

Closing the Impunity Gap: Southern Africa's Role in Ensuring Justice for the 1994 Genocide in Rwanda

MOVING BEYOND THE TRIBUNAL'S COMPLETION
STRATEGY AND RESIDUAL MECHANISM



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"That genocide happened in Africa is a shame, a collective failure. It is therefore our collective responsibility to ensure that suspects in Southern Africa are brought to justice and held accountable."

Tharcisse Karugarama, Minister of Justice/Attorney General of Rwanda

"Southern Africa led the world in helping the ICTR prosecute Rwandan genocide suspects. It would be fitting if the region could leave a similar imprint on history, as the ICTR inches towards closure, by co-operating in the apprehension of suspects at large who have long been sought by the ICTR."

Rakiya Omaar, Executive Director, African Rights

"The imminent closure of the ICTR, which was established to bring to justice perpetrators of the genocide and the narrowly mandated Residual Mechanism, should definitely give nations, especially those in Southern Africa, food for thought as to the fate of unindicted suspects. Pursuant to a State's duty under international law in ensuring that crimes such as genocide, war crimes and crimes against humanity do not go unpunished, there is need for a mechanism to be found to ensure that perpetrators of such crimes face justice."

Rosemary Kanyuka, Director of Public Prosecutions of Malawi

"Today, as genocide survivors, we appeal to Southern Africa to review their asylum seekers procedures and work on extradition of suspects or put them on trial in their own courts."

Bonaventure Kageruka, Genocide Survivor

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The Southern Africa Litigation Centre (SALC) promotes human rights and the rule of law through litigation support and training. SALC monitors international justice and its development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their legal obligations. Through litigation and advocacy SALC encourages Southern African states to give effect to these obligations by: Ensuring adequate legal frameworks are in place to accommodate the investigation and prosecution of international crimes; ensuring domestic courts and prosecuting authorities have the capacity to try perpetrators of international crimes; ensuring that indicted and suspected international criminals, when found within their borders are arrested and tried; or extradited to capable and willing jurisdictions or the International Criminal Court where appropriate.

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African Rights documents human rights violations, investigates genocide and conflict and promotes dialogue. It brings a strong commitment to participatory research together with experienced advocacy. It works in an integrated manner to document and analyse social and economic as well as civil and political injustices, providing fresh understandings of deep-rooted problems. Through research and publications, it brings the voices of victims, as well as other concerned parties, to the centre of debates on how to secure rights. *African Rights* considers the insights of ordinary people into the causes of the violence afflicting their own lives, and the potential solutions, as the point of departure for an informed and constructive analysis.

Table of Contents

1.	Introduction	11
2.	Genocide Suspects in Southern Africa: An Overview	16
3.	Accountability of Genocide Suspects in Southern Africa	21
	Legal Framework to Prosecute Genocide Suspects in Southern Africa	22
	Capacity of Southern African States to Detect, Investigate and Prosecute Genocide Suspects	34
	The Benefits of (Regional) State Cooperation and Mutual Legal Assistance	36
	Extradition as a Viable Alternative to Universal Jurisdiction Prosecutions?	40
4.	The Need for State Cooperation with the ICTR and the Residual Mechanism	46
5.	Transfers under Rule 11bis	51
	Jurisdiction	55
	Penalty Structure	56
	Fair Trial	57

6.	Legislative Reform in Rwanda in the Context of 11bis Transfers and the Extradition of Suspects	60
	Penalty Structure	61
	Fair Trial	61
7.	The ICTR Trial Chamber’s Decision in the Case of The Prosecutor v Jean Uwinkindi (Uwinkindi)	65
	Key Findings	66
	Potential Impact	70
8.	Ensuring Justice for Survivors	73
9.	Going Forward	83
10.	Recommendations	85
11.	Annexures	90
	Agenda	90
	Conference Speakers/Participants	96

1. Introduction

The 1994 genocide in Rwanda saw up to 800 000 people killed in less than one hundred days. In the immediate aftermath of the genocide, there was a mass exodus of military officers, civil servants as well as civilians suspected of having committed crimes during the genocide, leading to a large number of suspects escaping to third countries around the globe. Since the genocide, suspects have been found to be living in Africa, Europe, North America, Australia and New Zealand.¹

Initially, key suspects found abroad could be transferred to the International Criminal Tribunal for Rwanda (ICTR), established by the UN Security Council (UNSC) on 8 November 1994 to prosecute those most responsible for genocide, crimes against humanity and war crimes committed in Rwanda and neighbouring countries between 1 January and 31 December 1994. Indeed, approximately 24 countries, including Southern African states², have arrested and transferred about 80 accused to the ICTR.³

¹ Fox News 'Rwanda genocide suspect convicted of lying to US', 31 May 2011, available at <http://www.foxnews.com/us/2011/05/31/rwanda-genocide-suspect-convicted-lying/>; New Zealand Herald, 'Genocide Suspect gets legal aid', 24 July 2011, at http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10740470; The Guardian, 'Genocide suspects living in UK', 6 December 2008 available at: <http://www.guardian.co.uk/politics/2008/dec/06/immigration-policy-human-rights>; The Tribune, 'Top Rwandan genocide suspects believed in Canada', November 2011 available at <http://www.wellandtribune.ca/ArticleDisplay.aspx?archive=true&e=675512>; Herald Sun, 'Wall of secrecy shields police hunt for killers', 17 March 2009, available at <http://www.heraldsun.com.au/war-criminals-hide-here/story-fna7dq6e-1111119151888>. See also REDRESS and *African Rights*, 'The Extradition of Rwandan genocide suspects from Europe to Rwanda', Annex III, Overview of Current Proceedings against Rwandan Genocide Suspects in Europe, p. 52, available at http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf; and Lowy Institute for International Policy, 'Confronting reality: responding to war criminals living in Australia', February 2009, p. 4 available at <http://www.lowyinstitute.org/Publication.asp?pid=973>.

² For the purposes of this report, the following countries will be referred to as "Southern African" countries: Angola, Zambia, Malawi, Mozambique, Zimbabwe, South Africa, Swaziland and Botswana.

³ Countries that transferred suspects to the ICTR include: *Angola (1 accused); Belgium (7); Benin (2); Burkina Faso (1); Cameroon (9); Democratic Republic of Congo (6); Denmark (1); Gabon (1); Germany (1); France (5); Ivory Coast (2); Kenya (15); Mali (2); Namibia (1); Senegal (1); South Africa (2); Switzerland (2); Tanzania (9); The Netherlands (3); Togo (2); Uganda (3); United Kingdom (1); United States (1); Zambia (3); Rwanda*

As an ad-hoc Tribunal, however, the ICTR was never intended to be the primary forum for the prosecution of suspects allegedly involved in the 1994 genocide. Rather, by focusing on those most responsible for the genocide, the Office of the Prosecutor (OTP) of the ICTR only indicted a total of ninety-two suspects. Furthermore, under the terms of the “completion strategy” for the ICTR as determined by the UNSC, the ICTR stopped taking new cases at the end of 2004 and proceeded to prosecute only suspects who had already been indicted by the OTP before this time. A Residual Mechanism, established by the UNSC, will take over some of the functions previously carried out by the ICTR as of 1 July 2012, including the trial of some of the nine accused who have not yet been arrested. The narrow mandate of the Tribunal, as well as its limited resources, means that states need to complement efforts of the ICTR to hold suspects accountable and support the Tribunal as it is winding down and extend that support to the Residual Mechanism. As the Tribunal and the Residual Mechanism were established by the UNSC Council under Chapter VII, states are obliged to cooperate with both institutions, including through the arrest and transfer of fugitives to the ICTR or its Residual Mechanism. The Tribunal and Residual Mechanism further depend on state support in receiving cases transferred in accordance with the Tribunal’s Rules of Procedure and Evidence (RPE) for prosecution in domestic courts.

While domestic courts have a complementary role to play in respect of suspects indicted by the ICTR, they are the sole forums where suspects not indicted by the ICTR can be held accountable.

According to international law, all states may, and at times are obliged to, prosecute or extradite suspects of crimes such as genocide, crimes against humanity, war crimes and torture (“crimes under international law”). States can prosecute suspects before their own courts by adherence to the principle of **universal jurisdiction**, which allows states to exercise jurisdiction over crimes under international law irrespective of the location of the crimes and irrespective of the nationality of the victim or the perpetrator. Indeed, some countries, including Belgium, Canada, The Netherlands, Switzerland and Finland have investigated, prosecuted and convicted perpetrators on the basis of universal jurisdiction for their involvement in the 1994 genocide. Investigations against suspects found in these countries, as well as in

also transferred two individuals accused of contempt of court; see for further information: <http://www.unicttr.org/Cases/tabid/204/Default.aspx>

Germany, Sweden, Denmark, Norway and France are currently ongoing.⁴

The accountability efforts undertaken in these European countries and in Canada are in contrast to the current situation in Southern Africa, where genocide suspects⁵ throughout the region have been benefitting from impunity for the past 17 years. No Southern African country to date has prosecuted suspects found on its territory on the basis of universal jurisdiction. The lack of prosecutions in Southern Africa can to some extent be attributed to legislative and capacity related challenges. In a number of states, legislative frameworks are either entirely absent or arguably insufficient to enable states to exercise extraterritorial or universal jurisdiction over crimes committed during the 1994 genocide. These legislative difficulties are exacerbated by technical constraints such as lack of expertise and insufficient resources as well as a lack of political will to provide such resources. Therefore even in countries in which it may be legally possible to investigate and prosecute, the necessary support structures are non-existent.

States' failure to address the presence of genocide suspects on their territory has led Rwanda to request their extradition. In the past, Rwanda has requested the **extradition** of genocide suspects from Europe, Africa, North America, Australia and New Zealand.⁶ However, with the exception of Uganda,⁷ no country to date has extradited suspects to Rwanda, mainly due to fair trial and due process concerns. Efforts are under way in Rwanda to address these concerns, and recent judgments in Europe have affirmed that extradition of suspects from Europe to Rwanda may take place in the very near future, making it also more likely that suspects will be extradited from Southern Africa to Rwanda. However, other obstacles may prevent an extradition to Rwanda, such as the absence of an extradition agreement between Rwanda and the host state. Some Southern African countries

⁴ It is important to point out that not all European countries have engaged in such accountability processes: in Italy for instance the extradition of two genocide suspects was denied and the suspects were released from extradition detention. However, no domestic proceedings were initiated with a view to bringing them before Italian courts on the basis of universal jurisdiction; similarly, cases have been pending for up to 16 years before French courts and only recently have French authorities started to carry out investigations with a view to trying suspects in France before French courts.

