website available at http://www.icty.org/sid/10462 (accessed 6 October 2010).

[98] Amnesty International report 2010 - Croatia of 28 May 2010 available at http://www.unhcr.org/refworld/docid/4c03a834c.html%20[accessed%207%20October%202010 (accessed 7 October 2010).

criminal chambers. The reluctance of prosecuting perpetrators has been attributed to the long-standing ethnic tensions and intimidation of witnesses which has contributed to adverse impunity in the country.

Nevertheless, the country enacted a law regulating protection and assistance to persons who are exposed to danger resulting from testifying in criminal proceedings.[99] In addition, the country receives funding from donor communities for a victims and witness protection programme.[100]

2.5.4 Kosovo

Although no cases have been referred by the ICTY to Kosovo, the country has a unique witness protection programme (WPP). In 1999, the SC deployed a UN Mission in Kosovo (UNMIK) to establish a civilian administration for the peaceful transition of the country to stability, democracy and self-governance.[101] The UNMIK established a system consisting of international judges and prosecutors within Kosovo's domestic courts to prosecute and try war crimes.

A WPP was established in 2001 through the initiative of Elaine Banar, a UNMIK Legal Advisor on organized crime. The WPP provides security, emotional and psychological protection to witnesses and where necessary, witnesses are relocated to safe places. The programme has one witness protection coordinator and six field officers.[102]

The WPP was established so as to provide protection to witnesses of organized crime therefore it lacks sufficient resources for providing protection to all vulnerable witnesses. Jean-Christian Cady[103] expressed concern on the WPP's inability to provide protection to sensitive witnesses on its own. He underscored the need of having a witness protection programme with regional cooperation since witnesses are constantly subjected to threats.

---

[99] Witness Protection Act No 163 of 2003.

[100] 'Gender in Croatia' available at http://europeandcis.undp.org/gender/croatia/show/C2D332E3-F203-1EE9-B7FC479E37554EF2 (accessed 28 October 2010).

[101] The UNMIK was established through resln 1244 of 10 June 1999 available at http://www.un.org./peace/kosovo/pages/unmik12.html (accessed 6 October 2010).

[102] 'United Nations Mission in Kosovo - Police in Kosovo' (2001) 18 available at http://www.facebook.com/profile.php?id=1070274996 (accessed 6 October 2010).

[103] Deputy Special Representative of the Secretary-General. See speech delivered to law students of the University of Pristina - Kosovo on 9 June 2003 available at http://www.unmikonline.org/press/2003/pressr/pr984.htm (accessed 6 October 2010)

2.5.5 Rwanda

In Africa, most countries lack legislative and institutional structures for the protection of witnesses. Chris Mahony idealizes a witness protection mechanism 'independent from the police and state prosecuting authorities in order to maintain objectivity, confidentiality, operational readiness and accountability.'[104] According to Mahony, Africa lacks sufficient financial resources of setting up witness protection structures and one of the greatest challenges facing the continent is corruption.

Apart from Rwanda, South Africa is the only other country in Africa having an elaborate legal and institutional framework for the protection of witnesses. A law specific for the protection of witnesses was promulgated in 2000 establishing a Witness Protection Unit (WPU).[105] The WPU forms part of the country's National Prosecuting Authority and has branch offices in each of South Africa's nine provinces.

A detailed framework for the protection of witnesses in Rwanda will be provided in subsequent chapters.

2.6 Conclusion

Witness testimony occupies a prominent part of criminal justice systems. It is due to the role witnesses play in criminal proceedings that it is important to guarantee their protection. States have an obligation to ensure protection of human rights. By virtue of being humans, witnesses are entitled to protection of rights enshrined in human rights instruments.

The tension between protection of witnesses and the right of the accused to a fair trial is critical. The Human Rights Watch (HRW) for example, has strongly argued against protective measures that conceal the identity of witnesses from the defendant. Such measures according to the HRW violate international standards of fair trial.[106] The Tadic decision has provided courts with guidelines to be considered when granting protective measures to witnesses without prejudicing the right of the accused to a fair trial.

---

[104] C Mahony *The justice sector afterthought: Witness protection in Africa* (2010) 12.
[105] The Witness Protection Act 112 of 1998.
[106] HRW report (n 95 above) 31.

CHAPTER THREE

MEASURES IMPLEMENTING THE COMPLETION STRATEGIES

3.1 Introduction

The ICTY and the ICTR were established by the SC as temporary judicial bodies to investigate and to prosecute violations of international humanitarian law committed in the former Yugoslavia and Rwanda respectively. The resolutions establishing the tribunals did not indicate the time limit for the completion of the tribunals' mandates. This oversight was a cause for concern by the international community which was spending huge amounts of resources to run the activities of the tribunals. As a result, the SC adopted resolutions calling on the tribunals to wind up activities within specific deadlines.

3.2 Resolutions of the Security Council

Seven years after the establishment of the tribunals, judges began to think of a plan setting up specific dates for the winding up of the tribunals' mandates. In 2000, the President of the ICTY Claude Jorda submitted a report to the UN Secretary-General (Secretary-General) recommending two strategies for the conclusion process. He proposed for the streamlining of pre-trial case preparation and the appointment of a pool of ad litem judges specific for addressing the increasing caseload of the ICTY.[107] According to the report, all trials at first instance would be disposed of by 2007 instead of 2016. [108] The SC adopted resolution 1329 establishing a pool of ad litem judges and increased the number of judges in the Appeals Chambers of the two tribunals in order to expedite trial activities.[109]

On 23 July 2002, President Jorda presented another report recommending the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as a strategy for the completion of trial activities at first instance by 2008 instead of 2007. [110]

---

[107] Report on the operation of the ICTY of 12 May 2000 presented by the ICTY President to the Security Council on 20 June 2000 cited in D Raab 'Evaluating the ICTY and its Completion Strategy: Efforts to achieve accountability for war crimes and their tribunals' (2005) 3 *Journal of International Criminal Justice* 84.

[108] n 107 above, note 9.

[109] Resln 1329 (2000) of 30 November 2000 UN Doc S/RES/1329(2000) para 1.

[110] Report on the judicial status of the ICTY and the prospects for referring certain cases to national courts UN Doc S/PRST/2002/21 of 23 July 2002.

The SC adopted resolution 1503 setting specific deadlines for the completion of the tribunals' mandates. The Resolution called for the completion of investigations by 2004, trial activities at fist instance by 2008 and completion all activities in 2010.[111] For purposes of expeditious completion of trial activities at first instance, the SC urged the ICTY to concentrate on the prosecution and trial of senior leaders suspected of bearing the most responsibility for the crimes within the jurisdiction of the ICTY and to transfer cases involving intermediary and low-level accused persons to competent national jurisdictions.[112]

In 2003, Judge Theodor Meron, who succeeded Judge Jorda as President of the ICTY reported to the SC on the progress of the implementation of the ICTY completion strategy. He pointed out that compliance with the deadlines was dependent upon other factors such as the number of guilty pleas, the number of cases qualifying for transfer to national jurisdictions and the number of indictments issued by the Prosecutor. Due to these factors, the President stated that it would not be possible to complete trials at first instance by 2008.[113]

In response to the concern of the Prosecutor's plan of issuing more indictments, the SC adopted resolution 1534 calling on the tribunals to 'ensure that any new indictments concentrate on the most senior leaders suspected of being most responsible for the crimes within the jurisdiction of the relevant tribunal.'[114] The two tribunals called upon to review their caseload with a view of determining cases that needed to be transferred to competent national jurisdictions.[115]

3.3 The ICTY Completion Strategy

The ICTY has not been able to meet the second and third deadlines involving the completion of trial activities at first instance and all activities by 2008 and 2010 respectively. The ICTY has been submitting reports every six months pursuant to paragraph 6 of resolution 1534 detailing the progress it has made towards the implementation of its completion strategy. The relevant parts of the Completion Strategy include internal and external measures for the completion of the ICTY mandate and residual issues.

---

[111] Resln 1503 (2003) of 28 August 2003 UN Doc S/RES/1503(2003) seventh preambular paragraph.
[112] As above.
[113] Address by Judge Meron to the SC on 10 October 2003 UN Doc JL/PIS/790/e.
[114] Resln 1534 (n 92 above) para 5.
[115] n 114 above, para 4.

3.3.1 Internal measures for the completion of the ICTY mandate

As far as activities at first instance are concerned, a pool of nine ad litem judges was established to serve in trial chambers for cumulative periods of up to three years each.[116] The appointment of ad litem judges in addition to the sixteen permanent judges has facilitated the speedy adjudication of cases.

The ICTY Rules were amended to provide for the review of new indictments with the aim of determining whether they involve senior leaders suspected of being responsible for the violations of crimes within the jurisdiction of the ICTY.[117]

Another important development was the amendment of article 15 of the ICTY Statute to provide for separate prosecutors for each tribunal.[118] The two tribunals have since then had independent prosecutors tasked with investigation and prosecutorial responsibilities.

Arrests and surrender of fugitives have been made possible due to successful cooperation between the ICTY Prosecution and state authorities. The SC emphasized on the importance of state cooperation with the tribunals for purposes of facilitating investigations, arrests and transfer of fugitives for the timely conclusions of trial activities at first instance.[119]

In so far as judicial activities are concerned, the ICTY has been successful in apprehending and transferring high profile fugitives including a former Croatian General Ante Gotovina and a former political leader of the Serb entity Radovan Karadzic to the ICTY. The arrest of the two fugitives is a major success for the ICTY because the apprehended fugitives were among the fugitive indictees specifically mentioned in resolution 1534.[120] The ICTY has thus far concluded proceedings against 124 persons. Two fugitives Ratko Mladic and Goran Hadzic, are yet to be apprehended.[121]

---

[116] Resln 1329 (n 109 above) para 1 established a pool of *ad litem* judges and enlarged the membership of the Appeals Chamber. According to art 13(1)(d) *quarter, ad litem* judges have the power to adjudicate on pre-trial proceedings in cases other than those they are mandated to try.

[117] Rule 28(A) of the ICTY Rules as a response to resln 1534 para 5 calling on the ICTR and ICTY to ensure that all new indictments concentrate on senior leaders.

[118] Resln 1503 (n 111 above) para 8.

[119] Resln 1503 (n 111 above) para 4.

[120] ICTY *Fugitives: An unforeseen success rate after early problems* paras 7 & 8 available at http://www.icty.org/sid/10010 (accessed 25 September 2010).

[121] ICTY website http://www.icty.org/ (accessed 26 September 2010).

The Parliamentary Assembly of the Council of Europe (Parliamentary Assembly) expressed its concern on the lack of political will by some countries in locating and apprehending the two fugitives. The Parliamentary Assembly regards the lack of cooperation from states particularly Serbia and Republika Srpska, as 'an insult to the memory of the victims and to the expectations of the survivors of this conflict.'[122] According to a report of the HRW, the failure of the Serbian authorities to apprehend Mladic could be attributed to Serbia's concept of 'voluntary surrender' of fugitives which has not yielded any results since 2006.[123]

The ICTY is determined to prosecute cases of involving high-level fugitives including the two fugitives who are still at large. The Parliamentary Assembly has encouraged the ICTY to find all solutions to ensure that the fugitives do not escape international justice irrespective of the date of their arrest.[124] The idea of the possible extension of the ICTY mandate so as to prosecute the two fugitives is nonetheless not supported by some states. Julie Kim mentions Russia as being one of the states that is against the idea of such extension.[125]

3.3.2 External measures for the completion of the ICTY mandate

The ICTY is determined to have all indictees prosecuted before or after completion of its mandate so as to avoid the culture of impunity. It is for this reason that the transfer of cases to national jurisdictions forms an important part of the ICTY Completion Strategy.

