MAJOR THEME ON DAY 2: INTERNATIONAL CRIMES, DOMESTIC JUSTICE – ACCOUNTABILITY AND CAPACITY BUILDING IN EAST AFRICA" THE LEGACY AND IMPACT OF REGIONAL AND INTERNATIONAL COURTS IN DOMESTIC SYSTEMS;

SPECIFIC TOPIC: CONTRIBUTING, NOT COMPETING — THE LEGACY AND IMPACT OF REGIONAL AND INTERNATIONAL COURTS IN DOMESTIC SYSTEMS

I. INTRODUCTION

This presentation evaluates the legacy of the International Courts and regional courts with specific focus on the ICTR in regard to its achievements and shortcomings in prosecuting mainly the international crimes of genocide, crimes against humanity and war crimes. If time allows, a brief discussion on other organized crimes can be included.

Apart from time constraints, the choice of a limited scope is influenced by the historical issues Rwanda experienced and the relevance of the topic to my role as a prosecutor General and the hope of providing to the participants here present more firsthand information as a Rwandan derived from the experience I have as an insider and a practitioner for more than 16 years. Obviously, the legacy of the Tribunal will be discussed in comparison to the domestic system.

The presentation ends with a call for employing coordinated efforts in ensuring more enhanced effective contribution of the international and regional mechanisms as complementary approaches to domestic jurisdictions rather than competing mechanisms.

II. CONTRIBUTING AND NOT COMPETING

Although several contributions of the tribunal can be elucidated, the limitation will be on jurisprudential contribution because the main area of competition between the international

mechanisms and domestic courts would be in prosecuting genocide suspects.[1] It is further important to note that the entire case law of the ICTR cannot be examined in the context of the 8 minutes discussion allocated to panelists. However, some exemplary cases of high profile defendants shall be dealt with in order to demonstrate the contribution of the Tribunal's jurisprudence to bringing justice to Rwanda. The selected cases are groundbreaking either for their contribution to the development of international criminal law or for their role in clarifying the organization and the execution of the genocide. Their jurisprudential legacy is the principal subject discussed below;

a) The case of Jean paul Akayesu

This case is important because it was the first trial in which an international tribunal was called upon to interpret the definition of genocide contained in the Genocide Convention. The court based its findings on Article 2(2) of the ICTR Statute which is drawn verbatim from Articles II and III of the Genocide Convention. In the Akayesu case, the ICTR had to do pioneering work in interpreting the elements of the crime of genocide.

Apart from elucidating the elements of this offence, this case was also groundbreaking for its affirmation of rape and other forms of sexual violence which were common during the genocide as constituent acts of genocide. The trial chamber found that rape and sexual violence constitute serious bodily or mental harm which, if committed with the requisite intent to destroy a protected group, amount to the crime of genocide. In the Akayesu trial, the ICTR, expressly mentioned that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.

This finding was widely commended270 and was adopted in the subsequent jurisprudence of the Tribunal. It may be regarded as well-established case law today.

[1] The visible area for international and domestic criminal systems to compete would be in apprehending, prosecuting and trying suspects of international crimes.

b) The case of Jean Kambanda

Kambanda's guilty plea and subsequent conviction marked not only the first time under international law that a former head of government was convicted of genocide, but also that an accused person acknowledged his guilt for genocide before an international criminal tribunal. Notwithstanding his guilty plea which, importantly, recognised that genocide had occurred in Rwanda, the Tribunal sentenced him to life imprisonment on 4 September 1998.

This judgment that was pronounced on such a high ranking official is significant because it reaffirmed the principle under international law that no individual enjoys immunity for such crimes on account of their official position. The Kambanda case thus indisputably backs up the motives in establishing the Tribunal. It expressed a profound condemnation of the overwhelming scale of atrocities committed in Rwanda and established the certainty that impunity for such crimes was no longer tolerable, hence the replacement of a culture of impunity with accountability.

c) The case of Nahimana, Barayagwiza and Ngeze

Also noteworthy were the ICTR prosecutions of Ferdinand Nahimana, the former director of the 'hate-radio' station, Radio Television Libre des Mille collines (RTLM), Hassan Ngeze, the former owner and editor-in-chief of the 'extremist' Kangura newspaper and Jean-Bosco Barayagwiza, the former director of political affairs in the Rwandan ministry of foreign affairs, RTLM official and founding member of Coalition pour la Défence de la République (CDR). The ICTR consolidated the indictments of these three men into a single trial, commonly referred to as 'The Media Case.'