⁵ For the purposes of this Report, the term 'genocide suspect' is used for suspects of serious international crimes committed during the genocide in Rwanda: genocide, crimes against humanity, war crimes and torture.

⁶ *Supra* note 1.

⁷ New Times, 3 December 2010, 'Uganda extradites Genocide suspect' at <http://www.newtimes.co.rw/index.php?issue=14463&article=36243>.

require such a bilateral treaty to approve an extradition, and international and/or multilateral agreements do not serve as a basis for extradition in these countries.

The challenges preventing the extradition of suspects to Rwanda, in combination with Southern Africa's failure to successfully prosecute suspects on the basis of universal jurisdiction, has afforded genocide suspects in the region impunity and allowed them to rebuild their lives undisturbed outside Rwanda. Survivors, in the meantime, continue to grapple with the consequences of the genocide, and increasingly give up hoping for accountability and justice. Where efforts are undertaken to hold suspects accountable within Rwanda as well as abroad, survivors are often disenchanted as these procedures too often take place in complete ignorance of survivors' rights and needs. This is particularly true in regards to survivors' rights to full reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition which the vast majority of survivors have been unable to obtain in and outside Rwanda.

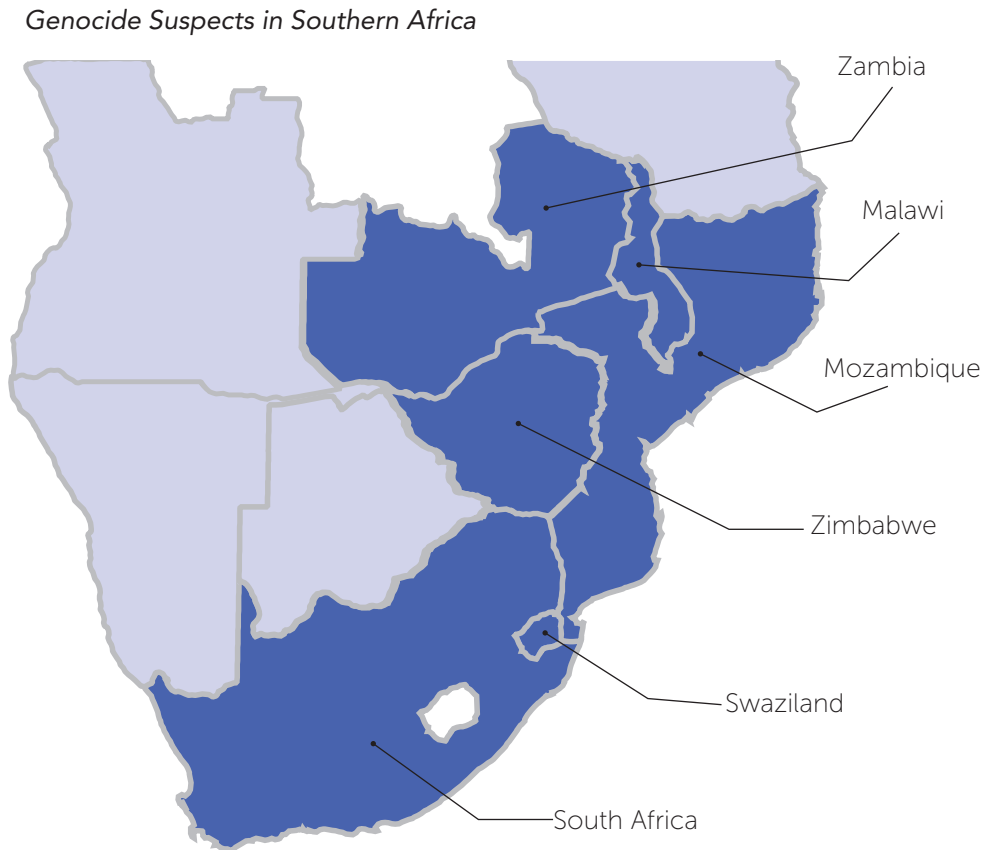
The impunity given to these suspects of the worst crimes not only undermines Southern Africa's rule of law, but also potentially impacts on the stability of the region. Southern African countries therefore not only have an obligation to ensure that suspects are held accountable, it is also in their own interest to do so. Valuable **lessons have been learned** by the ICTR, and by countries prosecuting genocide suspects on the basis of universal jurisdiction on how to ensure accountability. A wealth of information has been collected in particular by the OTP that can assist authorities elsewhere to identify, investigate and where necessary prosecute suspects on their territory on the basis of universal jurisdiction. Furthermore, Rwanda has made significant progress domestically with a view to facilitating the extradition of suspects to Rwanda in accordance with international human rights law.

SALC, REDRESS and *African Rights* brought together key stakeholders and experts for a two day conference ("Conference") to explore ways and means of how Southern African states can address the presence of genocide suspects on their territory, and contribute effectively to the ICTR's completion strategy and support its Residual Mechanism.

The conference took place on **30 June - 1 July 2011** in Johannesburg, South Africa. This report is based on Conference presentations as well

as additional research carried out by SALC and REDRESS in regards to developments that have taken place since the Conference. It is intended to raise awareness about the presence of suspects in Southern African states and the obligations of these states to hold them to account. The report outlines the legal frameworks in place in some Southern African states and highlights the key challenges that may arise in the investigation and prosecution of crimes under international law in Southern Africa as well as possible solutions of how to overcome these challenges. Building on the conference's discussions and conclusions that only a concerted effort based on cooperation will enable countries in the region to address the presence of genocide suspects, the Report concludes with a list of recommendations addressed to governments of Southern African states, the ICTR as well as civil society in the region.

2. Genocide Suspects in Southern Africa: An Overview



The scene for the Conference was set by **Bonaventure Kageruka** and **Xavier Ngagbo**, two survivors of the 1994 genocide who shared their experiences of how they survived. Both reminded conference participants that unless efforts were undertaken on a national and international level, impunity will prevail over accountability of suspects and justice for survivors. Mr Ngagbo emphasized that even though 17 years had passed since the genocide, he still had not obtained justice. Mr Kageruka stressed that it is imperative for national authorities engaged in accountability processes to have a greater understanding of the political and historical causes of the genocide, and that only through the active engagement of survivors in the process could justice for victims be achieved. Conference participants were encouraged to coordinate their efforts on a national and international level “in order to grant justice and prevent the perpetuation of impunity for the mass murderers of the genocide”.

“Southern Africa led the world in helping the ICTR prosecute Rwandan genocide suspects. It would be fitting if the region could leave a similar imprint on history, as the ICTR inches towards closure, by co-operating in the apprehension of suspects at large who have long been sought by the ICTR”

Rakiya Omaar,
African Rights

The presence of many genocide suspects throughout Southern Africa was highlighted by **Rakiya Omaar**, Executive Director of *African Rights*. According to Ms Omaar, Southern Africa is the region in Africa, outside of the Democratic Republic of the Congo (DRC), with the largest concentration of Rwandese refugees and asylum seekers. This can be partly explained by the proximity of Southern Africa to the DRC, which in 1994 witnessed the largest recorded flow of refugees from Rwanda. According to Ms Omaar, Zambia for instance, “has become home to over 5000 Rwandans, who overcame obstacles which often blight the lives of refugees. They have become successful businessmen, doctors, veterinarians, university lecturers and researchers, contributing to the communities and countries of which they are now an integral part.”

Ms Omaar said that it would be “incorrect and unfair to suggest that Rwandan communities in these countries consist largely of genocide suspects”. In fact, most Rwandan refugees are focused on rebuilding their

lives peacefully, laying a foundation for the future of their children and integrating into their host societies. But,

“[t]here are, nevertheless, very many prominent and well-known Rwandese genocide suspects in Southern Africa. They come from all walks of life, work in every field and are part of formidable networks that protect them from exposure.”

According to Ms Omaar, some suspects changed their names and identities, making it more difficult to track them down. Some have registered as Congolese and Burundians with the United Nations Office of the High Commissioner for Refugees (UNHCR), or with national refugee commissions, or have become naturalised, either through legitimate channels or through bribery and the use of fake documents.

Southern Africa’s status as a safe haven is also due to the ease with which genocide suspects are able to move into and within Southern Africa, according to Ms Omaar, highlighting “the regional character of the problem”.

Some Southern African countries acknowledge that genocide suspects living on their territory need to be held accountable to ensure respect for the rule of law. The President of Zambia, for instance, in 2010 assured his Rwandan counterpart that Zambia will assist efforts to identify and arrest suspects who may have fled to Zambia as refugees.⁸ Building on this assurance, *African Rights*, SALC and REDRESS in May 2010 sent a confidential report to the government of Zambia detailing the names and roles of 16 key suspects of the genocide who are believed to be living in Zambia. The government is yet to identify which steps it will take in regards to these and other potential suspects present in Zambia.⁹

In Malawi, the government has been under pressure from Rwanda to take action against genocide suspects known to conduct business within the country.¹⁰ In one case the suspect was able to flee Malawi and is now

⁸ AfrolNews, 19 January 2010, ‘Banda to help Rwanda arrest genocide suspects’, at <http://www.afrol.com/articles/35112>.

⁹ See REDRESS, ‘Rwandan Genocide Suspects in Zambia: A call for Justice’, 5 May 2010, at <http://www.redress.org/downloads/country-reports/Rwandan%20Genocide%20suspects%20hiding%20in%20Zambia%205%20May%202010.pdf>.