In that regard, the ICTY transferred 13 cases to national jurisdictions. Motions for referral of four accused persons were denied and five motions were withdrawn.[126] The ICTY is not planning to refer any more cases to national jurisdictions. The ICTY is rather intensifying its commitment to strengthen the capacity of national jurisdictions to prosecute violations of international humanitarian law.[127]

Prosecution of war crimes in national jurisdictions has necessitated the creation of war crime chambers in domestic judicial systems thus facilitating easier access of the local people to the criminal

---

[122] Resln 1564/2007 of the Parliamentary Assembly of the Council of Europe on the prosecution of offences falling within the jurisdiction of the ICTY paras 8 & 9 available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1564.htm (accessed 3 October 2010).

[123] L Bandwidth 'Serbia: Events of 2006' (2007) *World Report* available http://www.hrw.org/englishwr2k7/docs/2007/01/11/serbia14776.htm (accessed 6 October 2010).

[124] Resln 1564/2004 (n 122 above) para 12.

[125] J Kim 'Balkan cooperation on war crimes issues' (2008) *CRS report for congress* 4.

[126] ICTY website http://www.icty.org/sid/8934 (accessed 9 July 2010).

[127] The ICTY Completion Strategy (31 May 2010) UN Doc S/2010/270 para 73.

justice system. This development has also provided national judiciaries with the capacity to prosecute war crimes in accordance with international standards. Raab[128] acclaims the transfer of cases particularly to countries where crimes were committed as trials would be conducted close to the locations of the crimes and victims thus contributing towards the reconciliation process.

The transfer of cases to national jurisdictions brings into question the safety of potential witnesses testifying in those courts. It is generally anticipated that witnesses would be more vulnerable to intimidation and threats because witnesses and criminals are likely live in the same communities.

The HRW noted with concern the location of the WCC in Sarajevo Bosnia-Herzegovina which was the centre for the conflict of the 1990s. The report foresees challenges in maintaining witness anonymity in that area. Accordingly, the HRW emphasized on the need of providing effective protection to vulnerable witnesses.[129]

In 2004, a delegation from Serbia visited the ICTY to discuss about the obstacles facing Serbia's WCC in investigating and prosecuting war crimes. One of the obstacles that were identified was the lack of an effective system for providing protection to witnesses. A report from the ICTY confirmed the tendency of witnesses being subjected to threats when they testify in war crime cases thus deterring potential witnesses from agreeing to testify for fear for their lives and their families' safety.[130]

On the other hand, the situation in Kosovo is worse. The Institute for War and Peace Reporting (IWPR) reported a series of killings of witnesses who testify at the ICTY and go back to their countries. In one incident, one of the main prosecution witnesses in the trial of the KLA Unit was murdered along with his aunt in Western Kosovo three years after testifying at the ICTY.[131]

The former Chief Prosecutor of the ICTY, Carla Del Ponte acknowledged the challenge of witness intimidation, deaths and disappearances. At the ICTY, one of the prosecution key witnesses Tahir Zemaj

---

[128] D Raab 'Evaluating the ICTY and its Completion Strategy: Efforts to achieve accountability for war crimes and their tribunals' (2005) 3 *Journal of International Criminal Justice* 92.

[129] HRW report (n 95 above) 29.

[130] ICTY website http://www.icty.org/x/file/Outreach/view_from_hague/balkan_040519_en.pdf (accessed 5 October 2010).

[131] A Qirezi 'Kosovo: Witness protection fears grow' *Institute for War and Peace Reporting* (6 September 2005) available at http://iwpr.net/report-news/kosovo-witness-protection-fears-grow (accessed 22 September 2010).

was shot dead during investigations, another witness Kujtim Berisha was hit by a car in Montenegro and three other witnesses disappeared mysteriously in Kosovo.[132]

Incidences of witness intimidation have delayed proceedings at the ICTY and it is likely to be a major challenge in national jurisdictions. When a witness dies, valuable testimony that would have contributed towards a conviction of one or more perpetrators is lost.

3.3.3 Residual issues

In 2008, the President of the SC issued a presidential statement acknowledging the establishment of an ad hoc mechanism (residual mechanism) to carry out the remaining activities after the tribunals wind up their mandates. This was due to the tribunals' inability to meet the completion deadlines set out in resolution 1503.

An Informal Working Group on International Tribunals (IWGIT) is in the process of drafting a resolution on creating an international residual mechanism for criminal tribunals.[133] The residual mechanism is expected to handle outstanding issues identified by the tribunals after the completion of their mandates.[134] In that regard, the tribunals identified the following eight residual issues:

> the trial of fugitives, trial of contempt cases, protection of witnesses, review of judgments, referral of cases to national jurisdictions, supervision of enforcement of sentences, assistance to national authorities and management of archives.[135]

The ICTY has devised a plan for reviewing closed proceedings relating to witness protection. The plan includes 'the review of witness protection orders and decisions with a view to withdrawing or varying those that are no longer necessary.'[136]

---

[132] 'US praises indicted former Kosovo PM' *Chicago Tribune* 1 May 2007 available at http://www.balkanpeace.org/index.php?index=artide&artideid=14323 (accessed 7 October 2010).

[133] Statement by Thomas Mayr-Harting Chair of the IWGIT delivered on 3 December 2009 at the 6228th meeting of the Security Council on 'Justice supersedes completion strategy deadlines for international criminal tribunals in Security Council debate following briefings by key officials' UN Doc SC/9801 available at http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7YEUFY?OpenDocument (accessed 5 October 2010).

[134] Statement by the President of the Security Council of 19 December 2008 UN Doc S/PRST/2008/47.

[135] Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the ICTY and ICTR and the seat of the residual mechanism(s) for the Tribunals of 21 May 2009 UN Doc S/2009/258 para 239.

[136] The ICTY Completion Strategy (n 127 above) para 73(ii).

3.4 The ICTR Completion Strategy

The ICTR devised a completion strategy modelled on the ICTY Completion Strategy based on similar aspects but addressing Rwanda's circumstances. The strategy contained the same deadlines with respect to the completion of its activities.

3.4.1 Internal measures for the completion of the ICTR mandate

Activities at first instance

Considerable progress has been made by the ICTR with regard to completion of trial activities at first instance. To date, a total of 52 cases have been completed. A total of 22 cases are still ongoing. Two cases have been transferred to France pursuant to Rule 11 bis of the ICTR Rules. Ten fugitives are still at large.[137]

The ICTR has not been able to meet the deadlines stipulated in resolution 1503. According to the projections indicated in the ICTR Completion Strategy, more judgments are expected to be rendered in the course of 2011. The ICTR expects to commence two trials in 2010; though the time of their completion is not indicated.[138]

Activities at the Appeals Chamber

The ICTR and the ICTY share the same Appeals Chamber. Appellate chamber activities indicate an extension of completion of all activities beyond 2010. Reports indicate a continuation of appellate activities until the end of 2013. [139] The delay in the conclusion of trial activities at first instance caused by the delay in the apprehension of fugitives at large and fair trial concerns have greatly contributed towards the tribunals' inability to complete its activities as scheduled.

3.4.2 External measures for the completion of the ICTR mandate

Transfer of cases to national jurisdictions

[137] ICTR website http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx (accessed 27 September 2010).
[138] The ICTR Completion Strategy (n 4 above) para 3.
[139] n 4 above, para 25.

As is the case with the ICTY, transfer of cases to competent national jurisdictions forms part of the strategy for the downsizing of ICTR activities. The ICTR intends to transfer cases involving intermediary and low-level accused persons to competent national jurisdictions through Rule 11 bis of the ICTR Rules. Rwanda has been earmarked for the referral of cases from the ICTR because it is currently the only country in Africa that has jurisdiction and is willing to accept those cases.[140]

The transfer of cases pursuant to Rule 11 bis requires the fulfilment of certain conditions which are: The confirmation of an indictment by the ICTR, a guarantee the accused will receive a fair trial in the courts of receiving state and that the death penalty will not be imposed on the accused.[141] Where victims and witnesses were receiving protective measures, the trial chamber may order that the measures continue to remain in force.[142] So far only two cases have been transferred to France.[143]

Safety of witnesses testifying at the ICTR has not been very good. Incidences of witness intimidation have been reported by several organisations. In January 1997, a woman who had testified at the ICTR in the Akayesu case[144] was murdered along with her husband, four of their children and three other children.[145] Prosecution witnesses have been subjected to threats and killings before and after they testify. In 22 January 1997, UN officials reported killings about 300 people were killed in North-Western Rwanda, most victims being potential trial witnesses.[146] The same year, a Canadian priest and witness to the genocide was short while he was saying mass in Rwanda.[147]

Unfortunately, threats and killings are not only directed towards witnesses only. Musiime[148] reported killings of five human rights observers by Hutu terrorists in Rwanda. As a result, the UN withdrew all human rights observers in Cyangugu, Kibuye and Gisenyi. In another event, a Rwandan Supreme Court Judge, Vincent Nkezazaganwa was shot in his house on 14 February 1997.

---

[140] n 4 above, paras 60 & 80.

[141] The ICTR Rules, rule 11*bis* (A) & (C).

[142] n 141 above, rule 11*bis* (D)(ii).

[143] *The Prosecutor v Wenceslas Munyeshyaka* Case No ICTR-2005-87-1 *& The Prosecutor v Laurent Bucyibaruta* Case No ICTR-2005-85-1.

[144] *The Prosecutor v Jean Paul Akayesu* Case No ICTR-96-4-I.

[145] C Walsh 'Witness protection, gender and the ICTR' (1997) para 1 available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php (accessed 2 July 2010).

[146] Status report (n 7 above).

[147] E Musiime 'Rwanda's legal system and legal materials: Rwanda – Chronology of events' available at http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html (accessed 8 October 2010).

[148] As above.

Incidences of witness intimidation and killings in Rwanda leads one to question whether the country will be able to secure testimony from witnesses in cases referred by the ICTR. The institutional and legislative preparedness of Rwanda to prosecute cases referred by the ICTR will be analysed in the next chapter.

3.4.3 Residual issues

Among the fugitive indictees that still remain at large involve three senior leaders bearing the most responsibility in the genocide of Rwanda.[149] The ICTR is not likely to prosecute those cases because the time for arresting the three fugitives is long overdue.[150]

According to the latest report of the ICTR Completion Strategy, the ICTR is consulting with the government of Rwanda with a view of resolving issues involving the transfer of the fugitive cases and issues involving witness protection.

The ICTR is also in a process of reviewing witness protection orders that are no longer necessary, those that require lifting or need variation. The Registry has scheduled the training of new staff of the Witness Protection Programme (WPP).

3.5 Conclusion

The winding up of ICTR's activities is dependent upon the transfer of some of its cases to Rwanda. The SC has been monitoring the tribunal's activities by adopting several resolutions providing specific deadlines for its closure. The SC further called on the ICTR to include in its completion strategy, a plan of strengthening the judicial capacity of national jurisdictions to prosecute cases that would be referred by the ICTR.

The ICTR Completion Strategy provides a detailed summary of the progress it has made and lists the activities it intends to do before it completes its mandate. The ICTR Completion Strategies however does not contain any specific plan for providing protection to witnesses testifying in transfer cases. The Completion Strategy does not have any guidelines on the standard of protection that should be accorded to witnesses who would testify in transfer cases. There is no indication of whether it is the

[149] Rwandan businessman Felician Kabuga, former Defence Minister Augustine Bizimana and former Commander of the Presidential Guard of Rwanda Protais Mpiranya.

[150] Address of President of the ICTR delivered at the 6228th meeting of the Security Council (n 133 above).

responsibility of receiving states or the ICTR to provide protection to witnesses testifying in transfer cases. This is a cause for concern considering the seriousness of the matter in question.