The trial chamber found that Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze were guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, as well as the crimes against humanity of persecution and extermination.

Since the conviction of Julius Streicher at Nuremberg, the ICTR media case was the first ever conviction concerning hate speech in the media before an international tribunal. It was also the first time an international tribunal convicted defendants for the crime of incitement to genocide. The ICTR set a test for distinguishing statements protected by virtue of freedom of expression, from incitement to genocide, which is not protected by freedom of expression. Put differently, this famous case addressed the boundary between the right guaranteed under international law to freedom of expression and incitement to serious international crimes. Hate speech is not protected speech under international law. In fact, states have an obligation under international law to prohibit any advocacy for national, ethnic, racial or religious hatred that constitutes incitement of discrimination, hostility or violence

This case raises important principles concerning the role of the media which have not been addressed at the level of international criminal justice since Nuremberg. Mainly, the Tribunal clarified the scope of the elements of incitement to genocide. This case law also clarified that hate speech can amount to persecution where it is done on discriminatory grounds or targeting a population on the basis of ethnicity. The power of the media to create and destroy fundamental human values thus calls for accountability. Reasonably, the chamber ruled that **'**without a firearm, machete or any physical weapon, these media statements caused the deaths of thousands of innocent civilians.'

d) The case of Colonel Bagosora

The colonel failed in his duty to prevent or punish his surbodinates for the crimes that were directed mainly against Tutsi civilians and moderate Hutu. In the judgment, he was convicted of crimes committed during the genocide, based on both direct and superior responsibility. This was pursuant to the fact that he exercised effective control over the armed forces and had the requisite knowledge of his subordinates' crimes.

The relevance of this case is that it confirms the notion of 'command responsibility', particularly of superiors who often hide away from the scene of the crime, yet use other people as human

instruments or who commit crimes through their surbodinates. The fact that the acts were committed by the surbodinates does not relieve the commander of criminal responsibility if he knew or had reason to know that the surbodinates were about to commit such acts or did not punish the perpetrators thereof. Nevertheless, command responsibility is entrusted not solely to persons with a military background but civilians too can be accused and convicted of superior responsibility as evidenced in the case of Nyiramasuhuko, a female civilian who held a high post in the government.

The significance of this case of Pauline Nyiramasuhuko[2] specifically lies in the fact that it was an important clarification of the doctrine of superior responsibility outside the military context, extending its reach to the civilian work place too. Nyiramasuhuko was therefore held liable as a superior for the acts carried out by the surbodinates over whom she was found to have had legal control.

e) The case of Ntagerura, Bagambiki, and Imanishimwe

The accused persons held high positions in during the genocide period. Ntagerura was the minister of transport and communications in the interim government. Bagambiki was the préfet of Cyangugu, and Lieutenant Imanishimwe was the acting commander of the Cyangugu military camp. The prosecutor accused Ntagerura and others of genocide under Article 2 of the Statute, complicity in genocide, killing and causing serious bodily or mental injuries to members of the Tutsi group, crimes against humanity like murder, extermination, imprisonment, and torture in Article 3 of the Statute.

However, the trial chamber found that the operative paragraphs underpinning the charges against Ntagerura and Bagambiki, as well as the charges themselves, were unacceptably vague. It further found that the formulation of the counts in the Bagambiki case were problematic because the counts did not clearly identify whether Bagambiki and co-accused were being charged as principals or as accomplices, nor did they specify what particular form of complicity was charged. And as a result they were acquitted on all counts in the indictments, mainly genocide, complicity in genocide and crimes against humanity, and the court ordered for their immediate release from detention on 25 February 2004, with judge Williams dissenting in the Bagambiki

[2] The former minister of women and family welfare

case. Yet, the co-accused Imanishimwe was found guilty of genocide, crimes against humanity of extermination, murder, torture, imprisonment, and war crimes and was sentenced to 27 years' imprisonment, later reduced to 12 years on appeal on 7 July 2006. On 8 August 2011, he was released after serving his sentence in Mali.

This case of acquittal serves as a lesson for states and the international community not to regard all acquittals as partiality or failure of the Tribunal but instead to consider the Tribunal to have succeeded in dispensing justice. The case sends a message that an impartial court must seek fair justice for both victims and suspects and not only convict defendants. Although the acquittal triggered controversy, the case law demonstrates the ICTR's independence and attentiveness to matters of due process and the procedural rights of defendants. Importantly even if the trial resulted in an acquittal, the case law still remains relevant because it established considerable facts regarding the genocide and still creates a significant historical record. It is important to note that acquittals do not mean that crimes were not committed in the alleged provinces or areas where the accused persons operated; actually the detailed judgments could establish many facts about the human rights violations that occurred in those areas.