¹⁰ BBC News, Rwanda: African nations block genocide suspect hunt’, 27 November 2009, at <http://news.bbc.co.uk/1/hi/8382777.stm>.

believed to be in hiding in the US.¹¹ In another case, the suspect, Charles Bandora, was arrested following an extradition request from Rwanda and the issuance of an Interpol Red Notice.¹² However, he was released the following day without charge and able to leave Malawi. He was eventually arrested in Norway, where he is currently awaiting extradition to Rwanda.¹³ While these cases raise some doubts about the commitment of Malawi to hold suspects on its territory accountable, it also underlines the ease with which suspects can move in and out of Southern Africa, thereby underlining the crucial importance for regional and international collaboration.

This is particularly relevant in light of the reported 24 extradition requests and/or indictments sent by Rwandan authorities to their counterparts in Southern African countries in respect of genocide suspects residing on their territory, including four extradition requests sent to Malawian authorities, two indictments sent to Swaziland, 11 indictments sent to Mozambique, six indictments sent to Zambia and one to Zimbabwe.¹⁴

Protais Mpiranya, the former Rwandan presidential guard commander and a genocide suspect wanted by the ICTR, is currently believed to be in hiding in Zimbabwe where the government has faced accusations of harbouring fugitives.¹⁵ While the government denies that Mpiranya is in Zimbabwe, it has reportedly issued a domestic warrant for the arrest of Mpiranya¹⁶ and is reported to have started gathering evidence from refugees that may assist in locating other genocide suspects wanted by Rwanda.¹⁷

¹¹ Africa News, Malawi: Genocide suspect slips out to US, 20 January 2010, at http://www.africanews.com/site/Malawi_Genocide_suspect_slips_out_to_US/list_messages/29500

¹² Interpol Red Notice: Charles Bandora, [http://www.interpol.int/Wanted-Persons/\(wanted_id\)/2009-14798](http://www.interpol.int/Wanted-Persons/(wanted_id)/2009-14798); see also The New Times, 'Genocide fugitive arrested in Malawi', 7 January 2010, at <http://www.newtimes.co.rw/index.php?issue=14133&article=24560>.

¹³ The New Times, 'Rwanda: Norwegian court upholds decision to extradite genocide suspect', 22 September 2011, at <http://allafrica.com/stories/201109220276.html>.

¹⁴ The New Times, 'African prosecutors vow to track down genocide suspects', 15 August 2011, at <http://www.newtimes.co.rw/index.php?issue=14718&article=44169>.

¹⁵ Voice of America, 'Rwandan Genocide Tribunal Complains Zimbabwe Uncooperative on Fugitive', 15 June 2011, at <http://www.voanews.com/zimbabwe/news/Rwanda-Genocide-Tribunal-Complains-Zimbabwe-Uncooperative-on-Fugitive-123931354.html>; see also Hirondele News, 'ICTR/Mpiranya- Major Mpiranya's Evidence Preservation Hearings Commence, 24 October 2011, at <http://www.hirondellenews.com/content/view/14909/26/>.

¹⁶ Financial Gazette (Harare), 'Zimbabwe Police hunt genocide suspect', 18 August 2011, at <http://www.financialgazette.co.zw/top-stories/9511-zrp-hunts-genocide-suspect.html>

¹⁷ The Zimbabwean, 'Zim investigating Rwandan genocide fugitives', 12 July 2010, at <http://www.thezimbabwean.co.uk/news/32539/zim-investigating-rwandan-genocide-fugitives.html>; see also News Day, 'Repatriate genocide suspects Rwanda', 12 July 2011, at <http://www.newsday.co.zw/article/2011-07-12->

Following accusations of unwillingness to assist, Mozambique has pledged full cooperation with Rwandan efforts to apprehend genocide suspects, with the Foreign Minister stating that Mozambique has, “no interest whatsoever in hosting criminals”.¹⁸ These declarations have been followed by ministerial meetings in both Rwanda and Mozambique between justice ministers. According to news reports, Rwanda has since sent indictments in respect of 11 genocide suspects believed to be hiding in Mozambique.¹⁹

In addition to the 24 extraditions and/or indictments mentioned above, it has also been reported that Rwanda requested South Africa to extradite two genocide suspects allegedly living and working in South Africa.²⁰ Notwithstanding these extradition requests, there is no evidence that South Africa has taken any meaningful steps against these individuals or to cooperate with the Rwandan authorities.²¹

repatriate-genocide-suspects-rwanda.

¹⁸ BBC News, ‘Mozambique to help hunt Rwanda genocide suspects’ 17 December 2009, at <http://news.bbc.co.uk/1/hi/8418224.stm>

¹⁹ ‘African prosecutors vow to track down genocide suspects’ *supra* note 14.

²⁰ The Guardian, ‘Cape university keeps doctor named as killer’, 23 April 1999 at <http://www.guardian.co.uk/world/1999/apr/23/chrismcgreal>

²¹ The New Times, ‘Rwanda: Genocide suspects working in South African hospital’, 16 February 2010, at <http://allafrica.com/stories/201002160006.html>

3. Accountability of Genocide Suspects in Southern Africa

Following this overview of the situation of genocide suspects in Southern African countries, conference participants explored the role of these countries in securing accountability of suspects and justice for survivors.

“Neither the ICTR nor Rwanda can prosecute all the perpetrators of the genocide. The Completion Strategy of the ICTR requires the Tribunal to refer the cases of middle and low level perpetrators to Rwanda and other jurisdictions for trial. Clearly, a very tiny fraction of the suspects involved in the Rwandan genocide of 1994 will be processed at the international level. Most of the perpetrators of the genocide fled Rwanda after the genocide. Because of the many challenges involved, it is most unlikely that Rwanda will be able to apprehend and prosecute all those who fled and remain at large outside the country.”

Bongani Majola, Deputy Prosecutor, ICTR

Dumisa Ntsebeza, Advocate and former Commissioner of the South African Truth and Reconciliation Commission, in his key note speech compared the situation of South Africa, which in 1994 decided to confront decades of apartheid, with Rwanda, which also in 1994 experienced the horrors of the genocide and was confronted with hundreds of thousands of victims as well as perpetrators. He noted three key challenges facing countries emerging from widespread and systemic crime: (1) creating a post-conflict environment

conducive to sustained peace and stability, (2) securing justice and facilitating reconciliation and (3) maintaining the search for perpetrators and the quest for justice regardless of how long it takes. According to Mr Ntsebeza, the third challenge today was particularly relevant, given the continued impunity of a large number of genocide suspects.

While the accountability processes relating to Rwandan genocide suspects to date mainly focused on Rwanda and the ICTR, **Bongani Majola**, Deputy Prosecutor at the ICTR, stressed that, “most of the perpetrators of the genocide fled Rwanda after the genocide. Because of the many challenges involved, it is most unlikely that Rwanda will be able to apprehend and prosecute all those who fled and remain at large outside the country.”

Legal Framework to Prosecute Genocide Suspects in Southern Africa²²

International law permits, and at times obliges, all states to prosecute or extradite suspects of serious international crimes, including genocide, crimes against humanity, war crimes and torture, all of which were committed during the 1994 genocide.²³ **Chacha Murungu**, from the Centre for Human Rights at the University of Pretoria, said that in the context of the 1994 genocide to focus only on the crime of genocide would exclude other potential legal bases for domestic prosecution.

The most relevant treaties in relation to crimes under international law and that can be relied upon to some extent by Southern African countries in relation to Rwandan genocide suspects are:

²² This section does not purport to be an extensive overview of the legislative frameworks in selected Southern African countries, and is based on the information and legislation accessible at the time of writing and input from Conference speakers; see Chacha Murungu & Japhet Biegon (eds), *Prosecuting International Crimes in Africa*, Pretoria University Press, 2011. For an overview of international law and its application in Africa see Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, 2010.

²³ In addition to genocide, the ICTR has, in terms of Articles 4 – 8 of the Statute of the ICTR, jurisdiction to try crimes against humanity which include, amongst other acts, the act of torture and violations of common 3 of the Geneva Conventions and Additional Protocol II.

- The **Geneva Conventions** in relation to war crimes and their two additional protocols (“Geneva Conventions”)²⁴
- The Convention on the Prevention and Punishment of the Crime of **Genocide** (“Genocide Convention”)²⁵
- The **UN Convention against Torture** and other Cruel, Inhuman or Degrading Treatment or Punishment (“UN Convention against Torture”)²⁶
- The **Rome Statute** of the International Criminal Court (Rome Statute)²⁷
- The Pact on Security, Stability and Development in the Great Lakes Region (the **Great Lakes Pact**) and its Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity of the Great Lakes Pact²⁸

²⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950 (together the “Geneva Conventions”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, entered into force 7 December 1978

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, entered into force 12 January 1951.

²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987.

²⁷ Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force 1 July 2002.

²⁸ Pact on Security, Stability and Development in the Great Lakes Region, International Conference on the Great Lakes, 2006, signed at Nairobi, Kenya. Member states are Angola, Burundi, Central African Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia.

Monist (m)/ Dualist (d)	Geneva Conventions	Additional Protocols I (PI) and II (PII)	Genocide Convention	UN Convention Against Torture	Rome Statute	Great Lakes Pact	Domestic Legislation Incorporating International Treaty Obligations
Angola (m)	(a) 20/09/84	PI (a) 20/09/94 PII X	X	X	(s) 7/11/98	(s) 29/11/06	X
Botswana (d)	(a) 29/03/68	PI (a) 23/05/79 PII (a) 23/05/79	X	(s) 08/09/00 (r) 08/09/00	(s) 08/09/00 (r) 08/09/00	X	Geneva Conventions Act of 1970
Malawi (d)	(a) 05/01/68	PI (a) 01/10/91 PII (a) 01/10/91	X	(a) 11/06/96	(s) 03/03/99 (r) 16/08/00	X	Geneva Conventions Act of 1967
Mozambique (m)	(a) 14/03/83	PI (a) 14/04/83 PII (a) 12/11/02	(a) 18/04/83	(a) 14/09/99	(s) 28/12/00	X	X
						X	

South Africa (d)	(a) 31/03/52	PI (a) 21/11/95 PII (a) 21/11/95	(a) 10/12/98	(s) 29/01/93 (r) 12/12/98	(s) 17/07/98 (r) 21/11/00	Implementation of the Rome Statute of the International Criminal Court At 27 of 2002; Implimentation of the Geneva Conventions Bill.
Swaziland (d)	(a) 28/06/73	PI (a) 02/11/95 PII (a) 02/11/95	X	(a) 26/03/04	X	1959 Geneva Conventions Act (Colonial Territories Act)
Zambia (d)	a) 19/10/61	PI (a) 04/05/95 PII (a) 04/05/95	X	(a) 07/11/98	(s) 17/07/99 (r) 13/11/02	X
Zimbabwe (d)	(a) 07/03/83	PI (a) 19/10/92 PII (a) 19/10/92	(a) 13/05/91	X	(s) 17/07/98	X

Southern African Treaty Obligations: (s) Signature, (r) Ratifications; (a) Accession (Ratification Table).