CHAPTER FOUR

FAIR TRIAL GUARANTEES AND WITNESS PROTECTION IN RWANDA

4.1 Introduction

Rwanda was greatly destroyed by the 1994 genocide. In addition to the country's loss of about 1 million of its population, the country's institutions were badly damaged. While the international community responded by setting up an international criminal tribunal, Rwanda reconstructed its own judicial institutions with assistance from international donors. This chapter provides an overview of Rwanda's legal and institutional framework after the genocide. In doing so, the chapter analyses the reforms undergone by Rwanda in preparation to receive cases from the ICTR based on international minimum standards of fair trial which include the protection of witnesses.

4.2 Consideration for the transfer of cases to Rwanda

The Prosecutor has held preliminary discussions with national authorities aiming at securing agreements for the referral of cases to willing states. Apart from Europe where the Prosecutor was able to secure three such agreements, Rwanda was the only country in Africa that accepted the transfer of cases from the ICTR.[151]

In preparation to receive the cases, Rwanda enacted a law regulating the transfer of cases from the ICTR and from other states to Rwanda (Transfer Law).[152] In 2007, three months after the enactment of the Transfer Law, the Prosecutor filed motions for the transfer of five cases to Rwanda.[153] The requests were assigned to different trial chambers. Unfortunately, all trial chambers denied the Prosecutor's requests.

In denying the Prosecutor's request to transfer Munyakazi[154] to Rwanda, Trial Chamber III (Chamber) first considered the possibility of the accused being sentenced to life imprisonment in

[151] The ICTR Completion Strategy S/2007/676 (20 November 2007), para 34.

[152] Organic Law 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States.

[153] Motions for the transfer of Fulgence Kayishema, Gaspard Kanyarukiga, Idelphonse Hategekimana, Yussuf Munyakazi and Jean-Baptiste Gatete.

[154] *The Prosecutor v Yussuf Munyakazi* Trial Chamber III decision on the Prosecutor's request for referral of case to the Republic of Rwanda of 28 May 2008 Case No ICTR-97-36-R11*bis*.

isolation, which is inconsistent with the jurisprudence of the ICTY and ICTR. Then the Chamber noted the inclusion of the right to be tried before an independent tribunal in Rwanda's domestic laws but was concerned that such safeguards were not guaranteed in reality. As regards independence of the judiciary, the Chamber reasoned that one judge would not be in a good position to adjudicate on cases involving serious violations of international law due to outside pressure.[155]

On the issue of availability and protection of witnesses, the Chamber was of the opinion that it would be difficult for the accused to secure the attendance of witnesses due to fear of harassments, arrests and detentions. The Chamber considered a report of the HRW which had outlined a murder of eight witnesses including witnesses who had testified and those who had intended to testify in genocide prosecutions. The Chamber expressed its dissatisfaction on the operation of Rwanda's witness protection program. The Chamber was of the opinion that the location of the protection service within the office of the prosecutor was likely to intimidate defence witnesses. Finally, the Chamber stated that the plan of examining defence witnesses residing in foreign countries through video-link would jeopardise the principle of equality of arms since prosecution witnesses would be examined directly.[156]

On appeal, the Appeals Chamber granted one of the grounds of appeal relating to the independence of the judiciary stating that 'the composition of the courts of Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial.'[157] The Appeals Chamber dismissed the remainder of the appeal and denied the Prosecutor's request for referral of the accused to Rwanda.[158]

Other trial chambers denied the Prosecutor's motions on similar grounds. Rwanda's Prosecutor General viewed the decisions of the ICTR as a major setback to the government's efforts of ending impunity. He argued that the decisions undermine 'the government's ability to pursue and bring to justice those suspected of genocide all over the world.'[159]

---

[155] *Munyakazi* trial chamber decision (n 154 above) paras 32, 40, 46 & 47.

[156] n 154 above, paras, 60, 61, 62 & 65.

[157] *The Prosecutor v Yussuf Munyakazi* Appeals Chamber decision on the prosecution's appeal against decision on referral under Rule 11*bis* of 8 October 2008 para 50 Case No ICTR-97-36-R11*bis*.

[158] As above.

[159] Address by Prosecutor General Martin Ngoga to the Security Council 'ICTR referrals: Gov't takes case to UN' *The New Times* available at http://www.newtimes.co.rw/index.php?issue=13917&article=16344 (accessed 11 October 2010).

It is important to note that despite the rejection, the Prosecutor is planning to file motions for the referral of eight fugitive cases to Rwanda towards the last quarter of 2010.[160] The next section will examine the steps taken by Rwanda in preparation to receive the cases.

4.3 Minimum guarantees warranting referral of cases to Rwanda

In deciding whether to transfer cases to a national jurisdiction, the ICTR has to satisfy itself that the receiving state has appropriate laws in place. It is important that decisions rendered by Rwanda in transfer cases do not contradict established jurisprudence of international law.

4.3.1 Abolition of the death penalty

The presence of capital punishment in Rwanda's Penal Code was one of factors inhibiting transfer of cases from the ICTR.[161] As a result, in July 2007, Rwanda enacted a law abolishing the death penalty (Death Penalty Law).[162] The main features of the Death Penalty Law include the substitution of the death penalty with life imprisonment and commutation of all death sentences to life imprisonment.[163]

4.3.2 Rwanda's penalty structure

The Transfer Law is the applicable law for purposes of the prosecution of cases transferred by the ICTR and from other states to Rwanda. Article 21 of the Transfer Law states that 'life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR.'

The Death Penalty Law came into force four months after the Transfer Law. In addition to abolishing the death penalty, the Death Penalty Law classifies life imprisonment into life imprisonment and life imprisonment with special provisions.[164] The law defines life imprisonment with special provisions to mean imprisonment in isolation. Where a convicted person is sentenced to life imprisonment with special provisions, she or he will not be entitled to on any kind of mercy, conditional release or rehabilitation prior to serving 20 years of the sentence.[165] The crime of genocide and crimes

[160] The ICTR Completion Strategy (n 4 above) para 60.
[161] Law Decree 21/77 of 18 August 1977 establishing the Penal Code of Rwanda.
[162] Organic Law 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty.
[163] The Death Penalty Law (n 162 above) arts 3 & 6.
[164] n 162 above, arts 2 & 3.
[165] n 162 above, art 4.

against humanity are among the crimes that are punishable by life imprisonment with special provisions.[166]

The controversy that the trial chambers faced when considering the transfer of cases from the ICTR to Rwanda in 2007 was related to the possibility of the accused being sentenced to imprisonment in solitary confinement. The Chamber considered the jurisprudence of various human rights bodies which have stated that 'solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need.'[167] It has also been held that imprisonment in solitary confinement amounts to inhuman or degrading treatment[168] and is inconsistent with art 10 of the ICCPR.[169]

The HRW is of the opinion that prolonged solitary confinement constitutes a violation of the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and art 7 of the ICCPR. The HRC asserted that 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by art 7.'[170] Solitary confinement is also contrary to art 5 of the ACHPR.

For the aforementioned reasons, the Appeals Chamber was of the opinion that Rwanda's penalty structure rendered the transfer of cases from the ICTR to Rwanda inadequate and upheld the decision of the trial chamber.[171]

4.3.3 Fair trial guarantees

The right to a fair and public hearing is guaranteed in the Constitution of the United Republic of Rwanda (Constitution).[172] The government of Rwanda works to ensure that all persons charged with crimes within the laws are treated in accordance with minimum international fair trial standards.

---

[166] n 162 above, art 5.

[167] Concluding observations of the HRC Denmark of 31 October 2000 CCPR/CO/70/DNK para 12 available at http://www.unhchr.ch/tbs/doc.nsf/0/24c26f5a34820eaec125698c003a5a24?Opendocument (accessed 16 October 2010). See also *Ramirez Sanchez v France* ECHR (27 January 2005) Appln No 59450/00 para 139.

[168] *Case of Matthew v The Netherlands* ECHR (29 September 2005) Appln No 24919/03 para 199.

[169] Denmark (n 167 above) para 12.

[170] HRC GC No 20: Art 7 para 6 Compilation of general comments and general recommendations adopted by human rights treaty bodies UN Doc HRI/GEN/1/Rev 7 of 12 May 2004.

[171] *Munyakazi* Appeals Chamber decision (n 157 above) para 20.

[172] The Constitution of the Republic of Rwanda OG No special of 4 June 2003 art 19.

The right of a detained person to be informed of charges brought against him or her and the right of a defendant to consult with his or her counsel are absolute and are explicitly provided for in the Code of Criminal Procedure (CCP).[173] Likewise, the Organisation of Prosecution Law preserves fair trial rights enshrined in the Constitution. They include the right of the accused to defence, the right of all persons including accused persons except those falling within the first category to confession and plea bargain procedures.[174]

As regards transfer cases, the Transfer Law provides an elaborate framework for the accused's right to fair trial. Article 13 of the Transfer Law provides a list of rights and entitlements guaranteeing that an accused person is entitled to the same treatment as the party against him or her.

4.3.4 Judicial independence

In 2004, Rwanda went through a major judicial reform which reduced the number of courts and the number of judges sitting in trials from three to one except for appeals.[175] The decision for the reform was intended to foster efficient and effective delivery of judgments at a cheaper cost.[176]

The reduction in the number of judges sitting in trial courts was a cause for concern in the Prosecutor's request for referral of five cases to Rwanda in 2007. The defence argued that 'international standards of fair trial require that persons accused of serious crimes under international humanitarian law appear before a panel of three judges at first instance and before five judges at appellate level.'[177]

On appeal, the Appeals Chamber was of the opinion that international legal instruments and conventions do not specify the number of judges to sit on a trial or appeal for it to be fair.[178] The Appeals Chamber further reasoned that there was no evidence that a single judge was likely to be swayed by external influence and therefore the trial chamber erred in considering that the judiciary was at serious risk of government interference.[179]

---

[173] Law 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure OG Special No of 30 July 2004 arts 38, 39 & 64.
[174] Organisation of Prosecution Law (n 19 above) arts 36 & 4-13.
[175] Organic Law 07/2004 of 25 April 2004 Determining and organisation, functioning and jurisdictions of courts and the Republic of Rwanda.
[176] HRW report 'Law and reality: Progress in judicial reform in Rwanda' (2008) 24.
[177] *Munyakazi* Trial Chamber decision (n 154 above) para 33.
[178] *Munyakazi* Appeals Chamber decision (n 157 above) para 26.
[179] n 157 above, para 28.

The UN Basic Principles on the Independence of the Judiciary define independence of the judiciary to mean the ability of the judiciary to decide matters impartially based on facts and law, the absence of inappropriate or unwarranted interference with the judicial process, the right to be tried by ordinary courts using established legal procedures, the fair conduct of judicial proceedings and the respect of rights of the parties.[180]

The international interpretation of the right to a fair trial and public hearing includes the right to be tried before an independent and impartial tribunal.[181] The Constitution guarantees the right to be tried by a competent judge.[182] Rwanda has taken steps to ensure that cases transferred by the ICTR will be adjudicated by the most experienced judges.[183]

The reforms in the judicial system have generally improved for the better. However, the HRW maintains that what is on paper is not what it seems to be in reality. The HRW reported that most people working in the judicial system would publicly admit that the judiciary is independent but when asked individually, the same people contradict their own public statements.[184] A former judicial officer averred that 'judges in important cases have been subjected to pressure from the executive and as well as from powerful persons outside the government.'[185]

4.3.5 Protection of witnesses

Witness testimony is crucial to the establishment of criminal guilt. As the ICTR President rightly said "witness statements are the building blocks upon which the prosecution directly bases its case."[186] Since witness reluctance hampers the timely prosecution of cases and the guarantee of witness protection is the only way of securing their participation, Rwanda has ratified international and regional laws and adopted national laws ensuring that witnesses are accorded the right protection.

---

[180] Basic Principles on the Independence of the Judiciary adopted by the 7th UN congress on the prevention of crime and treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN GA reslns 40/32 of 29 November 1985 & 40/146 of 13 December 1985 paras 2, 4, 5 & 6.