Interim conclusion

The discussion above reaffirms that the international tribunal contributed to dispensing justice in a complementary manner with the Rwanda domestic systems, particularly Gacaca and National courts rather than competing**.**

For instance in a period of 10 years, right from the pilot phase, Gacaca registered tremendous success in dealing with 1,958,634 genocide cases by the year 2012 when it closed, using 29,665,828,092 Rwandan francs (about 52 million USD). In the same year of closure, the ICTR had handed down judgments to only 75 individuals in eighteen years after its establishment with an annual budget of around $270 million USD, yet the domestic courts in Rwanda, had tried more than 15,000 suspects in the same period as the Tribunal using $17 million USD. A separate budget for national courts on genocide trials indicates that 17 million USD from the whole judiciary's budget had been used in a period of seventeen years.

On average, Gacaca trials cost 50 USD per suspect and tried almost two million cases, while the ICTR tried 75 in eighteen years at a cost over 20 million USD per suspect.
Consequently, the slow pace of the ICTR and national courts' trials impacts on the right of suspects to be tried without undue delay. This divergence shows that classical justice is slow and limited capacity wise.

Some of these trials in Rwanda domestic systems resulted into acquittals, property reparations, imprisonment and some sentences being commuted to community service as an alternative to imprisonment.

Consequently, the Tribunal has faced criticism and complaints for the huge budget in relation to Rwandan mechanisms while various genocide suspects, whether officially indicted by the ICTR or not, are able to live freely in many countries. Certainly, it is not possible for the ICTR to bring to trial all genocide suspects, but the most the Tribunal could do was to try only high level perpetrators just like other international mechanisms. The Tribunal's legacy should therefore be evaluated not in terms of 'numbers tried' but in terms of the 'important lessons' from the trials. Actually, the ICTR trials have provided the most comprehensive account of the machinery of genocide and shed light on the anatomy of the crime. Moreover, the ICTR is credited for having been able to try most of the master-minders of the genocide that had fled Rwanda.

III. THE LEGACY AND IMPACT OF REGIONAL AND INTERNATIONAL COURTS IN DOMESTIC SYSTEMS

As suggested before, the discussion considers the ICTR as the case study among the various international and regional mechanisms. The achievements and legacy of various mechanisms vary reason as to why they cannot be consolidated in one discussion. However, there are similarities in considerable details and impact as seen below;

a) Legacy and Achievements of the Tribunal

From the above analysis of representative cases, it is evident that amongst the Tribunal's main achievements, was the arrest and prosecution of high-ranking persons with a view to deciding their guilt or innocence, the creation of important historical records and the establishment of judicial precedents. Additionally, in performing its tasks, the Tribunal has conformed to fair trial standards envisaged under international instruments.

I. Development of International Criminal Law

As demonstrated in the jurisprudence above, the ICTR has made an enormous contribution to the clarification of international criminal law. The judgments have clarified important aspects and principles of international law. This is true, in particular, for the elements of the crime of genocide. Thus, the Tribunal has single-handedly made clear that the psychological consequences of rape can amount to serious mental harm in terms of the genocide definition. Therefore, the Tribunal has characterized rape as a possible means of committing genocide. In addition, the Tribunal has elaborated on the legal qualification of incitement to genocide among media personalities. The trial chamber has confirmed that racist propaganda can amount to the crime against humanity of persecution. Finally, the Tribunal has refined the criteria for determining superior responsibility of both civilian and military leaders.

II. Accountability for Leaders

In an effort to punish those responsible for genocide, the ICTR was established in 1994 by the UN Security Council to try people who bear the greatest responsibility for the genocide. From the outset, the prosecutor focused on investigating and prosecuting individuals who had held important positions in Rwanda in 1994. The Tribunal's focus on leadership is illustrated by the fact that the accused who were apprehended included the former prime minister, fourteen ministers, seven prefects, twelve bourgmestres (mayors), high media personalities and several high-ranking military personnel.