States may use different approaches to incorporate their obligations under these treaties into domestic law, depending on their legal system in place. Traditionally, *monist* legal systems, such as **Angola** and **Mozambique**, do not require specific incorporation as international law enjoys priority over domestic law, and therefore theoretically is directly applicable. All other Southern African countries however are dualist legal systems which require specific implementation into domestic law of serious international crimes as well as specific jurisdictional rules allowing their authorities to exercise jurisdiction over these crimes. Yet even in monist legal systems there is a strong impetus for states to expressly include the relevant offences into domestic legislation, to ensure that treaty obligations are complied with and that courts are willing to exercise jurisdiction in line with those obligations. Where the crimes are not incorporated into domestic law, judges may lack sufficient knowledge to confidently and correctly apply international law. According to Mr Murungu, the distinction between monist and dualist systems is therefore not meaningful in the context of serious international crimes. The key factor for effective prosecutions of these crimes is the existence of a domestic legal framework providing national authorities with jurisdiction to investigate, prosecute and try serious international crimes.

In order to examine whether Southern African countries have the relevant legal framework to ensure that suspects of crimes under international law do not benefit from impunity within their territories, it is therefore important to determine whether these countries have ratified or acceded to the relevant treaties and incorporated their provisions into domestic legislation.

'Geneva Conventions': All Southern African countries have ratified the four Geneva Conventions which oblige state parties to "search for, prosecute and punish perpetrators" of grave breaches of the Conventions²⁹ "unless they hand over such persons for prosecution by another State Party."³⁰ The

²⁹ As defined in Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (Geneva Convention I), Article 51 of Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949 (Second Geneva Convention), Article 130 of Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention) and Article 147 of Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949 (Fourth Geneva Convention); grave breaches include wilful killing; torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; wilfully depriving a civilian of the rights of a fair and regular trial; and the unlawful confinement of a civilian.

³⁰ Article 51, First Geneva Convention, Article 52, Second Geneva Convention, Article 131, Third Geneva

Conventions also require state parties to implement national legislation to provide “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.”³¹ To date, **only four Southern African countries** - Malawi, Zimbabwe, Botswana and Swaziland - have incorporated the Conventions to some extent in their domestic legislation. Courts in these countries are therefore able to exercise universal jurisdiction over grave breaches of the Conventions, subject to various conditions such as the presence of the alleged perpetrator on the state’s territory, yet, no country to date has actually exercised universal jurisdiction in practice. According to **Ms Rosemary Kanyuka**, Director of Public Prosecutions of Malawi, a lack of experience in international criminal law currently prevents an exercise of such jurisdiction in Malawi.

‘Genocide Convention’: Only **three Southern African countries** - Mozambique, South Africa and Zimbabwe - ratified the Genocide Convention of 1948.³² **Mr Murungu** said that the Genocide Convention requests States Parties to enact, “in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.” Mr Murungu pointed out that in Southern Africa, only Malawi (even though it has not ratified the Convention), South Africa and Zimbabwe have some implementing legislation criminalizing genocide. Ms Kanyuka also pointed out that in 2011, Malawi’s criminal code was amended so as to provide for a definition of genocide in its Article 217A.³³

While it is well recognized that states may investigate and prosecute the crime of genocide on the basis of universal jurisdiction,³⁴ **Mr Christopher**

Convention, Article 148, Fourth Geneva Convention.

³¹ The common first paragraph of Articles 49, 50, 129 and 146 of the four Geneva Conventions: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”.

³² See Ratification Table, pp. 24-25 above.

³³ Penal Code (Amendment) Act No. 1 of 2011, Malawi. This amendment provides content to the prohibition of genocide provided for in Article 17 of the Constitution of Malawi.

³⁴ Extensive literature covers this issue. See for example: Kenneth Randall, ‘Universal Jurisdiction under International Law’ (1987-1988) 66 Tex.L.Rev 785, pp.834-83; Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 Va. J. Int’ L 81; S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, University of Pennsylvania Press, 2006; L. Reydams *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2002; W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, 2006. See also Amnesty International “Universal Jurisdiction: A

Gevers, from the University of KwaZulu-Natal, highlighted that there is some debate as to whether customary international law imposes an obligation upon states to prosecute or extradite suspects of genocide. Mr Gevers said that “although Article I provides for the obligation to prevent and punish genocide, the exact contours of that obligation are highly contested.” Citing the International Court of Justice’s (ICJ) decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Genocide Case) he pointed out that the ICJ interpreted Article VI of the Genocide Convention “to mean that an obligation exists on the territorial state only – i.e. the state on whose territory the genocide took place – to ‘institute and exercise territorial criminal jurisdiction’”³⁵

However, as Mr Gevers pointed out, the ICJ in the ‘Genocide Case’ expressly limited its findings to Article VI of the Genocide Convention, thereby leaving open “the possibility for an *aut dedere aut judicare* obligation in respect of genocide under international customary law.”

The view that an *erga omnes* obligation – an obligation for all states – exists to either prosecute or extradite suspects of genocide (or crimes against humanity) is also supported in the discussions at the International Law Commission on the topic of the obligation to extradite or prosecute, where it has been reported that:

“A large and growing number of scholars joins the opinion supporting the concept of an international legal obligation *aut dedere aut judicare* as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it concerns certain categories of crimes.”³⁶

Accordingly, there is a growing recognition that **international customary law imposes an obligation on states to prosecute suspects of genocide** (and crimes against humanity) even on the basis of universal jurisdiction,

Preliminary Survey of Legislation around the World”, October 2011, available at <http://www.amnesty.org/en/library/info/IOR53/004/2011/en>.

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, para. 442. However, the ICJ added that: ‘while [article VI] certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so’.

³⁶ International Law Commission, Preliminary Report on the Obligation to Extradite or Prosecute (“*aut dedere aut judicare*”), UN Doc. A/CN.4/571, 7 June 2006, at para.40.

and irrespective of whether an extradition request has been made. Where such a request has been made, and is denied, the obligation to prosecute applies.

Mr Murungu said that criminal (procedural) codes in South Africa and Zimbabwe provide for universal jurisdiction over genocide committed after the coming into force of the respective acts in 2000 and 2002 respectively.³⁷ They are not, therefore, applicable in the context of the 1994 genocide in Rwanda.³⁸ In Malawi, Ms Kanyuka mentioned that the new Article 217A of its criminal code provides that “*a person may be tried and punished for the offence of genocide whether committed within or outside the Republic.*” However, due to the relatively recent amendment of the code, this provision has not yet been invoked by courts in Malawi and, in any case, could not be applied to the 1994 genocide in Rwanda as it does not have retroactive effect.³⁹

The other Southern African countries have done very little to ensure that their international obligations in regards to the crime of genocide are domestically enforceable and Mr Murungu concluded that to date, no Southern African country appears to have legislation in place expressly providing for universal jurisdiction over genocide committed in 1994.

UN Convention against Torture: With the exception of Zimbabwe and Angola, all other Southern African countries ratified the UN Convention against Torture, which imposes an obligation on state parties to implement the Convention into domestic law and to either prosecute or extradite an alleged torturer present on the State Party’s territory.⁴⁰ While torture can also constitute a war crime and/or a crime against humanity, thereby giving rise to universal jurisdiction, individual acts of torture are therefore also recognized as obliging states to extradite or prosecute alleged torturers found on their territory, including on the basis of universal jurisdiction. In the context of the 1994 genocide in Rwanda, the UN Convention against

³⁷ Genocide Act 9/2000, Zimbabwe; Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, South Africa.

³⁸ However, given the lack of cases, this view has not been tested by the Courts in either country. Both States have ratified the International Covenant on Civil and Political Rights which provides in Art. 15(2) that: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.

³⁹ Ibid.

⁴⁰ Articles 5(2) and 7(1) of the UN Convention against Torture.

Torture can therefore serve as an additional basis for jurisdiction in regards to individual acts of torture, in particular in countries where no other basis for universal jurisdiction exists under domestic law.⁴¹

However, none of the Southern African countries that ratified the UN Convention against Torture proceeded to incorporate its provisions into domestic legislation.⁴² Furthermore, all Southern African countries which are state parties to the Convention, ratified the Convention only after 1994. Any implementing legislation giving effect to the provisions of the Convention would therefore need to provide for retroactive universal jurisdiction over torture so as to ensure that domestic authorities can prosecute torture committed before the ratification of the convention.⁴³

Rome Statute of the ICC: To date, **Botswana, South Africa, Malawi and Zambia** are the only Southern African countries that have ratified the Rome Statute of the ICC.⁴⁴ The Rome Statute, which came into force on 1 July 2002, emphasizes that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Article 5 sets out the jurisdiction of the ICC over “the most serious crimes of concern to the international community as a whole”, namely genocide, crimes against humanity, war crimes and the crime of aggression.⁴⁵ As **Mr Murungu** pointed out, however, the Rome Statute does not apply directly to the genocide committed in Rwanda in 1994, as it only came into force in 2002. Yet as Mr Murungu emphasized, the ratification of the Rome Statute could provide a strong impetus for state parties to criminalize the offences of the Statute in their domestic legislation in order to be in a position to carry out investigations and, where necessary, domestic prosecutions of such crimes.⁴⁶

When incorporating the Rome Statute into domestic legislation states should consider introducing a provision enabling its domestic authorities

⁴¹ See for instance the judgment by a District Court in The Netherlands, finding Joseph Mpambara guilty of torture committed during the 1994 genocide in Rwanda. The judgment was appealed by both parties, and Joseph Mpambara was convicted for war crimes by the Court of Appeal and sentenced to life imprisonment.