[181] Arts 14(1) of the ICCPR, 6(1) of the European Convention on Human Rights, 7(1)(d) of the ACHPR, the HRC GC No 32 & Principles 1 & 2, UN Basic Principles on the Independence of the Judiciary.

[182] The Constitution (n 172 above) art 19.

[183] *Amicus curiae* brief on behalf of the government of Rwanda of 28 July 2008 paras 14 & 15 cited in *Munyakazi* Appeals Chamber decision (n 157 above) para 25.

[184] HRW report (n 176 above) 44.

[185] n 184 above, 51-52.

[186] Fifth annual report of the ICTR of 2 October 2000 A/55/435-S/2000/927 para 134.

Rwanda ratified the ICCPR and the African Charter on Human and Peoples' Rights (ACHPR) in 1975 and 1983 respectively. Therefore, the state has an obligation to among others protect the rights of all men and women, to ensure that everyone enjoys equal protection of the law and to uphold the principles of fair trial. In addition to its international and regional obligations, the Constitution[187] guarantees every person the protection of fundamental human rights which include the right to life, not to be subjected to torture, physical abuse or cruel, inhuman or degrading treatment, equal protection of the law and the right of free movement within the territory of Rwanda.[188]

The Transfer Law has a special provision governing the protection of witnesses in cases transferred from the ICTR. According to the Transfer Law, witnesses are accorded the same protective measures as those that are set forth in articles 53, 69 and 75 of the ICTR Rules.[189] The Prosecutor General has the responsibility of facilitating appearance of witnesses including the facilitation of their travel documents, security, medical and psychological assistance. Witnesses testifying in cases transferred by the ICTR are immune from search, seizure, arrest and detention in the duration of their travel and testimony.[190]

A preliminary draft for the protection of victims and witnesses (Draft Law)[191] was adopted by the Parliament providing the normative framework for the protection of victims and witnesses in criminal proceedings.[192] The Draft Law defines the term witness as:

> a person who provided or agreed to provide information for the benefit of an investigation, instruction, lawsuit relating to an offence he or she has information about its perpetration[193]

The Draft Law establishes a unit for providing protection and assistance to victims and witnesses (VWPU) within the National Public Prosecution Authority (NPPA).[194]

Chapter III of the Draft Law governs the rights of witnesses. According to the Draft Law, the High Court (Court) can take measures 'to ensure the security, physical and psychological wellbeing, dignity

[187] The Constitution (n 172 above).
[188] The Constitution (n 172 above) arts 12, 15, 16 & 23.
[189] Transfer Law (n 152 above) art 14.
[190] As above.
[191] Preliminary Draft of Law on the Charter of Rights of Victims and Witnesses of Intentional Offences, annex A.
[192] n 191 above, art 1.
[193] n 191 above, art 2(d).
[194] n 191 above, art 2.

and respect of the private life of the witnesses.'[195] In so doing, the Court takes into account such factors as the age, sex, nature of the offence and health conditions of witnesses.[196] Where a witness bears information which is likely to endanger him or her or a member of his or her family, the prosecutor may withhold the disclosure of such information.[197]

The Draft Law provides an extensive definition of the term family of victims and/or witnesses which includes 'family in direct lineage or family in-law up to the 3rd degree.'[198] The rights accorded to witnesses can be extended to members of their families when there is reason to believe that families may be at risk.[199]

4.4 Rwanda's institutions

Rwanda's justice system was devastated after the 1994 genocide. Carla Ferstman[200] explains that the former government of Rwanda and its supporters destroyed everything that they could not transport including vehicles, office stationery and equipment before they fled into exile. She argues that even if the judicial system had not been destroyed, it would not have been able to deal with the huge number of cases since 'the system in place had never been set up to deal with the scale of violence Rwanda experienced.'[201]

The current judicial structure classifies courts into ordinary and specialised courts.

4.4.1 Rwanda's specialised courts

According to the Constitution, specialised courts include gacaca courts, military courts and commercial courts.[202] Gacaca courts and military courts have jurisdiction to prosecute the crime of genocide and crimes against humanity committed during 1 October 1990 to 31 December 1994.

Military courts

[195] n 191 above, art 20(1).
[196] As above.
[197] n 191 above, art 20(4).
[198] n 191 above, art 2.
[199] n 191 above, art 20(5).
[200] CJ Ferstman 'Domestic trials for genocide and crimes against humanity: The example of Rwanda' (1997) 9 *African Journal of International and Comparative Law* 859.
[201] Ferstman (n 200 above) 859-860.
[202] The Constitution (n 172 above) art 143.

The Constitution provides that 'Military courts comprise of the Military Tribunal and Military High Court.'[203] Military courts are specifically established for the trial of all offences including murder committed by military personnel.[204]

Gacaca courts

Rwanda, like any other African country has its own traditional means of dispute settlement. Gacaca which means 'lawn' in Kinyarwanda, involves the settlement of disputes by the community under the guidance of a village head who is normally chosen on the basis of his integrity.

Due to the large number of defendants awaiting trial and the huge backlog of cases in the original courts, referral of some of the cases to the gacaca mechanism was considered a viable solution. As a result, the mandate of gacaca courts was extended to include the prosecution of the crime of genocide and crimes against humanity.[205] In the adjudication of international crimes gacaca courts applied modified traditional practices and conventional punitive justice methods.[206]

The Transfer Law specifically provides that transfer cases will be tried at the High Court.[207] For this reason, gacaca courts are not competent to prosecute cases referred by the ICTR. In addition to their lack of jurisdiction, gacaca jurisdictions were scheduled to end in June 2010. The Executive Secretary of the National Service of Gacaca Jurisdictions (NSGJ) Domitille Mukantaganzwa reported that 355 out of 416 administrative districts had already completed their trials and submitted their final reports by April 2010.[208]

Gacaca courts have received a lot of criticism from human rights organisations. A report from the HRW criticized the operations of gacaca courts for their lack of adherence to fair trial procedures.[209] The HRW pointed out that RPF officials dominated the administrative affairs of the courts thus interfering with judicial independence. According to the report, accused persons had no access to

---

[203] n 172 above, art 153.
[204] n 172 above, arts 154 & 155.
[205] The Constitution (n 172 above) art 152 & the Gacaca Law (n 21 above).
[206] HRW report (n 176 above) 17 & 18.
[207] Transfer Law (n 152 above) art 2.
[208] 'Rwanda/Gacaca – Gacaca closure now scheduled for June 30' *Hirondelle News Agency Arusha* 12 April 2010 available at http://www.hirondellenews.com/content/view/13360/332/ (accessed 10 October 2010).
[209] HRW report (n 176 above).

counsel and had no right to contest charges brought against them.[210] It was therefore very unlikely that any witness would testify for the defence for fear of retribution from the society.

In addition to fair trial concerns, witnesses testifying or waiting to testify in the gacaca trials faced reprisals and killings. The US Department of State reported a series of killings of genocide witnesses with the aim of undermining the gacaca justice system. In 2007 alone, 12 to 20 survivors had been killed.[211] The HRW reported an incident where a prisoner awaiting trial had killed a nephew of a gacaca judge with a machete in Ngoma district in November 2007. The murder caused an uprising by genocide survivors who in retaliation killed eight people including children. According to the report, the survivors criticised the government saying that it was not doing enough.[212]

4.4.2 Rwanda's ordinary courts

The ordinary courts of Rwanda include the Supreme Court, the High Court, Intermediate Courts and Primary Courts.[213]

The High Court

Rwanda enacted the Organisation of Prosecutions Law for the prosecution of genocide, crimes against humanity and other offences committed along with genocide in its national courts.[214] The law covers all crimes and offences committed in Rwanda since 1 October 1990 thus giving national courts a wider temporal jurisdiction unlike the ICTR.[215] The High Court is mandated to conduct the trial of cases that would be transferred to Rwanda. In so doing, the High Court will have jurisdiction to prosecute all crimes falling within the jurisdiction of the ICTR.[216]

Notwithstanding the extensive temporal and subject matter jurisdiction of the law of Rwanda, the ICTR maintains primacy over national courts in the prosecution of international crimes committed in the territory of Rwanda. National courts prosecuting such violations have concurrent jurisdiction.[217]

---

[210] n 176 above, 18-21.
[211] US Department of State report of 6 March 2007 sec 1(a) available at http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm (accessed 13 October 2010).
[212] As above.
[213] The Constitution (n 172 above) art 143.
[214] Organisation of Prosecution Law (n 19 above) art 1.
[215] n 19 above, art 1.
[216] The Transfer Law (n 152 above) art 3.
[217] The ICTR Statute, art 8.

The Supreme Court

The Supreme Court is Rwanda's highest judicial body.[218] The jurisdiction of the Supreme Court includes inter alia hearing of appeals against decisions of the High Court and the Military High Court.[219]

Where the High Court errs in law or in fact causing a miscarriage of justice in transfer cases, the decision may be appealed against at the Supreme Court.[220] The Supreme Court may either uphold, invalidate a part or all of the decision of the High Court or may order the High Court to review the case.[221] Where a review of a decision has been ordered, the High Court shall be comprised of three judges.[222]

4.4.3 Rwanda's prisons and detention centres

The conditions of prisons and detention centres in Rwanda have increasingly been condemned for not meeting international minimum standards. The increase in the number of persons being accused of participating in the genocide and other crimes has caused overcrowding of prisons beyond their maximum limit. The US Department of State reported that sanitary conditions in prisons and detention centres were poor, medical care was inadequate and food rations to prisoners were insufficient.[223] Such conditions contravene the international principles for the protection of detained persons which inter alia entitle prisoners and detained persons to 'be treated in a humane manner and with respect for inherent dignity of the human person.'[224]

Gaparayi[225] noted that by January 2000, a huge number of detainees were awaiting trial in deplorable conditions. He argues that the number of detainees could have been cut down if the confessions and plea bargain procedures were implemented regularly.[226] On the other hand, critiques

---

[218] The Constitution (n 172 above) art 144.

[219] n 172 above, art 145(1).

[220] Transfer Law (n 152 above) art 16.

[221] As above.

[222] n 152 above, art 17.

[223] US Department of State report (n 211 above) sec 1(c).

[224] Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment UN Doc A/RES.43/173 of 9 December 1988.

[225] Unpublished: IT Gaparayi 'Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the *gacaca* tribunals' (2000) unpublished LL.M Dissertation 33.

[226] Confessions and plea bargain procedures are governed under chapter III of Organisation of Prosecution Law. According to art 5 of the law all persons have the right to participate in the confessions and plea bargain procedures which have the effect of reducing sentences except for persons falling within the first category.

have argued against plea bargain procedure saying that buying testimony with promises of leniency risks perjury which leads to wrongful convictions. They also argue that the most culpable receive lesser sentences since they have access to more information thus generating a range of unfair results.[227]

In preparation to receive cases from the ICTR, Rwanda built a new prison in the southern province (Mpanga prison). Unfortunately, due to fair trial and prison condition concerns raised by human rights organisations, the request for referral of cases to Rwanda was denied. As a result, Mpanga prison remained empty for about two years. In March 2009, the government of Rwanda and the SCSL concluded an agreement for the transfer of convicted prisoners from Sierra Leone to Rwanda. On 31 October 2009, convicted leaders involved in violations of international humanitarian law in Sierra Leone were transferred to serve their sentences in Rwanda.[228]

4.4.4 The Victims and Witnesses Protection Unit

The NPPA is an institution established by the Constitution charged with the responsibility of the investigation and prosecution of crimes committed in Rwanda.[229] The NPPA comprised of the office of the Prosecutor General and public prosecution at the primary and intermediary levels.[230] The VWPU is a service operating within the NPPA.