This implies that, had it not been for the Tribunal's investigations, insistence upon their arrest and subsequent requests for transfer to Arusha, many of the master minders of the genocide who fled Rwanda would not have been brought to justice. After all, most countries have long been

unwilling to extradite suspects to Rwanda due to fear of violation of fair trial rights. There can be no doubt that the Tribunal's proceedings relating to persons in very high positions have sent a strong signal to the world, including the African continent, that the international community will not accept impunity for serious crimes. In this sense, the ICTR helps to promote accountability for human rights abuses and combating impunity at both national and international level.

In fact, two decades back, most of those accused of international crimes could seek refuge in other countries, quite convinced that that they would not be required to stand trial for their conduct. So, the establishment of the ICTR, along with that of the ICTY, has revived the idea of individual criminal responsibility as applied in the trial of German war criminals. Such a view is adequately supported by the statement of the Nuremberg International Military Tribunal (IMT) that 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' One can therefore credit the Tribunal for the international recognition of the crime of genocide committed in Rwanda, and for prosecuting some of the 'big fish' who could not have been apprehended by Rwanda.

III. Creation of a Historical Record

The ICTR has been important in creating a historical record through its trials. The most comprehensive archives accessible today on the internet about the conflicts which engulfed Rwanda in 1994, and the consequences that resulted, are those held by the ICTR. The whole of the ICTR's jurisprudence is therefore a significant component of the country's history.

Establishing a historical record of what occurred during the conflict is an important contribution of the Tribunal in order to prevent historical revisionism.The ICTR has repeatedly determined that the crimes committed in Rwanda against the Tutsi were in fact genocide. This authoritative finding has set a clear course for the way the history of the conflict has been and will be written. This is particularly important given the very common perception in the late 1990s among large parts of the 'negationists' that the conflict was nothing more than a civil war.

Many judgments contain long discussions of the historical context in which the genocide was organised and executed.These judgments, especially of high ranking officials and politicians, have huge potential to help victims and the public in general to know the facts of massive crimes,

and to contribute to mankind's collective memory of mass atrocity. Therefore, even when the defendants are acquitted, the facts regarding the massacre itself remain intact, demonstrating that trials can help to create a significant historical record.

Interim conclusion

Therefore, the jurisprudence of the ICTR has clarified the framework of genocide as a core crime. And as put by Bornkamm, 'although the actual number of trials conducted in Arusha has been negligible; they have played a major part in shedding light on the anatomy of genocide. When taken as a whole, the judgments provide the most comprehensive account of the machinery of genocide.'[3]

IV. CHALLENGES IN ENHANCING CONTRIBUTING AND NOT COMPETING MECHANISMS

Despite the above achievements at both international and domestic level in carrying out parallel trials of suspects of international crimes; at times the approaches seemed to be competing hence affecting their contribution to effective justice by multifaceted approaches. Although under the principle of concurrent jurisdiction, the ICTR Statute gave primacy to the *ad hoc* Tribunal over national courts, it is sufficient to mention that the ICTR and Rwandan national mechanisms lacked a coherent and organised structure that links all the processes and allows the various systems to play complementary roles. This at times contributed to the overlap of international and domestic processes, and both formal and informal processes. For instance, it is a trite fact that the Tribunal and Rwandan courts often competed for defendants, in several instances requesting the same defendants from governments. E.g Froduard Karamira became the object of a brief 'tug of war' between the ICTR and the government of Rwanda but later he was deported

[3] P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation,* (2012), at 28; W.A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone,* 1st edn, (2006), at 44 *et seq;* G. Mettraux, *International Crimes and the Ad hoc Tribunals,* (2005), at 21 *et seq*

to Rwanda from Ethiopia and was convicted to death sentence yet if he had been tried by the ICTR, he would have faced a maximum sentence of life imprisonment.[4] This reveals another problem between international and domestic systems which is the existence of prima facie differences in structure, laws, procedure, and sentencing options among the three systems[5] which tried genocide suspects for the same situation thereby yielded inequalities.

In view on these discrepancies, mentioned despite enormous achievements already discussed at the beginning, the question I leave behind is the following;

i) What are the key challenges and lessons emerging from the use of multifaceted justice mechanisms in the contemporary international legal order? (This encompasses domestic systems, regional and international courts)

It was also the objective of this discussion to examine the relationship between the Rwandan national mechanisms and the ICTR. An assessment of the efficiency of having these different institutions to prosecute the same crime but employing their own procedural rules and laws is paramount in this regard. This similarly applies to other international courts and regional mechanisms in terms of how they operate and relate to domestic legal approaches

The significance of this work lies in its attempt to show the problems that exist in having different approaches in the prosecution of the same international crimes and in our case even organized crimes. It views the problems from all sides revealing the disparities, and makes possible suggestions.