⁴² See Ratification Table, pp. 24-25 above.

⁴³ See note 38, above. See, also, further below on the need for retroactive universal jurisdiction, pp. 32-33.

⁴⁴ Mozambique, Angola and Zimbabwe have signed the Statute but have yet to ratify it. See Ratification Table, pp. 24-25 above.

⁴⁵ Article 5 of the Rome Statute.

⁴⁶ Article 17 of the Rome Statute.

to also exercise retroactive universal jurisdiction over these offences in accordance with international customary law and in doing so ensuring jurisdiction over offences committed during the 1994 genocide.⁴⁷

The Great Lakes Pact: Mr Murungu noted that the only **regional** treaty imposing obligations in regards to serious international crimes is the Great Lakes Pact, and in particular its *Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity of the Great Lakes Pact* ('International Crimes Protocol'), which came into force in June 2008. Similar to the Rome Statute, the Protocol emphasizes in its Preamble that it is the duty of each member state to exercise its criminal jurisdiction over perpetrators of serious international crimes. Member states are obliged to "domesticate and enforce" the provisions of the Protocol and to "provide for effective penalties for persons guilty of the crime of genocide, war crimes and crimes against humanity."⁴⁸ Article 10 provides that member states⁴⁹ are obliged to exercise jurisdiction over such crimes not only on common bases of jurisdiction, such as territoriality and nationality, but also where the alleged perpetrator is 'ordinarily resident' on their territory. This somewhat limited form of extraterritorial jurisdiction is complemented by Article 14(2) of the Protocol, stating that the Protocol itself can act as a basis for extradition in the absence of a bilateral treaty, subject to the conditions enumerated in Article 15.⁵⁰ Article 13 further obliges states to "assist one another through cooperation of their respective institutions with a view to preventing, detecting and punishing perpetrators of genocide, war crimes and crimes against humanity."⁵¹

Only **Angola** and **Zambia** are state parties to the Great Lakes Pact and therefore bound by its provisions.⁵² As with the Rome Statute, the coming into force of the Protocol in 2008 means that its provisions may not apply directly in the context of the genocide in Rwanda, unless interpreted

⁴⁷ See note 38 above. See, also, further below on the need for retroactive universal jurisdiction, pp. 32-33.

⁴⁸ International Crimes Protocol, Article 9(1).

⁴⁹ Angola; Burundi; Central African Republic; Congo; Democratic Republic of Congo; Kenya; Rwanda; Sudan; Tanzania; Uganda; and Zambia

⁵⁰ See further below, Extradition as a Viable Alternative to Universal Jurisdiction Prosecutions, pp. 40-45 below.

⁵¹ See further Deirdre Clancy, "Lessons from a State of Flux: The International Justice Laboratory of the Great Lakes Pact", p.206, 2011, in Lutz Oette (ed) *Criminal Law Reform and Transitional Justice Human Rights Perspectives for Sudan*.

⁵² For other Southern African countries to join the Pact, the Pact would need to be amended.

to provide for retroactive application, but may provide an incentive for Angola and Zambia to implement relevant domestic legislation and ensure compliance with the Protocol's provisions.

An **analysis of the current legal framework** in place in Southern African states suggests that the legal frameworks in the majority of countries should be strengthened in order to confirm that states can prosecute suspects of international crimes committed in Rwanda during the 1994 genocide on the basis of universal jurisdiction. While all countries have ratified the four Geneva Conventions, ratification in regards to other treaties, in particular the Genocide Convention is minimal. Even where treaties are ratified, most often no specific domestic legislation incorporating treaty obligations into domestic law exists. Where domestic legislation provides for universal jurisdiction over serious international crimes such as genocide, as for instance in South Africa, Zimbabwe and Malawi, such jurisdiction is not **retroactive** and arguably does not extend to crimes committed in 1994.⁵³ Even in monist countries, a lack of awareness of the presence of suspects, combined with a lack of experience in international criminal law and reluctance to rely on international law without implementing legislation are likely to prevent the exercise of universal jurisdiction on a purely international customary law basis.

Mr Murungu proposed that as a first step, Southern African states need to **reform their domestic legislation** to comply with their international obligations and ensure accountability of suspects found on their territories. Such reform would include incorporating international crimes into domestic legislation in accordance with relevant treaty definitions. It will be crucial for any law reform efforts to ensure that national authorities and courts can exercise universal jurisdiction over international crimes retroactively. Such retroactive jurisdiction is in line with international law in regards to crimes recognized at the time of commission as crimes under international law.⁵⁴ The *Canadian War Crimes and Crimes Against Humanity Act* of 2000, for

⁵³ See note 38 above.

⁵⁴ See the commentary to the revised Commonwealth Model Law on the International Criminal Court Statute. The Commentary thereto states, "As a general principle, genocide, crimes against humanity, and war crimes would fall within the category of crimes described in paragraph 2 of Article 15 though there is some doubt as to whether all of the conduct included in the definition of crimes against humanity in the Rome Statute was recognised at the time of its adoption (1998) as criminal under customary international law. Subject to arguments on this point, retrospective jurisdiction for these crimes would be permissible." Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of The International Criminal Court (April 2011), para. 17, available at [http://www.thecommonwealth.org/files/238381/FileName/LMM\(11\)17PICCStatuteandImplementationoftheGenevaConventions.pdf](http://www.thecommonwealth.org/files/238381/FileName/LMM(11)17PICCStatuteandImplementationoftheGenevaConventions.pdf).

instance, allows for retrospective application of universal jurisdiction over genocide, crimes against humanity and war crimes in accordance with

“customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”⁵⁵

The Act was used successfully to prosecute – on the basis of universal jurisdiction - Desire Munyaneza for crimes committed during the 1994 genocide.⁵⁶

Civil society will play a key role in advocating for such law reform to take place. As outlined by Mr Murungu, and during subsequent discussion, the ratification and implementation of the Rome Statute in Southern African states, should be used as a stimulus for such law reform.⁵⁷

“[S]tates are at liberty to enact laws to punish crimes committed in the past.”

Chacha Murungu, Centre for Human Rights, University of Pretoria

⁵⁵ See Crimes Against Humanity and War Crimes Act (2000, c.24), Article 6 (3) available at <http://www.iccnw.org/documents/Canada.CrAgH.WcrEng.pdf>; similar law reform was undertaken in the United Kingdom, where the International Criminal Court Act of 2001 was amended specifically in order to provide for retrospective universal jurisdiction over genocide, war crimes and crimes against humanity committed before the coming into force of the ICC Act of 2001, see *Ministry of Justice Circular 2010/06* available at <http://www.justice.gov.uk/publications/docs/circular-06-2010-coroners-justice-act-provisions.pdf> at paras 9-16. The amendments were brought about by the Coroners and Justice Act 2009. Other countries that currently provide for such retrospective legislation include Norway, New Zealand and Senegal, while similar changes are currently being discussed in The Netherlands.

⁵⁶ Superior Court, Criminal Division, Province of Quebec, District of Montreal, Prosecutor v Desire Munyaneza, No. 500-73-002500-052, 22 May 2009, available at http://www.haguejusticeportal.net/Docs/NLP/Canada/Munyaneza_Judgement_22-5-2009_EN.pdf

⁵⁷ See in this regard *Closing the Impunity Gap: UK Law on Genocide and Related Crimes*, a report prepared by the Human Rights Joint Committee, available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/15302.htm>. See also R Cormacín, N Donavon, A McDonald, B Meyersfeld *Suspected War Criminals and Genocidaires in the UK – Proposals to strengthen our Law* prepared by the Aegis Trust, available at http://www.aegistrust.org/images/reports_briefings_2009/suspected_war_criminals_and_genocidaires_in_the_uk.pdf.

Capacity of Southern African States to Detect, Investigate and Prosecute Genocide Suspects

While there is an obvious need for further ratification of relevant treaties by Southern African countries as well as relevant law reform, these steps alone do not give effect to actual state compliance with international law obligations. The ability of Southern Africa to fulfil its role in ensuring accountability for the suspects of the 1994 genocide through domestic prosecutions will also greatly depend on states' capacity and willingness to prosecute crimes under international law.

Ottilia Maunganidze of the Institute for Security Studies said that investigating and prosecuting serious international crimes on any basis of jurisdiction can be costly, time consuming and complex, requiring a significant amount of experience and expertise of all authorities involved. However, this is true of most 'cross-border' crimes such as drug trafficking and terrorism. Political willingness of governments is needed to provide the necessary resources and to create an "environment that is conducive to successful prosecutions." In Southern Africa, Ms Maunganidze said that overburdened and under resourced judicial systems, in combination with current skill shortages make any prosecution of serious international crimes very challenging. According to Ms Maunganidze, the political will to make these types of crimes a priority does not currently exist among most Southern African countries. The notable exception might be South Africa, where specialized serious international crimes units were established to investigate and prosecute crimes contemplated in the ICC Act.⁵⁸ To date, South Africa is the only country in the region with a specialized prosecuting and investigating unit.⁵⁹

⁵⁸ Within South Africa's National Prosecuting Authority the Priority Crimes Investigation Unit (PCLU) is responsible for the prosecution of crimes contemplated in the Rome Statute. In the South African Police Service, the Directorate of Priority Crimes Investigation (DPCI) is responsible for the investigation of national priority crimes which include, amongst others, genocide, crimes against humanity and war crimes.

⁵⁹ Similar units exist in Europe in Belgium, Sweden, Norway, The Netherlands, Germany, France and the United Kingdom, see REDRESS and FIDH, "Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialized War Crimes Units", December 2010, at http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf.

Siri Frigaard of the National Authority for the Prosecution of Serious Crimes in Norway said that the challenges facing Southern Africa in relation to the prosecution of genocide suspects are not unique to the region. While the available resources may differ, Norway struggled against similar problems and a lack of political willingness to make these types of crimes a priority. However, through civil society and media campaigns alerting Norwegian society about the presence of war crimes suspects in Norway, political will was created that prompted the Norwegian government to take action against suspects of crimes under international law present in Norway. Over the past 6 years, resources have been allocated to establish specialized ‘war crimes units’ within the Norwegian police and prosecution services, creating the expertise of relevant officials necessary for investigating and prosecuting such suspects. Ms Frigaard described the past years as “very much a learning process, finding out what works and what does not.” However, it is a matter of selecting the right first case to start with, and to then proceed with it. According to Ms Frigaard:

“If a country shows that they are capable and willing to prosecute, the resources will follow. The resultant media coverage will also send out the message that Southern Africa is not a safe haven. It takes one or two cases to earn the reputation as a country that will not tolerate the presence of international criminals.”