In December 2008, Rwandan government officials and representatives from the ICTR met for a four days conference to discuss about the security of witnesses in transfer cases. They considered the challenge of having the VWPU within the office of public prosecution and recommended the establishment of an autonomous national witness protection service.[231]

The Principal State Attorney, Claire Umwari pointed out that the main challenge of having an autonomous witness protection service is the lack of resources that would be required to handle victims and witnesses in accordance with ICTR standards. She noted that such unit would require resources to pay for facilities such as transport and medical insurance which would require mobilizing of funds from

---

[227] N Fyfe & J Sheptycki 'International trends in the facilitation of witness cooperation in organized crime cases' (2006) 3 *European Journal of Criminology* 347.

[228] JAK Sesay 'Special Court of Sierra Leone transfers convicted persons to Rwanda' *Centre for Accountability and Rule of Law* 31 October 2009 available at http://www.carl-sl.org/home/index.php?option=com_content&view=article&id=361:special-court-for-sierra-leone-transfers-convicted-persons-to-rwanda-&catid=5:reports&Itemid=20 (accessed 11 October 2010).

[229] The Constitution (n 172 above) art 160.

[230] n 172 above, art 161.

[231] 'Rwanda: Stakeholders want autonomous witness protection service' *The New Times* 16 December 2008.

donors such as the European Union (EU) and United States Agency for International Development (USAID).[232] To date, the VWPU is still operated within the NPPA. An autonomous and effective unit for the protection of witnesses is yet to be established.

4.5 Conclusion

Compared to the period before the genocide, Rwanda's legal and institutional structures have generally improved. New laws guaranteeing the protection of human rights, principles of judicial independence and fair trial have been adopted while bad laws have been abolished.

This chapter has highlighted a few areas of weakness that Rwanda has not addressed since the Prosecutor was denied referral of cases to Rwanda in 2007. The areas include the ambiguity in Rwanda's penalty structure particularly in relation to the appropriate sentence for international crimes and the lack of an independent WVPU. The following chapter provides recommendations on the measures that need to be taken by Rwanda so as to facilitate the transfer of cases from the ICTR and possibly from other jurisdictions in the future.

[232] As above.

CHAPTER FIVE

SUMMARY OF FINDINGS AND RECOMMENDATIONS

5.1 Summary of findings

This study has extrapolated the relationship between international criminal justice and human rights. In doing so, it has explained why the rights of accused persons and those of witnesses have to be taken into account at all levels of criminal proceedings. Bearing in mind the value of witness testimony in criminal justice, laws and programmes have been put in place to ensure the safety of witnesses who agree to testify against perpetrators of gross human rights violations.

The ICTR provides protective measures to witnesses whose lives are believed to be in danger or at risk. Such witnesses are guaranteed with support and protective measures from the investigation stage through the WVSU. In exceptional circumstances where a greater risk is involved, witnesses are relocated to third countries after testifying. However, due to financial shortcomings and the lack of a police force, the ICTR does not guarantee protection to all witnesses after they testify. An important point to be noted is that when providing protective measures to witnesses, regard has to be had to the rights of the accused.

The absence of provision in the ICTR Statute stating when the ICTR was bound to complete its activities led to the adoption of resolutions by the SC providing specific deadlines for the completion of ICTR's activities.[233] Regular reports indicated that the tribunals were not going to meet the deadlines set out by the SC.[234] As a result the ICTR was called upon to concentrate on the indictment of the most responsible suspects and to transfer cases involving intermediary and low-level accused persons to competent national jurisdictions. Rwanda had been earmarked as the only country in Africa having jurisdiction and being willing to accept cases from the ICTR. It is in this context that the Prosecutor intends to file applications for the referral of some of its cases to Rwanda.

The judicial reform that took place from 2001 to 2004 led to the adoption of new laws which have strengthened fundamental legal principles such as judicial independence and rule of law.[235] The

[233] Reslns 1503 (2003) & 1534 (2004).

[234] UN Doc S/PRST/2002/21 (n 110 above) & UN Doc JL/PIS/790/e (n 113) above.

[235] Eighth periodic report of Rwanda to the African Commission of March 2005.

Constitution of Rwanda guarantees the protection of human rights and contains specific judicial and administrative guarantees ensuring fair trial. Importantly, the country has ratified several international human rights instruments including the ICCPR and ICESCR, and is party to the ACHPR. Compared to the time before the outbreak of the genocide, Rwanda's institutions have generally improved. Judicial power of prosecuting and trying transfer cases is vested on the High Court.

Despite Rwanda's achievements, the study has identified several issues of concern that need to be addressed for purposes of facilitating the transfer of cases from the ICTR.

The ambiguity in Rwanda's penalty structure in relation to the appropriate sentence for the crime of genocide and crimes against humanity in transfer cases is yet to be resolved. Whereas the Transfer Law provides that life imprisonment would be the heaviest penalty imposed in transfer cases,[236] the Death Penalty Law lists genocide and crimes against humanity among the crimes that are punishable by life imprisonment in isolation.[237] There is no express mention of whether accused persons in transfer cases, if convicted would not be sentenced to life imprisonment in isolation.

The construction of Mpanga prison in preparation to receive prisoners and/or detainees from the ICTR is a positive step taken by the government of Rwanda. The agreement entered into between Rwanda and the SCSL to host convicts of international crimes shows that the prison meets minimum international standards. It is however not clear whether prisoners from the ICTR would be detained in the same prison or whether there is a plan of building another prison by the end of this year.

The issue of protection of witnesses is still a major challenge. Experience shows that witnesses testifying against perpetrators in Rwanda have been killed along with their families. A specific law on the protection of victims and witnesses has been adopted by the Parliament. The Draft Law has not yet been published in Rwanda's Official Gazette therefore; it has not entered into force.[238] The Draft Law establishes VWPU within the NPPA.[239] The NPPA has been criticised for not being a neutral body for purposes of providing protection to victims and witnesses. Rwanda, on the other hand has argued that the establishment of an independent unit would require financial assistance from donors.[240] It can

[236] The Transfer Law (n 152 above) art 21.
[237] The Death Penalty Law (n 162 above) art 5(3).
[238] Draft Law (n 191 above).
[239] n 191 above, art 2.
[240] *The New Times* (n 231 above).

therefore be concluded that the establishment of an independent VWPU in Rwanda is subject to availability of funding, the lack of which would jeopardise protection of witnesses testifying in transfer cases.

The ICTR Completion Strategy does not provide any guidance on witness protection in transfer cases. Apart from a schedule of training new staff of Rwanda's WPP,[241] there are no guidelines on the standard of protective measures that should be accorded to witnesses testifying in national jurisdictions. Rwanda, being a developing country is heavily dependent on foreign aid. Currently, foreign aid accounts for 50% of Rwanda's national budget.[242] With such dependency on aid, it is unlikely that Rwanda would be able to establish an independent VWPU with capacity to provide witnesses with the same standard of protection as that of the ICTR.

The ICTR Completion Strategy expressly mentions Rwanda as being the country to which the Prosecutor intends to refer the remaining fugitives' cases. Consultations are ongoing to that effect.[243] However, there is reason to believe that the Prosecutor might be considering other possible competent jurisdictions aside of Rwanda for purposes of referral of the cases. In a recent conference that was organised by the East African Community (EAC),[244] Paul Ng'arua, senior trial attorney with the ICTR speaking on behalf of the Prosecutor proposed an extension of the East African Court of Justice (EACJ)'s mandate to include the prosecution of international crimes particularly cases involving Rwanda's genocide.[245]

Ng'arua further asked the EAC to consider taking the UN detention facility based in Arusha. The proposal was strongly opposed by the Rwandan delegation but received support from Kenya. Kenya's assistant Minister for EAC Affairs, Peter Munya said that 'the regional court would be the ideal forum to try violators of human rights.'[246]

---

[241] The ICTR Completion Strategy (n 4 above) para 80.

[242] 'Rwanda seeks alternatives to aid' *The Independent* 15 January 2009 available at http://www.independent.co.ug/index.php/news/regional-news/471-rwanda-seeks-alternatives-to-aid (accessed 27 October 2010).

[243] The ICTR Completion Strategy (n 4 above) para 60.

[244] Conference on peace and security held in Kampala, Uganda from 5-7 October 2009.

[245] 'Bid to EA Court of Justice try genocide and human rights suspects' *The East African* 12 October 2009 available at http://www.theeastafrican.co.ke/news/-/2558/670854/-/qxs6enz/-/index.html (accessed 24 October 2010).

[246] As above.

The EACJ lacks jurisdiction to prosecute international crimes. Recent developments reveal that the EAC is considering extending EACJ's mandate to include prosecution of international crimes and human rights abuses in the East African region.[247] A final report of the meeting of EAC Chief Justices recommended the establishment of an ad hoc committee to foresee the extension of the EACJ's mandate.[248] No new developments have been made on the recommendation this year.

5.2 Recommendations

Rwanda fulfils most of the criteria required for the transfer of cases by the ICTR.[249] This explains why the country is being considered by the ICTR for the transfer of the remaining cases. This study has identified several challenges that need to be addressed. Nevertheless, if the Prosecutor insists on transferring cases to Rwanda, the following recommendations should be taken into account by both the ICTR and Rwanda.

The author takes note of the positive steps taken by Rwanda in establishing a WVPU for ensuring protection of witnesses. However, the process of recounting past events might be traumatising to most witnesses therefore, a neutral unit that would ensure their safety before, during and testifying is more desirable. Having the unit within the NPPA is likely to intimidate defence witnesses. It is therefore recommended that an independent unit be established outside the prosecution department.

Alternatively, Rwanda could emulate from Bosnia-Herzegovina, the ICTY and ICTR which have established witness protection units in court registries and move the existing WVPU from the NPPA to the High Court Registry. In that regard, an amendment to artide 2 of the Draft Law to allow transfer of cases from the ICTR and other jurisdictions is strongly recommended.

Although Rwanda has made significant progress in ensuring that its laws and institutions meet the minimum international standards required for prosecution of cases from the ICTR, it is doubtful whether the country will be able to maintain such standards particularly in the provision of protection to witnesses. It has been noted that half of Rwanda's national budget is dependent on foreign aid. The Dutch government withdrew aid from Rwanda last year based on reports on Rwanda's alleged

[247] Press release 'EAC Chief Justices propose harmonisation of legal systems' available at http://www.eac.int/about-eac/eacnews/349-harmonisation-of-legal-systems.html (accessed 24 October 2010).

[248] 'East Africa Court to try rights-abuse cases' *The East African* 14 December 2009 available at http://allafrica.com/stories/200912141680.html (accessed 24 October 2010).

[249] See the ICTR Rules, rule 11*bis*.

involvement in the conflict of the Democratic Republic of Congo (DRC).[250] It is not known how many more countries are going to withdraw aid on account of the said allegations.

The dependency on foreign aid shows that Rwanda will not be able to provide witnesses with the same standard of protection as that of the ICTR since protective measures require both institutional and financial stability. It is recommended that protection of witnesses testifying in transfer cases should be handled by the international community through ICTR's residual mechanism. Alternatively, the strengthening of national judicial systems as stipulated in resolution 1534 should be interpreted to include the strengthening of national WPPs so as to generate funding from the donor community for the creation and operation of an autonomous WPP in Rwanda.

Cases of intimidation have been noted to go beyond witnesses testifying against perpetrators in Rwanda. There have been incidences of murders of human rights observers, a priest and a Supreme Court Judge in 1997 and of a gacaca judge's nephew in 2007.[251] The transfer of fugitive cases from the ICTR is likely to make other people aside from witnesses vulnerable. For this reason, there is a need of creating a mechanism that guarantees safety for all those who would be involved in the prosecution of transfer cases.

Rwanda should consider revising its Death Penalty Law and Transfer Law to provide a clearer interpretation of the appropriate sentence for the crime of genocide, crimes against humanity and other violations of international humanitarian law. In order to accommodate cases that will be transferred by the ICTR and from other jurisdictions as well, it is recommended that the sentence of life imprisonment with special provisions be repealed from Rwanda's statute books. In doing so, Rwanda should consider setting aside a prison that would accommodate prisoners and detainees of transfer cases.