[4] This scenario shows one of the primary areas of conflict between the ICTR and national courts, namely the distribution of defendants between the two court structures. In cases where the ICTR and the government of Rwanda wanted custody of the same individual, the problem has often been which court to take custody. This is because the courts have overlapping jurisdictions despite their differences in structure and procedures. If the relationship is not coordinated, the gaps in the allocation of judicial competence to prosecute core crimes may lead to a situation where criminals may escape prosecution, first at the national level, and, if need be, at the international level or even at regional level.

[5] ICTR, Gacaca and National courts

In fact, taking Rwanda's approach as a case study offers a number of lessons to be learnt, not only by the international courts but also by other domestic jurisdictions. Many of the shortcomings it addresses are not exclusive to Rwanda. Rwanda is merely presented as a 'guinea pig' for the parallel use of differing justice mechanisms over the crime of genocide and other international crimes. In addition to highlighting major achievements of each mechanism, this presentation significantly suggests coherent options of how national and international relationship can be structured.

Apart from experience, prominent authors have also called for caution in ensuring effective contribution to justice instead of competition of multifaceted approaches. For instance, Ramer argues that this emerging system of international criminal law consists of unclear lines and procedures which may potentially lead to competing claims to jurisdiction.[6] Indeed, other authors, such as Werle, assert that the parallel existence of direct and indirect enforcement mechanisms can lead to situations in which national and international courts simultaneously claim jurisdiction to prosecute.[7] This is because both jurisdictions have the potential to address in parallel, the same disputes involving the same parties and issues.[8]

V. CONCLUSION AND RECOMMENDATIONS

Therefore, after assessing the contributions, achievements and shortcomings of the courts, this part proposes solutions to raised challenges from the experience of Rwandan national courts and the ICTR, which are particularly addressed to current international and regional legal systems in operation.

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[6] S.R. Ramer and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edn, (2001), at 187 *et seq*;

[7] G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 81, MN 223; W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, (2006), at 1 and 270 *et seq*;

[8] See C. Mibenge, 'Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda,' 7 *Yearbook of International Humanitarian Law*, (2004), at 424; M.H Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 Duke *Journal of Comparative and International Law*, (1997), at 349 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 82, MN 226.

As a solution, we suggest a comprehensive legal framework as the starting point towards a harmonised and coordinated relationship. Though the ICTR closed down**,** its existence provides lessons that interactions between international and national courts in post-conflict societies should have well established legislation so that parallel jurisdiction does not lead to competing claims, but mutual partnership in the repression and prevention of serious crimes.

In spite of the differences and inequalities resulting from the use of various accountability mechanisms under study, recourse to a single mechanism would still not have been the appropriate model to the post-genocide situation because of various reasons; a) the ICTR alone would not have been able to try all the genocide perpetrators given its slow speed; b) It was also uncertain that regular trials could be completed faster in a domestic system while guaranteeing all the fair trial rights of the accused; and c) Gacaca courts would have not been able to deal with the complex genocide matters of high level perpetrators single-handedly, mainly due to the lack of legal training.

Hence, one can assert that the specific focus on the complementary sample approach in solving Rwandan conflicts was the realistic way for Rwanda to establish reconciliation, accountability, and justice through the combined efforts of the ICTR, national courts and Gacaca processes.

Therefore, based on the positive trends and transformations of parallel trials over Rwandan genocide suspects, a multifaceted approach is suggested for post-conflict societies with large scale perpetrators and broken relationships so as to foster accountability at the international level, and enhance reconciliation through local mechanisms. In particular, such an approach can surely be recommended in the great lakes region of Africa that has been plagued by wars characterised by gross violations of human rights on the basis of ethnicity, nationality, racial or religious grounds.

In regard to the optimal relationship between the various courts, international tribunals need to complement rather than to supersede the jurisdiction conferred on national courts. This possibly explains why the complementarity principle of the International Criminal Court may be the recommended remedy where there is a prevalence of national courts other than the absolute

primacy of the international court, which should intervene only in exceptional circumstances. Therefore, the basic operating presumption should be that the local domestic courts will have primary jurisdiction to prosecute a crime, where however, a given state is unwilling or unable to conduct a free and fair trial, alternate mechanisms of justice at the international level and regional level would need to be considered.