Actual cases will also help to identify existing practical and legislative weaknesses that prevent a country from prosecuting suspects residing on its territory. Rather than debating potential difficulties that may arise, and which become magnified the more they are being discussed, Ms Frigaard stressed that countries should therefore start a case to see whether the concerns are confirmed or not.

“If a country shows that they are capable and willing to prosecute, the resources will follow. The resultant media coverage will also send out the message that Southern Africa is not a safe haven. It takes one or two cases to earn the reputation as a country that will not tolerate the presence of international criminals”

Siri Frigaard,
*National Authority for the
Prosecution of Serious
Crimes, Norway*

In subsequent discussions, **Ms Omaar** highlighted that it is important to use tools available, such as the media, to ensure that suspects do not benefit from being in third countries where they know they will never be held to account. Mr Murungu said that even poorer countries can do something, as law reform does not cost much money. Because Southern African states face the dual challenge of legislative and capacity restraints, participants agreed that legislative reform must occur simultaneously with capacity building initiatives to allow for the effective and credible investigation and prosecution of international crimes.

The Benefits of (Regional) State Cooperation and Mutual Legal Assistance

“Rwanda is aware of the limitations of various kinds that respective governments face in that regard. But Rwanda is ready to work with you and through other friends and well wishers to cooperate in every way possible to ensure that genocide suspects in this region are held accountable. The impunity gap must be closed and Rwanda will spare no effort to provide access, information and assistance as required to ensure that this impunity gap is closed forever. It is the only guarantee that genocide will not take place in any other country on the African continent.”

Tharcisse Karugarama,
*Minister for Justice/Attorney
General of Rwanda*

Ms Frigaard emphasized the importance of mutual assistance in efforts designed to hold suspects accountable. Such assistance could not only include countries of the region, but also European countries and others with experience in holding genocide suspects accountable. Ms Frigaard encouraged countries of the region to conclude **cooperation agreements** with Rwanda which, in the case of Norway, greatly facilitated investigations and prosecutions.

Other assistance can be provided by the ICTR. Recognising that there might be capacity issues within the region, **Mr Bongani Majola** pointed out that the ICTR, for instance, has the largest electronic database of evidence on the genocide, and

that the database has become a crucial tool to support national investigators and prosecutors worldwide. In the discussions that followed, it was also emphasized that the ICTR as well as the Special Court for Sierra Leone (SCSL) has personnel with experience and skills in the investigation and prosecution of crimes under international law. This personnel should be used to assist countries with less experience, for instance through training sessions or even temporarily placing former ICTR and/or SCSL staff into national police and prosecution services.

Mr Tharcisse Karugarama, Minister of Justice and Attorney General of Rwanda, stressed that the fight against impunity for genocide and related crimes is a **shared responsibility**, which requires that all states subscribe to a culture of cooperation with a view to “bringing to justice perpetrators of genocide in our respective borders” and that Rwanda “will spare no effort to provide access, information and assistance as required to ensure that this impunity gap is closed forever.”

Ms **Chantal Joubert** from the Ministry of Security and Justice in The Netherlands said that while the ICTR, established by all states, could try those most responsible, all states must equally work together to complement the efforts of the Tribunal.

“International justice is the primary responsibility of states. This is an important step, because it reminds us all that justice begins at home. With this realization comes the acknowledgment that doing justice at home cannot be achieved effectively without states assisting one another.”

From the perspective of The Netherlands, where a number of perpetrators of war crimes and torture committed in Rwanda, Afghanistan, the former Zaire (today’s DRC) and elsewhere were brought to justice on the basis of extraterritorial jurisdiction, any successful investigation and prosecution of these types of crimes depends on mutual legal assistance in criminal

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Chantal Joubert, Ministry of Justice, The Netherlands

matters. Suspects, witnesses and evidence will often be found in several states, requiring the cooperation of those states in one case. International cooperation is therefore paramount for the effective prosecution of crimes under international law. Yet Dutch investigators and prosecutors often realize that mutual legal assistance and judicial cooperation in international crimes cases is cumbersome and time consuming. Recognising that the existing international legal framework for extradition and mutual legal assistance in these types of cases is somewhat underdeveloped, The Netherlands, together with other like-minded states is taking the initiative to enhance the international legal framework for cooperation in criminal matters.⁶⁰

Mr Murtaza Jaffer from the OTP of the ICTR similarly advocated for more cooperation and assistance. According to Mr Jaffer, **regional solutions** must be identified that address the current situation of impunity, and take into account the different realities of the region. Such regional solutions should include the experiences of Rwanda in prosecuting such cases and the capacities at the ICTR (as well as the SCSL) and focus on cross-border efforts. According to Mr Jaffer, only a regional approach will help to address the capacity issues that currently inhibit most countries in Southern Africa from ensuring that suspects of the crimes committed in Rwanda in 1994 are held accountable. Effective information sharing and development of best practices can only be achieved through an increase of regional cooperation. Mr Jaffer encouraged participants to seek assistance from the ICTR as it is ideally placed to initiate regional cooperation, bringing practitioners together for training and to “address challenges, exchange ideas, experiences and best practices and to explore the role of national prosecuting authorities and civil society.”⁶¹

The Great Lakes Pact offers another possibility for regional cooperation and could be seen as an incentive for regional solutions to challenges experienced throughout Africa. Its International Crimes Protocol establishes a Committee that is tasked to handle “important activities in the region” in relation to the crimes of genocide, crimes against humanity and war crimes. The Committee, currently chaired by Rwanda, will also

⁶⁰ For example, on 22 November 2011, The Netherlands, in collaboration with Belgium and Slovenia, organized an expert meeting on “A Legal Gap? Getting evidence where it can be found: Investigating and prosecuting international crimes”, to explore possibilities to enhance the current legal framework for cooperation.

⁶¹ See also ICTR, ‘Briefing Paper, Forum Between Office of The Prosecutors of UN Ad Hoc Criminal Tribunals and National Prosecuting Authorities (26-28 November 2008)’, at <http://www.unict.org/Portals/0/English/News/events/Nov2008/EN/briefing.pdf>.

enable representatives of member states to meet and exchange information, including in regards to the prosecution and extradition of suspects of such crimes. At a meeting of the Committee in November 2011, member states adopted a resolution to “strengthen judicial cooperation with a view to prevent, detect and punish perpetrators and to design focal points for genocide prevention at the local, national and regional levels.”⁶² As such, the Committee can play a crucial role to ensure that states are aware of the presence of genocide suspects on their respective territories and facilitate the exchange of information necessary to support investigations and, where necessary, prosecutions and/or extraditions of such suspects.

The proposed extension of the **African Court on Human and Peoples’ Rights** jurisdiction to adjudicate international crimes cases was also mentioned as potentially providing an additional avenue to share the burden of prosecuting genocide suspects, though in light of current budget constraints, serious concerns persist about its capacity to do so. Similarly, regional courts such as for instance the East African Court of Justice could play a role in a regional approach within Eastern Africa to complement efforts in Rwanda and assist countries in the region to hold suspects to account.

The **African Prosecutor’s Association** (“APA”) at its 6th annual meeting in Kigali on 12 August 2011 decided to prioritise networking and cross border cooperation through the creation of a “Sub-Regional Network of Prosecutors” to enhance cooperation, assistance and experience/information sharing. Such a Network will also, according to the APA’s final communiqué, include “exchange programmes between countries on best practices.”⁶³ As such, the APA and/or its sub-regional networks could serve as a platform for prosecutors to meet and exchange best practices in the detection, investigation and prosecution of serious international crimes. A similar network exists in Europe, where the EU network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (“Genocide Network”) was established

⁶² See Radio Netherlands Worldwide, ‘Rwanda will chair War Crimes Regional Committee’, 16 November 2011, at <http://www.rnw.nl/international-justice/article/rwanda-will-chair-war-crimes-regional-committee>; <http://www.cnl.gov.rw/news/11/11/13/rwanda-chosen-lead-regional-committee-prevention-genocide-war-crimes-crimes-against-hu>.

⁶³ African Prosecutor’s Association, Final Communiqué, 12 August 2011, at http://www.apaconference.org/index.php?option=com_content&view=article&id=17&Itemid=99.

in 2002.⁶⁴ The Genocide Network meets twice a year, bringing together police investigators, prosecutors, representatives from the Ministries of Justice of the 27 EU member states as well as experts from civil society. It provides an opportunity for practitioners to meet and discuss challenges to prosecutions and explore possible solutions. The most recent meeting of the Network, for instance, focused on the challenges to ensure victim and witness protection in the investigation and prosecution of crimes under international law.⁶⁵

On a global level, Interpol is assisting countries to disseminate information about fugitives and established a specific **Rwandan Genocide Fugitives Project** in collaboration with the Rwandan prosecution services and the ICTR, specifically with a view to targeting the “outstanding fugitives wanted by these two bodies.” Since its creation in 2007, 30 fugitives who were subject of an Interpol Red Notice have been arrested in African as well as European countries. Interpol also provides training to investigators in the investigation of these crimes, and as such can be a crucial partner for Southern Africa.⁶⁶

Professor Alex Obote Odora, former Chief of Appeals at the OTP of the ICTR, pointed out that in reality, many countries do not have the financial resources to implement their obligations and therefore will depend on assistance from elsewhere as well as on regional cooperation. This, according to Mr Obote Odora, is particularly relevant as many suspects are very resourceful and aware of the weaknesses of certain systems.

Extradition as a Viable Alternative to Universal Jurisdiction Prosecutions?

To date, none of the Rwandan suspects known to be living in Southern Africa have been investigated or prosecuted, and yet they have also not been extradited to Rwanda, despite requests for their extradition by the

⁶⁴ Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, 2002/494/JHA, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0494:EN:NOT>.