Even though the Appeals Chamber in the Munyakazi case did not find any constraints on Rwanda's judicial independence, serious concerns were raised by human rights organisations negating that fact. The defence among other things noted a tendency of the Rwandan government exerting pressure on the judiciary. The adjudication of transfer cases by a single High Court judge at first instance might generate doubts on whether the judge might not be influenced by the government. For the avoidance of such uncertainties, it is recommended that an independent body be consulted to oversee the proceedings in transfer cases.

---

[250] *The Independent* (n 242 above).

[251] See p 29, 30 & 41 above.

Based on the challenges that have been identified in this study, the author is of the opinion that Rwanda is currently not adequately prepared to receive cases from the ICTR. The Prosecutor should consider other alternative competent jurisdictions preferably outside Africa for the transfer of the fugitive cases. A good example is the successful transfer of two cases to France under Rule 11bis in 2007.[252]

Most countries in Africa depend on foreign aid therefore the Prosecutor will likely face the same challenges if he pursues African countries for referral of cases. Most judicial bodies in Africa are overloaded with domestic cases and therefore lack capacity of prosecuting international crimes. In addition to incapacity, African countries have not been co-operative in the apprehension of the remaining fugitives for instance the case of Felician Kabuga who is believed to be in Kenya. Africa has also shown reluctance in concluding relocation agreements of vulnerable witnesses requiring safer havens. It is therefore questionable whether Africa would be committed in handling cases from the ICTR.

In the event the EAC takes the recommendation of extending EACJ's mandate seriously and timely, the EACJ would be better suited to handle cases from the ICTR. Otherwise, considering the urgency in concluding ICTR's mandate and all the challenges identified in this study, it is recommended that the Prosecutor considers other alternative competent jurisdictions that are willing and have jurisdiction to prosecute such cases. Rwanda needs more time to amend its laws and to improve its institutions.

Word Count: 17,993 (including footnotes)

[252] The cases of *Munyeshyaka* & *Bucybaruta* (n 143 above).

ANNEXURE 'A'

PRELIMINARY DRAFT OF LAW ON THE CHARTER OF RIGHTS OF VICTIMS AND WITNESSES OF INTENTIONAL OFFENCES

We, KAGAME Paul,

President of the Republic;

THE PARLIAMENT HAS ADOPTED AND WE SANCTION, PROMULGATE AND ORDER THE FOLLOWING LAW TO BE PUBLISHED IN THE OFFICAL GAZETTE OF THE REPUBLIC OF RWANDA.

THE PARLIAMENT:

The Chamber of Deputies, in its session of ……..

The Senate, in its session of ….……

Pursuant to the Constitution of the Republic of Rwanda of 04 June 2003, as revised to date, especially in its Artides 13, 14, 15, para. l, 16, 19, Al 2, 44, 62, 66, 67, 88, 89, 92, 93, 95, 108, 118, 143 para. 5, 160, 161, 165, 190;

Considering the International Pact relating to civil and political rights of 19 December 1966 especially in its artide 14 para. 1;

Considering the African charter of Human and Peoples' Rights of 27 June 1981, especially in its article 7 et seq.;

Considering the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985;

Pursuant to the code of criminal procedure as modified and complemented to date, especially in its articles 10,19,54,55,61,62,63,65,131,133,135,136,137,138,205;

Pursuant to Law n° 51/2008 of 09/09/2008 governing the organization, functioning and competence of courts as modified to date especially in its articles 2, 66, 93;

Pursuant to Decree Law N° 21/77 of 18/08/1977 governing the criminal code, especially in its articles 316, 354, 355, 357, 358, 359, 360, 361,380;

Pursuant to organic law nº 16/2004 of 19/06/2004 establishing the organisation,

competence and functioning of gacaca courts as modified to date, especially in its articles 29, 72, 73, 74, 75;

Pursuant to Law n°23/2003 of 07//08/2003 relating to the punishment of corruption and related offences, especially in its articles 36 and 37;

Pursuant to Law n° 15/2004 of the 12/06/2004 relating to evidence and its production, especially in its articles 9, 62, 63, 67, 68, 69, 71, 72, 73, 74, 75;

Pursuant to Law n° 22/2004 of 13/08/2004, on Statute of Public Prosecutors and other personnel of the Public Prosecution Service as modified to date, especially in its articles 19, 20, 27 et 29;

Pursuant to Decree of 30/07/1888 relating to the Civil Code Book III, especially in its artides, 258, 259, 260, 261, 262;

ADOPTS:

CHAPTER I: GENERAL PROVISIONS

Article 1: Scope of the law

This Law determines the legal framework of rights of victims and witnesses of intentional offences defined in the penal code and other related laws.

This Law shall guarantee the protection of rights of victims and witnesses at all level of criminal proceedings from the enquiry to the closing of the case.

Depending on circumstances, this protection may be extended after trial.

The protection granted within the framework of this Law is intended to guarantee a sufficient safety to victims and witnesses so that they can testify in peace.

It shall also grant the most proportionate compensation for the prejudice suffered by the victim.

Article 2: **Definitions of terms**

Protection of victims and witnesses shall include the removal, accommodation, the change of identity as well as psychological assistance and financial support necessary for achievement of the objectives of this Law and of all those aiming at ensuring the safety of the victim and/or the witness or aiming at facilitating his/her resettlement or autonomy;

The victim:

a) Victims shall be persons who, personally or collectively, underwent a prejudice, in particular an attack to their physical or moral integrity, a moral harm, a partial loss, or a serious attack on their fundamental rights , from actions or omissions which violate current criminal laws, including laws proscribing the criminal abuses of power;

b) The term “victim” may also refer to persons who, personally or collectively, underwent a damage, in particular an attack on their physical or moral integrity, a moral harm, a partial loss, or a serious attack on their fundamental rights, due to actions or omissions which, do not constitute yet a violation of criminal laws in force, but which are violations of the internationally recognized standards in human rights;

c) The term "victim" also includes, where provided by the law, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

d) **The term "witness"** shall be defined as a person who provided or agreed to provide information for the benefit of an investigation, instruction, lawsuit relating to an offence he/she has information about its perpetration.

The family of victims and/or of witnesses shall mean family in direct lineage or family in-law up to the 3rd degree;

The Unit for protection and assistance to victims and witnesses shall be an organ whose mandate is to provide protection and assistance operating within The National Public Prosecution Authority;

Threat" means any act of intimidation, from a person, to inspire to another person fear of an evil to be expected by that person, his/her family or goods, by written or verbal note either public or private.

Claimant for civil damages shall mean a person having personally suffered from a damage directly caused by an offence, who sues in order to be compensated for the injury caused by the offence.;

"Civil liability" shall mean any obligation to be held civilly liable for the damage that one caused to a third party, i.e. to repair in nature or by equivalent through paying compensation;

"Repair" shall be understood as a compensation for a prejudice by a civilly liable person of that prejudice; recovery of the balance/equilibrium destroyed by the damage which consists in resettling the victim in the situation in which he/she would have been if the prejudice had not occurred. It also refers to the action to repair as well as the mode of repair.

"Compensation" shall mean the operation of making the victim unharmed from the damage by means of repairing the harm the most adequately, either in nature (rehabilitation), granting an equivalent property or money.

CHAPTER II: RIGHTS OF VICTIMS OF OFFENCE

Section 1: General provisions

Article 3: Protected rights of victims of offences

1) Under this Law but not limited to, fundamental rights of the victim of an offence shall be as follows:

2) Right to be treated with courtesy, compassion and respecting his/her dignity and its private life;

3) Right to have access to material, medical, psychological and social assistance;

4) Right to be informed on the existence of medical, social assistance services ans other forms of assistance which may be helpful to him/her and enjoy easy access;

5) Right to have access to information related to services and recourses at his/her disposal;

6) Right to have access to information relating to the progress being made in investigations and criminal prosecution;

7) Right have his/her safety protected in as a witness;

8) Rights to rehabilitation.

Article 4: Basic principle of repair

Any person who suffered a prejudice due to an offence is entitled to a repair, in the sense that he/she must be resettled in the closest situation to the one in which he/she would have been if the damage had not occurred.

Repairs thus consist in measures which aim at removing, moderating, or compensating effects of a committed offence. Their nature and their amount depend on the characteristics of the offence and the prejudice it caused to the victims' property.

Section 2: Repair for body injuries

Article 5: Variation of the allowance

When the missed profit was repaired by granting an annuity, the amount of that annuity can be increased or decreased thereafter, in the event of reduction or of increase of victim's capacities of work due to aggravation or improvement of his/her health conditions, likewise in the event of change of

the value of the currency or the level of incomes. These changes of situation however shall not be considered when the judge had already taken them into account during the initial assessment of the damage.

When missed profit was repaired by the granting of a capital, a subsequent increase shall only be allowed if a new damage occurs, raising from an aggravation of the victim's health, and which was not considered during the initial assessment of the damage. Reduction of a capital already granted shall not be allowed.

Article 6: Compensation for an aesthetic damage

The victim must be compensated for the aesthetic damage, physical pains and psychic suffering. With regard to the victim, this category includes any other troubles and nuisances such as faintnesses, insomnia, having an inferiority complex, decrease of pleasures of life caused in particular by the impossibility of devoting himself/herself to certain leisure activities.

Article 7: Compensation for physical pains and psychic suffering

The physical pains and the psychic sufferings are compensated according to their intensity and duration. The calculation of the compensation must be carried out regardless of the victim's fortune.

Articles 8: Repair of the psychological damage of the father, mother or spouse and brothers and sisters of the victim

The father, mother, spouse, children, brothers and sisters of the victim who, because of an attack on the physical or moral integrity of the victim, undergo psychic sufferings, can obtain repair of this damage only in the presence of sufferings of exceptional nature, other persons cannot claim for such a repair.

Section 3: Repair in case of death of the victim

Article 9: Refunding of expenses caused by death

Expenses caused by the victim's death, and in particular funeral expenses, must be refunded.

Article 10: Repair of the patrimonial prejudice

The death of the victim gives right to repair of the patrimonial prejudice:

a. To persons who are legally in the care of the victim or to whom he/she would have had a legal maintenance obligation;

b. To the persons to whom the victim assumed or would have assumed maintenance, wholly or partially, even without being requested by the law.

Article 11 : Forms of repair in case of death of the victim

The repair of the patrimonial prejudice caused by the death of the victim to the persons referred to in the previous article can be carried out either by the granting of an annuity or a capital, according to criteria determined by the applicable law. In the event of granting an annuity, it is desirable that the annuity be accompanied by additional measures intended to ensure that in spite of the monetary depreciations, the value of payments constantly corresponds to the value of the damage.

When the patrimonial prejudice caused by the death of the victim to the above mentioned persons was repaired by the grant of an annuity, the initial amount shall be modified. The criteria of such a revision are determined by the applicable law.

When the patrimonial prejudice caused by the death of the victim to the persons referred to in article 12 was repaired by the grant of a capital, no subsequent revision of that amount shall be allowed.

Article 12: Determination of modalities of compensation for repair in case of body injuries and death of the victim

The Court shall determine modalities for granting repair compensation in the event of body injuries and death of the victim, as well as its beneficiaries.

Section 4: The Government responsibilities with regard to the protection of rights of victims of offences.

Article 13 : Repair of the prejudice where the offence perpetrator is unknown or has no resources.

Repair of a prejudice is due by the offence perpetrator.

In case of lack of means, the Government must contribute to the compensation of:

a. Any person having undergone serious body injuries resulting from an offence,

b. All the persons who were in the care of the person killed from that offence

With regard to the criminal offence giving rise to body prejudice, all intentional acts of violence shall have at least to be covered, even if the author cannot be prosecuted.

The Government can subrogate in the victim's rights without impeding, as much as possible, the social rehabilitation of the offender.

Article 14: Right to know the truth, to investigate facts, identify, judge and sanction the responsible persons.

The Government shall have the obligation to investigate facts, to identify and sanction the responsible persons in order to make effective the enjoyment of the right to the truth for victims of offences.

The right to the truth is equivalent to the right of victims and their families to obtain from proper authorities explanation of the facts and responsibilities corresponding by means of investigation and judgment.

Article 15: Right to speedy justice

The Government must immediately undertake necessary proceedings to accomplish in reasonable time investigations and criminal trials in order to give justice to victims.

Article 16: Right to a decent burial

In the event of criminal acts having killed a person whose corpse could not be found immediately, the Government will do all necessary in order to find the body or its remains and restitute them to family members of the deceased for their subsequent decent and memorable burial.

Article 17: Right to social rehabilitation

In the event of serious violation of human rights, the Supreme Court may, on request from the National Public Prosecution Authority, order the publication of facts established by a final judicial decision; such a publication shall be published in the Official Gazette of the Republic of Rwanda.

That publication of facts through judicial means shall constitute an important act through which the Government restores the reputation of victims as well as a certain guarantee of non recidivism.

Article 18 : Moral and symbolic rehabilitation of victims

Within the framework of an integral repair aiming at repairing the breach of essential values for the people, the State will have to set up public work in order to honor the memory of victims, to restore their dignity, to mark the official reprobation of human rights violations and the commitment to prevent their recidivism in the future.

Article 19: **Right to psychological rehabilitation of victims**

In the event of psychological harm subsequent to intentional offence, the victim shall be entitled to a psychological and social appropriate rehabilitation.

The cost of such assistance is at the expense of the person or persons who are directly or indirectly responsible of these harms. In case those people are not able to pay the assistance cost, the Government shall be in charge of it and priority shall be given to victims of sexual offences.

CHAPTER III: RIGHTS OF WITNESSES

Article 20 : Measures for witnesses protection

1. Without prejudice to inalienable rights recognized in other legal instruments in particular the Constitution of the Republic of Rwanda and the Law n°15/2004 of 12/06/2004 regulating evidence and its production, the Court shall take suitable measures to ensure the security, physical and psychological wellbeing, dignity and respect of the private life of the witnesses. By doing this, the Court takes into account all relevant factors, in particular the age, sex and health conditions as well as the nature of the offence, in particular, but without limiting itself to it, when this one is accompanied by sexual violence, violence with character sexist or violence against children. The prosecutor takes these measures as a private individual at the stage of investigation and prosecution. These measures should be neither prejudicial nor contrary to the right to defense and to the requirements of an equitable and impartial trial.

2. As an exception to the principle of publicity of hearings, the Court can, in order to protect witnesses or a defendant, decide to hear any session of the proceedings in camera or allow that the depositions be submitted by electronic means or any other special means. These measures are applied in particular

with regard to a child witness unless the Court decides otherwise considering all the circumstances especially point of view of the concerned witness.

3. The Unit for protection and assistance to witnesses of the National Judicial Prosecution Authority may advise the prosecutor and the Court on protection measures, security arrangements as well as on activities of advice and assistance referred to on article 25.

4. When the disclosure of elements of evidence and information under this Law may seriously endanger a witness or members of his/her family, the prosecutor can, in any procedure initiated before the opening of the trial, abstain from revealing these elements of evidence or information and only present its summary. Such measures must be applied in a manner which is neither prejudicial nor contrary to the rights of defense and requirements for an equitable and impartial trial.

5. Witnesses have in addition the following rights among others:

Right to provide information without any pressure;

Right not to undergo a humiliating interrogation which is not compatible with the dignity due to his/her person;

Right to be regularly informed on legal proceedings engaged whenever he/she has any direct link with the case;

Right to be informed about the decision regarding a case in which he/she is involved.

Right to obtain a new identity when deemed necessary;

Right to be shifted to a new place and/or refunding for the transport and accommodation expenses if necessary;

The rights stated above are also recognized to families of the witnesses in all cases where the evaluation carried out by the Unit for protection and assistance to victims and witnesses shows the existence of a certain risk to theses families.

Article 21 : **Psychological, social and medical assistance**

In addition to rights recognized in article 20, witnesses having suffered injuries because of information they provided or they are ready to provide are entitled to free medical assistance as well as to psychological and social rehabilitation.

Article 22 : Consent of an accused

The testimony of an accused against the authors, joint authors and accomplices shall not discharge him/her from his/her own criminal liability with regard to facts he/she is charged with.

CHAPTER IV : ASSISTANCE FUND FOR VICTIMS AND WITNESSES

Article 23 : **Assistance Fund**

1. There is hereby created a Fund to assist victims and witnesses, of intentional offences whose authors have not been identified or are insolvent.

2. The Court shall order that part of the fine or any other confiscated property be deposited to the Fund.

CHAPTER V : MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS

Sections 1 : Miscellaneous provisions

Article 24: Direct participation of representatives of the victims.

Persons legally competent from any local non governmental organization recognized in Rwanda in charge of the protection of rights of victims can represent those victims before judicial and administrative authorities.

Article 25 : Individual or collective compensation

Under this Law, the compensation for repair of injuries caused to victims of offences may be individual or collective.

Article 26: Exemption from court fees

Victims of intentional offences and witnesses shall be exempted from court fees before all court levels.

Section 2 : Transitional provisions

Articles 27 : Existing Services of assistance to victims and witnesses

Organs of assistance to victims and witnesses which are operating before the publication of this Law in the Official Gazette of the Republic of Rwanda, shall continue as usual until the creation of the Fund referred to in artide 23.

Section 3 : Final provisions

Article 28: Upholding existing provisions favorable to the protection of victims and witnesses.

No provision of this law shall be interpreted as affecting in whatsoever way the existing legislative provisions which are favorable to the protection of rights of victims and witnesses of offences.

Article 29: Repealing of contrary provisions

All prior legal provisions contrary to this Law are hereby repealed.

Article 30 : Commencement

This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Kigali, ……;

The President of the Republic

KAGAME Paul

The Prime Minister

MAKUZA Bernard

Seen and sealed with the Seal of the Republic:

The Minister of Justice/ Attorney General

KARUGARAMA Tharcisse

BIBLIOGRAPHY

A. Books

Black's Law Dictionary 7(1999) St. Paul: West Publishing Co.

Galligan, DJ (1996) Due process and fair procedures: A study of administrative procedures Oxford: Clarendon Press.

Mahony, C (2010) The justice sector afterthought: Witness protection in Africa (2010) Institute for Security Studies.

Vermeulen, G (2006) Protecting witnesses of serious crime: Training manual for law enforcement and judiciary Brussels: Council of Europe Publishing.

B. Articles

Akhavan, P 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 The American Journal of International Law.

Aptel, C 'The International Criminal Tribunal for Rwanda' (1997) 321 International Review of the Red Cross.

Bassiouni, MC 'Former Yugoslavia: Investigating violations of international humanitarian law and establishing an international criminal tribunal'(1994-1995) 18 Fordham International Law Journal.

Ferstman, CJ 'Domestic trials for genocide and crimes against humanity: The example of Rwanda' (2006) 9 African Journal of International and Comparative Law.

Fyfe, N & Sheptycki, J 'International trends in the facilitation of witness cooperation in organized crime cases' (2006) 3 European Journal of Criminology.

Morris, MH 'The trials of concurrent jurisdiction: The case of Rwanda' cited in Musungu, SF & Louw, L 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 7 East African Journal of Peace & Human Rights.

Musungu, SF & Louw, L 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 7 East African Journal of Peace & Human Rights.

Raab, D 'Evaluating the ICTY and its Completion Strategy: Efforts to achieve accountability for war crimes and their tribunals'(2005) 3 Journal of International Criminal Justice.

Schotsmans, M 'Listening to the survivors: Research on the survivors' perception of their present situation' (2000) cited in Thelle, EH 'The Gacaca jurisdictions: A solution to the challenge of the Rwandan judicial settlement?' (2001) Human Rights in Development Yearbook.

Thelle, EH 'The Gacaca jurisdictions: A solution to the challenge of the Rwandan judicial settlement?' (2001) Human Rights in Development Yearbook.

C. Reports and papers

Amnesty International report 2010 - Croatia of 28 May 2010 available at http://www.unhcr.org/refworld/docid/4c03a834c.html%20[accessed%207%20October%202010 (accessed 7 October 2010).

Bandwidth, L 'Serbia: Events of 2006' (2007) World Report (2007) available http://www.hrw.org/englishwr2k7/docs/2007/01/11/serbia14776.htm (accessed 6 October 2010).

Coalition for women's human rights in conflict situations 'Witness protection, gender and the ICTR' available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php (accessed 2 July 2010).

Gaparayi, IT 'Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the gacaca tribunals' (2000) unpublished LL.M Dissertation, University of Pretoria.

Human Rights Watch report 'Law and reality: Progress in judicial reform in Rwanda' (2008) available at http://www.hrw.org/node/62098 (accessed 9 October 2010).

Human Rights Watch report 'Looking for justice: The War Crimes Chamber in Bosnia and Herzegovina' (2006) 18 No 1(D) available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-lookingforjustice.pdf (accessed 27 September 2010).

Institute for War and Peace Reporting 'International justice-ICTY: Introduction to Balkan war crimes courts' available at http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts (accessed 6 October 2010).

Ivanisevic, B 'The war crimes chamber in Bosnia-Herzegovina: From hybrid to domestic court International' (2008) Center for Transnational Justice.

Kim, J 'Balkan cooperation on war crimes issues' (2008) CRS Report for Congress available at http://www.fas.org/sgp/crs/row/RS22097.pdf (accessed 25 September 2010).

Loberg, B 'The witness protection measures of the permanent International Criminal Court are superior than those provided by its temporary ad hoc contemporaries' (2006) Independent Research available at http://www.kentlaw.edu/perritt/courses/seminar/brad-loberg-witness%20protection.final.htm (accessed 2 July 2010).

Musiime, E 'Rwanda's legal system and legal materials: Rwanda – Chronology of events' available at http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html (accessed 8 October 2010).

Pritchard, RJ 'Genocide and crimes against humanity: Tokyo Trial' available at http://www.enotes.com/genocide-encyclopedia/tokyo-trial (accessed 31 August 2010).

Qirezi, A 'Kosovo: Witness protection fears grow' Institute for War and Peace Reporting (6 September 2005) available at http://iwpr.net/report-news/kosovo-witness-protection-fears-grow (accessed 22 September 2010).

Sesay, JAK 'Special Court of Sierra Leone transfers convicted persons to Rwanda' Centre for Accountability and Rule of Law 31 October 2009 available at http://www.carl-sl.org/home/index.php?option=com_content&view=article&id=361:special-court-for-sierra-leone-transfers-convicted-persons-to-rwanda-&catid=5:reports&Itemid=20 (accessed 11 October 2010).

Turner, A 'ICTR witness protection?' (2009) available at http://www.ictrlegacydefenseperspective.org/papers/Allison_Turner_ICTR_WItness_Protection1.pdf (accessed 2 July 2010).

US Department of State report of 6 March 2007 available at http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm (accessed 13 October 2010).

Walsh, C 'Witness protection, gender and the ICTR' (1997) available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php (accessed 2 July 2010).

Weber, M 'The Nuremberg trials and the Holocaust: Do the war crimes trials prove extermination?' Institute for Historical Review available at http://www.ihr.org/jhr/v12/v12p167_Webera.html (accessed 31 August 2010).

D. Cases

Case of Matthew v The Netherlands ECHR (29 September 2005) Application No 24919/03.

Ramirez Sanchez v France ECHR (27 January 2005) Application No 59450/00.

The Prosecutor v Dusko Tadic a.k.a 'Dule' Decision on the Prosecutor's motion requesting protective measures for victims and witnesses Case No IT-94-1 of 10 August 1995.

The Prosecutor v Jean Paul Akayesu Case No ICTR-96-4-I.