⁶⁵ See for instance Council of the European Union, Conclusions of the 11th meeting of the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes, 24 November 2011, at <http://register.consilium.europa.eu/pdf/en/11/st17/st17125.en11.pdf>.

⁶⁶ Interpol at <http://www.interpol.int/Crime-areas/Fugitive-investigations/War-crimes/INTERPOL's-activities>

Rwandan government.⁶⁷ Indeed, it appears that no court within Southern Africa has to date made a finding on a request for extradition of a genocide suspect, and that such requests from Rwanda have neither been denied, nor approved. No practice therefore exists to illustrate how national authorities and, in particular, courts, deal with such requests from Rwanda. The lack of judicial action suggests that the requests are either handled solely on a political level, or that they are entirely ignored.

Underlying extradition is the **principle of reciprocity** in that two or more states agree to cooperate with one another in relation to sought after individuals accused of certain crimes. Building on the principle of reciprocity, a number of Southern African countries make the extradition of a suspect contingent on the existence of a bilateral extradition treaty with Rwanda. Government officials from **Mozambique, Malawi and Swaziland** who participated in the Conference indicated that their countries did not have such a treaty and could therefore not extradite genocide suspects to Rwanda. In such cases, the only opportunities for accountability are to bring the individuals to account before these countries' national courts on the basis of universal jurisdiction or to extradite to another country willing to undertake a prosecution and with which the country has an extradition treaty.

South Africa is another example of a country that does not have an extradition treaty with Rwanda, yet its Extradition Act permits extradition in the absence of a specific treaty, subject to the approval of the president.⁶⁸ No such extradition has yet been approved in the context of a Rwandan genocide suspect. According to **Mr Karugarama**, where the Rwandan government seeks extradition of a specific suspect from a Southern African country that requires a bilateral, extradition treaty, a draft bilateral extradition treaty accompanies the request for extradition. However, this has not yet resulted in the conclusion of an actual bilateral extradition treaty.

Mr Karugarama pointed out that some countries may also rely on

⁶⁷ According to the New Times, the Head of Rwanda's Fugitives Tracking Unit has sent 110 indictments and appeals for arrest to several African and European countries. This was confirmed in an interview with the Head of the Unit by African Rights and REDRESS. According to the New Times, these include 11 indictments sent to Mozambique, four to Malawi, six to Zambia, two to Swaziland and one to Zimbabwe, New Times, 'African Prosecutors pledge to track down Genocide Fugitives', *supra* note 14.

⁶⁸ Extradition Act 67 of 1992, section 3(2) of which provides: "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

multilateral agreements, such as the London Scheme for Extradition Within the Commonwealth (“the London Scheme”). This agreement is particularly important for the extradition and prosecution of Rwandan genocide suspects because, with the exception of Angola, all Southern African countries are members of the Commonwealth and Rwanda joined the Commonwealth in 2009.

The London Scheme sets out the provisions governing the extradition of a person from one Commonwealth country to another.⁶⁹ A person can only be extradited for an extraditable offence,⁷⁰ which for the purposes of the scheme is an offence that is punishable in the requesting and requested country by imprisonment of two years or more.⁷¹ It does not matter if the elements that constitute the offence are the same in the requested and the requesting countries.⁷² An offence is also considered an extradition offence even if it was committed outside the territory of the requesting country, so long as extradition for such offences is permitted by the requested country.⁷³

However, the London Scheme also provides for numerous exceptions. For instance, the requested state (the state where the suspect is residing) can refuse extradition if the offence was committed outside the requesting state (the state asking for extradition) or the requested country, and the laws of the requested country do not allow it to have jurisdiction over an offence “committed outside its territory in comparable circumstances.”⁷⁴ This exception is unlikely to lead to a rejection of an extradition request for a genocide suspect from Rwanda, given that the genocide was committed in Rwanda, however it might be invoked where a third country asks for the extradition of a genocide suspect under the London Scheme. Finally, the requested country can refuse extradition if the requesting country “has the death penalty for the extradition offence.”⁷⁵ In Rwanda’s case this will not be an impediment for the extradition of suspected génocidaires, since it has

⁶⁹ The London Scheme for Extradition Within the Commonwealth, 2002, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf, Article 1(3).

⁷⁰ *Ibid.*, Article 2(1).

⁷¹ *Ibid.*, Article 2(2).

⁷² *Ibid.*, Article 2(3)(b).

⁷³ *Ibid.*, Article 2(4)(b).

⁷⁴ *Ibid.*, Article 14(b).

⁷⁵ *Ibid.*, Article 15(2).

now abolished the death penalty.⁷⁶

According to **Mr Karugarama**, the London Scheme could be considered for future extradition requests. Additionally, as highlighted by Mr Murungu and as outlined above, the International Crimes Protocol of the Great Lakes Pact also has an extradition mechanism. It provides that in the case that two countries have not completed a formal extradition agreement, then a “Member State may consider this Protocol as a legal basis for requesting extradition, as long as the crimes regarding which extradition is sought are within the field of application of this Protocol.”⁷⁷

Extradition under the Protocol is subject to a number of conditions as enshrined in Article 15, including double criminality, meaning that the crime allegedly committed by the suspect wanted for extradition must constitute a crime under both the law of the requesting and the requested state. State parties are furthermore not obliged to extradite their own nationals. However, where such a request is made and refused, state parties must submit an extradition request “to their competent authorities with a view to commence prosecution against such a national.”

The Protocol, depending on how its applicability is interpreted, may therefore also serve as a basis for an extradition treaty in regards to Rwandan genocide suspects present in Angola and Zambia in accordance with Article 14(2) and the conditions enumerated in Article 15.⁷⁸

However, even where a basis for extradition exists in the form of a bilateral or a multilateral treaty, states may reject an extradition request from Rwanda because of concerns that the suspect’s human rights will not be adequately protected in Rwanda. International human rights law regulates extradition, providing that the requested state can be held responsible for a foreseeable human rights violation of the suspect’s rights in the requesting state.⁷⁹

⁷⁶ See discussion below by Sam Rugege, Deputy Chief Justice of Rwanda, Legislative Reform in Rwanda in the context of 11bis Transfers and the Extradition of Suspects, pp. 60-64.

⁷⁷ Article 14(2) of the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity of the Great Lakes Pact.

⁷⁸ For other potential bases for extradition within multilateral treaties such as the Geneva Conventions, the Genocide Convention and the UN Convention against Torture; see REDRESS and *African Rights*, “The Extradition of Rwandan genocide suspects from Europe to Rwanda” (“REDRESS and *African Rights* Extradition Report”), pp.9-10 available at http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf.

⁷⁹ The internationally accepted principle of non-refoulement is recognised as a non-derogable principle. It prohibits the sending, expelling, returning or otherwise transferring of individuals to territories which expose them to specified forms of threat or persecution regardless of the nature of the activities the person

All Southern African countries have ratified the International Covenant on Civil and Political Rights (ICCPR)⁸⁰ as well as the African Charter on Human and Peoples' Rights (ACHPR).⁸¹ As such, they are under an obligation to ensure that any extradition complies with their obligations under the ICCPR and Charter respectively, including the right of the suspect to a fair trial and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.⁸² This is particularly relevant as concerns about Rwanda's ability to adequately protect these rights have led to a series of court decisions in Europe as well as in Canada denying the extradition of suspects to Rwanda.⁸³

Any extradition request from Rwanda will therefore need to be scrutinized on a case by case basis to assess whether the suspect's rights will be adequately protected if extradited to Rwanda. The European Court of Human Rights (ECtHR), on 27 October 2011, in a landmark decision allowed an extradition of a genocide suspect from Sweden to Rwanda to go ahead, after having determined that his extradition would not expose him to a real risk of ill-treatment and a violation his/her rights to a fair trial.⁸⁴

concerned may have been engaged in, or their immigration status, and relates not only to the country to which the person faces immediate return but extends to any other country where he runs a risk of being expelled or returned. See also note 82 below.

⁸⁰ International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976; for a list of countries that ratified the ICCPR, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁸¹ African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986; for a list of countries that ratified the African Charter, see http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

⁸² The principle of non-refoulement is recognised in a number of international treaties: most commonly in treaties dealing with the protection of refugees, for example, the United Nations Convention Relating to the Status of Refugees, 1951 and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969. It is also recognised outside the context of refugee protection in Art 3(1) of the UN Convention against Torture. Extensive case law also exists in this regard. See for example South African court decisions in *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) and *Tantoush v the Refugee Appeal Board & Others* 2008 (1) SA 232 (T). See also the jurisprudence of the European Court of Human Rights in *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; *Ahmed v. Austria*, Judgment of 7 December 1996, 1996-VI, no. 26; *Scott v. Spain* Judgment of 18 December 1996, 1996-VI, no. 27; *Boujlifa v. France*, Judgment of 21 October 1997, 1997-VI, no. 54; *D. V. The United Kingdom* 02 May 1997, 1997-III, no. 37; *Paez v. Sweden* Judgment of 30 October 1997, 1997-VII, no. 56.

⁸³ Courts in France, Germany, Finland, the UK, Switzerland and Canada have denied extradition of suspects to Rwanda, see REDRESS and *African Rights* Extradition Report, pp.18-22; see also Justice Updated, 'ECHR: Ahorugeze: Court Gives Green Light to an Extradition to Rwanda', 9 November 2011, at <http://justiceupdated.com/?p=2630>.

⁸⁴ *Ahorugeze v. Sweden* (Application no. 37075/09), 27 October 2011; European Court of Human Rights 'Extradition of genocide suspect would not breach the European Convention on Human Rights', 27 October

While this judgment still needs to be confirmed, it is important to recognize that it is only applicable in that specific case. However, if confirmed, it may impact upon extradition requests made by Rwanda to countries even outside Europe.⁸⁵

While extradition to Rwanda might be preferable for states for several reasons, there appear to be many obstacles in place that, at least to date, prevent extraditions from being approved, thereby obliging countries to initiate investigations, and, where sufficient evidence exists, prosecutions of suspects of crimes under international law. As will be outlined further below, there is also a risk of countries extraditing large number of suspects to Rwanda in an effort to ensure that they are not providing a safe haven to suspects of crimes under international law. However, as it is not yet clear whether Rwanda will have the capacity to deal with large numbers of extradition and transfer cases, in addition to trying suspects already found on its own territory, concern is warranted that extraditions to Rwanda may undermine rather than shore up accountability and justice if suspects are required to spend years in pre-trial detention. If countries are serious about accountability for genocide suspects, efforts must be directed not only towards extradition, but must include building domestic and regional capacity to complement Rwanda's efforts.