The Prosecutor v Laurent Bucyibaruta Case No ICTR-2005-85-1.

The Prosecutor v Wenceslas Munyeshyaka Case No ICTR-2005-87-1.

The Prosecutor v Yussuf Munyakazi Trial Chamber III decision on the Prosecutor's request for referral of case to the Republic of Rwanda of 28 May 2008 Case No ICTR-97-36-R11bis.

The Prosecutor v Yussuf Munyakazi Appeals Chamber decision on the prosecution's appeal against decision on referral under Rule 11bis of 8 October 2008 Case No ICTR-97-36-R11bis.

E. Reports and documents of international and regional bodies

Address of Judge Theodor Meron , President of the ICTY to the Security Council of 10 October 2003 UN Doc JL/PIS/790/e.

African Charter on Human and Peoples' Rights adopted 27 June 1981 and entered into force 21 October 1986 OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 (1982).

Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 15 November 2009 to 15 May 2010 (ICTY Completion Strategy report) UN Doc S/2010/270.

Amicus curiae brief on behalf of the government of Rwanda of 28 July 2008 cited in Munyakazi Appeals Chamber decision.

Committee on Legal Affairs and Human Rights of the Council of Europe 'The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans' of 3 September 2009 Doc AS/Jur (2009) available at http://assembly.coe.int/CommitteeDocs/2009/20090903_ajdoc38.pdf (accessed 2 October 2010).

Eighth periodic report of Rwanda to the African Commission on Human and Peoples' Rights of the period between 2002 and 2004 of March 2005.

Fifth annual report of the ICTR of 2 October 2000 A/55/435-S/2000/927.

Letter of 28 September 1994 by Rwanda's Permanent Representative addressed to the President of the UN Security Council UN Doc S/1994/1115.

Original Statute of the International Criminal Tribunal for Rwanda adopted by Security Council resolution 955 (1994) of 8 November 1994 UN Doc S/RES/955 (1994).

Proclamation by the Supreme Commander for the Allied Powers establishing the International Military Tribunal for the Far East of 19 January 1946 T.I.A.S No 1589.

Report on the completion strategy of the International Criminal Tribunal for Rwanda (20 November 2007) UN Doc S/2007/676.

Report on the completion strategy of the International Criminal Tribunal for Rwanda (25 May 2010) UN Doc S/2010/259.

Report on the judicial status of the International Criminal Tribunal for the Former Yugoslavia and the prospects for referring certain cases to national courts (June 2002) UN Doc S/2002/678.

Report of the Secretary-General of 23 August 1995 UN Doc A/50/365-S/1995/728.

Report of the Security Council on the establishment of the International Criminal Tribunal for Rwanda held on 8 November 1994 UN Doc S.PV.3453.

Report of the Secretary-General pursuant to paragraph 5 of resolution 955 (1994) UN Doc S/1995/134.

Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the ICTY and ICTR and the seat of the residual mechanism(s) for the Tribunals of 21 May 2009 UN Doc S/2009/258.

Reports under preparation in the Committees of the Parliamentary Assembly of the Council of Europe (June - October 2010) http://assembly.coe.int/CommitteeDocs/2010/AS_Inf_2010_E.pdf (accessed 3 October 2010).

Rome Statute of the International Criminal Court of 17 July 1998 A/CONF.183/9 as amended, entered into force on 1 July 2002.

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia UN Doc IT/32/Rev.43 of 24 July 2009.

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda adopted on 29 June 1995 as amended.

Seventh periodic report of Rwanda to the African Commission on Human and Peoples' Rights of the period between 1999 and 2002 of February 2003

Speech delivered by Deputy Special Representative of the Secretary-General to law students of the University of Pristina-Kosovo on 9 June 2003 available at http://www.unmikonline.org/press/2003/pressr/pr984.htm (accessed 6 October 2010).

Statement by the President of the Security Council of 19 December 2008 UN Doc S/PRST/2008/47.

Statement by Thomas Mayr-Harting Chair of the IWGIT delivered on 3 December 2009 at the 6228th meeting of the Security Council on 'Justice supersedes completion strategy deadlines for international criminal tribunals in Security Council debate following briefings by key officials' UN Doc SC/9801

available at http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7YEUFY?OpenDocument (accessed 5 October 2010).

Statute of the International Criminal Tribunal for Rwanda as amended.

Status Report as at 24 January 1997 HRFOR/STRPT/33/24 Jan 1997/E.

The IMTFE Charter available at http://www.stephen-stratford.co.uk/imtfe_charter.htm (accessed 10 August 2010).

The IMT Charter available at http://www.stephen-stratford.co.uk/imtcharter.htm (accessed 10 August 2010).

The London Agreement establishing the International Military Tribunal at Nuremberg of 8 August 1945 82 U.N.T.S 279.

UN Doc A/52/582.S/1997/868 of 1997.

UNMIK report United Nations Mission in Kosovo 'Police in Kosovo' (2001) available at http://www.facebook.com/profile.php?id=1070274996 (accessed 6 October 2010).

Updated Statute of the International Criminal Tribunal for the Former Yugoslavia adopted on 25 May 1993 by resolution 827 as amended.

F. Newspaper articles

'ICTR referrals: Gov't takes case to UN' The New Times available at http://www.newtimes.co.rw/index.php?issue=13917&article=16344 (accessed 11 October 2010).

'Bid to EA Court of Justice try genocide and human rights suspects' The East African 12 October 2009 available at http://www.theeastafrican.co.ke/news/-/2558/670854/-/qxs6enz/-/index.html (accessed 24 October 2010).

'East Africa Court to try rights-abuse cases' The East African 14 December 2009 available at http://allafrica.com/stories/200912141680.html (accessed 24 October 2010).

'Rwanda/Gacaca – Gacaca closure now scheduled for June 30' Hirondelle News Agency Arusha 12 April 2010 available at http://www.hirondellenews.com/content/view/13360/332/ (accessed 10 October 2010).

'Rwanda seeks alternatives to aid' The Independent 15 January 2009 available at http://www.independent.co.ug/index.php/news/regional-news/471-rwanda-seeks-alternatives-to-aid (accessed 27 October 2010).

'Rwanda: Stakeholders want autonomous witness protection service' The New Times 16 December 2008 available at http://allafrica.com/stories/200812160004.html (accessed 16 October 2010).

'US praises indicted former Kosovo PM' Chicago Tribune 1 May 2007 available at http://www.balkanpeace.org/index.php?index=article&articleid=14323 (accessed 7 October 2010).

G. Resolutions of the Security Council

Resolution 827 (1993) of 25 May 1993 UN Doc S/RES/827 (1993).

Resolution 955 (1994) of 8 November 1994 UN Doc S/RES/955 (1994).

Resolution 1329 (2000) of 30 November 2000 UN Doc S/RES/1329 (2000).

Resolution 1503 (2003) of 28 August 2003 UN Doc S/RES/1503 (2003).

Resolution 1534 (2004) of 26 March 2004 UN Doc S/RES/1534 (2004).

H. Resolutions of the General Assembly

Resolution 39/118 of 14 December 1984.

Resolution 40/146 of 13 December 1985.

Resolution 41/149 of 4 December 1986.

Resolution 42/143 of 7 December 1987.

Resolution 43/153 of 8 December 1987.

Resolution 44/162 of 15 December 1989.

Resolution 45/166 of 18 December 1990.

I. Resolutions of the Parliamentary Assembly of the Council of Europe

Resolution 1564/2007 of the Parliamentary Assembly of the Council of Europe on the prosecution of offences falling within the jurisdiction of the ICTY available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1564.htm (accessed 3 October 2010).

J. Human rights instruments

Charter of the United Nations signed on 26 June 1945 in San Francisco and came into force on 24 October 1945.

European Convention on Human Rights signed on 4 November 1950 and entered into force on 1 September 1953.

International Covenant on Civil and Political Rights Resolution 2200 A (XXI), 16 December 1966 UN Doc A/RES/21/2200.

International Covenant on Economic, Social and Cultural Rights Resolution 2200 A (XXI), 16 December 1966 UN Doc A/RES/21/2200.

Universal Declaration on Human Rights adopted by the General Assembly on 10 December 1948.

K. UN Documents

Basic Principles on the Independence of the Judiciary adopted by the 7th UN congress on the prevention of crime and treatment of offenders endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 9 December 1988 UN Doc A/RES.43/173.

Convention against Corruption adopted by the General Assembly by resolution 58/4, 31 October 2003 entered into force on 14 December 2005.

Convention against Organised Crime General Assembly resolution 55/25, 15 November 2000.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Resolution 40/34 of 29 November 1985 UN Doc A/RES/40/34.

Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by the Economic and Social Council on 22 July 2005 Resolution 2005/20.

L. National laws

Croatia

Witness Protection Act No 163 of 2003.

Rwanda

Law Decree 21/77 of 18 August 1977 establishing the Penal Code of Rwanda.

Law 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure OG Special No of 30 July 2004.

Preliminary Draft of Law on the Charter of Rights of Victims and Witnesses of Intentional Offences.

Prime Minister's Order 53/03 of 27 July 2001 establishing/creating Rwanda's Legislative Reform Commission.

Organic Law 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990.

Organic Law 40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed between 1 October 1990 and 31 December 1994 as amended and completed.

Organic Law 07/2004 of 25 April 2004 Determining and organisation, functioning and jurisdictions of courts and the Republic of Rwanda.

Organic Law 11/2007 of 16 March 2007 concerning transfer of cases to the Republic of Rwanda from the ICTR and from other states.

Organic Law 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty.

Prime Minister's Order No 53/03 of 27 July 2001.

The Constitution of the Republic of Rwanda OG special of 4 June 2003.

South Africa

Witness Protection Act 112 of 1998 published in GN R 646 of 20 July 2001 Government Gazette No 22469 .

M. General comments and concluding observations

Concluding observations of the Human Rights Committee on Denmark of 31 October 2000 CCPR/CO/70/DNK available at http://www.unhchr.ch/tbs/doc.nsf/0/24c26f5a34820eaec125698c003a5a24?Opendocument (accessed 16 October 2010).

Human Rights Committee General Comment 20: Art 7 Compilation of general comments and general recommendations adopted by human rights treaty bodies UN Doc HRI/GEN/1/Rev 7 of 12 May 2004.

Human Rights Committee General Comment 32 of 23 August 2007 UN Doc CCPR/C/GC/32.

N. Websites

The ICTY Website

ICTY About the ICTY available at http://www.icty.org/sections/AbouttheICTY (accessed 29 September 2010).

ICTY About the ICTY: The former Yugoslavia-conflicts available at http://www.icty.org/sid/322 (accessed 26 September 2010).

ICTY Fugitives: An unforeseen success rate after early problems available at http://www.icty.org/sid/10010 (accessed 25 September 2010).

ICTY Outreach: Development of the local judiciaries available at http://www.icty.org/sid/10462 (accessed 6 October 2010).

ICTY Outreach: Status of transferred cases available at http://www.icty.org/sid/8934 (accessed 9 July 2010).

ICTY Outreach: View from The Hague: Judiciary without a witness protection system (19 May 2004)' available at http://www.icty.org/x/file/Outreach/view_from_hague/balkan_040519_en.pdf (accessed 5 October 2010).

The ICTR website

ICTR Cases: Status of cases available at http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx (accessed 27 September 2010).

The EAC website

EAC Press release 'EAC Chief Justices propose harmonisation of legal systems' available at http://www.eac.int/about-eac/eacnews/349-harmonisation-of-legal-systems.html (accessed 24 October 2010).

Other websites

UNDP Gender in Croatia http://europeandcis.undp.org/gender/croatia/show/C2D332E3-F203-1EE9-B7FC479E37554EF2 (accessed 28 October 2010).

'What is UNMIK?' http://www.un.org./peace/kosovo/pages/unmik12.html (accessed 6 October 2010).