2011, at <http://cmiskp.echr.coe.int/tpk197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=93740&sessionId=82633869&skin=hudoc-pr-en&attachment=true>.

⁸⁵ At the time of writing, the ECtHR's decision was not final, pending an application by the claimant to the Grand Chamber of the Court. On the potential impact of the ECtHR's judgment, see below at pp. 70-71.

4. The Need for State Cooperation with the ICTR and the Residual Mechanism

The ICTR was established in November 1994 by Security Council Resolution 955⁸⁶ to try those most responsible for genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II committed in Rwanda between 1 January 1994 and 31 December 1994.⁸⁷ **Mr Majola** described its establishment as “an experiment at the international level to create accountability” for serious international crimes.

To date, the Tribunal has convicted forty two perpetrators while ten persons have been acquitted. At the time of writing, six cases were ongoing at first instance and thirteen cases were pending on appeal. One case was scheduled to start in early 2012, while a decision of the Appeals Chamber on the transfer of one case to Rwanda was expected before the end of 2011. Two cases were transferred to France in November 2007. Two cases were not completed as the accused died before the completion of the proceedings. The OTP withdrew the indictment in two other cases, and nine accused had not been apprehended at the time of writing.⁸⁸

⁸⁶ UNSC, Security Council Resolution 955, S/Res/955, 8 November 1994.

⁸⁷ In terms of Resolution 955 the ICTR may also try Rwandan citizens who have committed these crimes in neighbouring states during this time period.

⁸⁸ Sixteenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible

The accomplishments of the ICTR are in large part due to the cooperation rendered by states in locating, arresting and transferring the accused residing on their respective territories to the ICTR. The Tribunal does not have its own police force and has no powers to arrest suspects and is therefore dependent on the cooperation of third countries where suspects are located for the arrest and transfer of these suspects to the seat of the Tribunal in Arusha, Tanzania. As a resolution adopted by the Security Council under Chapter VII, Resolution 955 obliges states to cooperate fully with the ICTR and its organs⁸⁹, while Article 28 of the Statute of the ICTR obliges states to assist with, among other things, “the arrest or detention of persons and the surrender or the transfer of the accused” to the Tribunal. The Tribunal’s Rules of Procedure and Evidence (“RPE”) provide that a “State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.”⁹⁰

Arrests of fugitives in Cameroon, Togo, Kenya, Mali, Tanzania, Congo, Burkino Faso, South Africa, Namibia, Ivory Coast, Gabon, Angola, Senegal and most recently, the Democratic Republic of Congo,⁹¹ are clear examples of how several African countries complied with their obligations to cooperate with the Tribunal.

According to **Ms Omaar**, Southern Africa’s recognition of this obligation warrants special mention. She reminded Conference participants that “Southern Africa has the distinction of being the first region in the world to co-operate with the ICTR in a concrete manner”, as the first persons were transferred by Zambia on 2 May 1996.⁹² South Africa, Namibia and Angola, in turn, also handed over individuals sought by the Tribunal for their role in the 1994 genocide.⁹³ However, despite the initial support by Southern

for Genocide and Other Serious Violations of 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 and 31 December 1994, S/2011/472, available at <http://www.unictt.org/Portals/0/English/AnnualReports/a-66-209e.pdf>. For an overview of all cases, see <http://www.unictt.org/Cases/tabid/204/Default.aspx>.

⁸⁹ Resolution 955 contains a general obligation to cooperate with the ICTR requiring that “all States shall cooperate fully with the International Criminal Tribunal and its organs ...”

⁹⁰ Rule 56 of the Rules and Procedure and Evidence of the ICTR.

⁹¹ The Transfer of Genocide Suspects to the ICTR *supra* note 3.

⁹² *Ibid.*

⁹³ *Ibid.*

Africa, Ms Omaar said that presently two accused are believed to be living in Zimbabwe who are yet to be transferred to the Tribunal.⁹⁴ Indeed, the Chief Prosecutor of the Tribunal has repeatedly called on the government of Zimbabwe to arrest and transfer indicted suspect Propais Mpiranya. In June 2011, he reported Zimbabwe's non-compliance with its obligation to cooperate with the Tribunal to the UN Security Council,⁹⁵ yet at the time of writing both accused remained at large.

“Renowned international judge, Justice Cassese, has aptly described international tribunals as giants without arms and legs. This is what they are indeed. They are giants – and they are pretty much unable to move unless they receive the support and cooperation of states.”

Cecile Aptel

States need to continue cooperating with the Tribunal as it is winding down, as otherwise some of the key architects of the genocide will escape justice. In particular, according to **Cecile Aptel**, Senior Fellow at the United States Institute of Peace, states must ensure the timely arrest of fugitives and accept the transfer of cases pursuant to Rule 11bis.⁹⁶ She stressed that the Tribunal also depends on states to:

- Identify and facilitate the appearance of witnesses
 - Protect victims and witnesses
 - Give access to investigators
- Host those convicted as well as those acquitted and those who have served their sentence⁹⁷

The need to support the Tribunal therefore extends beyond its downsizing to the so-called Residual Mechanism, established by UNSC 1966.⁹⁸ As the Tribunal was never intended to be a permanent institution, the Residual Mechanism will take over the responsibility for some of the functions previously performed by the ICTR as of 1 July 2012.

⁹⁴ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council, 6 June 2011, available at <http://unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1212>.

⁹⁵ 'Rwandan Genocide Tribunal Complains Zimbabwe Uncooperative on Fugitive' *supra* note 15.

⁹⁶ See further below, Transfers Under Rule 11bis, pp. 51-59.

⁹⁷ Kevin Jon Heller, 'What Happens to the Acquitted' *Leiden Journal of International Law* 21 (2008), pp. 663-680.

⁹⁸ UNSC, Security Council Resolution, S/RES/1966, 22 December 2010.

According to Ms Aptel, Southern Africa's cooperation with the ICTR must extend to the Residual Mechanism which will be even more dependent on state cooperation, as it will essentially continue carrying out functions very similar to the Tribunal but with a very reduced number of staff.

States need to support the Residual Mechanism in relation to the same areas as outlined above, and comply without undue delay with requests for assistance by a the Residual Mechanism in relation to the investigation and prosecution of accused, including the:

- identification and location of persons;
- taking of testimony and the production of evidence;
- service of documents;
- arrest or detention of persons;
- surrender or the transfer of the accused to the Residual Mechanism.⁹⁹

Establishment of the Residual Mechanism, Security Council Resolution 1966:

"4. *Decides* that ... the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ... ICTR ...

8. *Recalls* the obligation of States to cooperate with the Tribunals, and in particular to comply without undue delay with requests for assistance in the location, arrest, detention, surrender and transfer of accused persons;

9. *Decides* that all States shall cooperate fully with the Mechanism in accordance with the present resolution and the Statute of the Mechanism and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute of the Mechanism, including the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute;

10. *Urges* all States, especially States where fugitives are suspected to be at large, to further intensify cooperation with and render all necessary assistance to the Tribunals and the Mechanism, as appropriate, in particular to achieve the arrest and surrender of all remaining fugitives as soon as possible;

11. *Urges* the Tribunals and the Mechanism to actively undertake every effort to refer those cases which do not involve the most senior leaders suspected of being most responsible for crimes to competent national jurisdictions in accordance with their respective Statutes and Rules of Procedure and Evidence;

12. *Calls upon* all States to cooperate to the maximum extent possible in order to receive referred cases from the Tribunals and the Mechanism"

⁹⁹ Ibid, Article 28.

Ms Aptel said that the cooperation of states remains and will remain a necessary component of the ICTR's work and that of the Residual Mechanism. She acknowledged that there are difficulties to overcome within Southern Africa, yet stressed that inaction has the cost of injustice. She also reminded participants that justice and accountability are shared responsibilities of all states. In this respect, it is important to highlight that both the ICTR for the remainder of its existence, as well as the Residual Mechanism in the future will also be able to **assist states**, in particular in relation to suspects residing on their territories. According to Article 28(3), the Residual Mechanism shall respond to requests for assistance from national authorities in relation to investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in Rwanda.

5. Transfers under Rule 11bis

While the ICTR has made an important contribution to holding those most responsible for the genocide to account, **Mr Majola** emphasized that the ICTR was never created to prosecute the “thousands of perpetrators” involved in the genocide and that neither the ICTR nor Rwanda can prosecute all perpetrators of the genocide. He said that the many challenges to criminal justice at the international level threaten its sustainability. These include the high costs involved, the lack of enforcement mechanisms and the obligation to respect the territorial sovereignty of countries in which these mechanisms carry out their work, which prevents them

Rule 11bis: Referral of the Indictment to another Court

“(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

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

(ii) in which the accused was arrested; or

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

...”

Rule 11bis: Referral of the Indictment to another Court

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

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

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

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

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

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

from freely entering a country to conduct investigations and arrest suspects.

Furthermore, even though the number of suspects indicted by the ICTR represents only a small fraction of alleged perpetrators actually involved in the genocide, **the Tribunal will not be able to prosecute all** of the ninety-two suspects already indicted by it and depends on national jurisdictions to assist. Mr Majola said, under the terms of the completion strategy of the ICTR, the Tribunal is expected to transfer the cases of middle and lower level accused to Rwanda and other jurisdictions for trial. In this regard, the Tribunal adopted Rule 11bis of the RPE to regulate the transfer of cases from the Tribunal to national jurisdictions. Indeed, the UNSC completion strategy is to a large extent based on a successful 11bis regime, somewhat optimistically assuming that states are generally willing and able to take on cases from the Tribunal. The ICTR's practice

thus far suggests that while possibly a growing number of states are willing to accept cases from the Tribunal, very few actually meet the stringent conditions of Rule 11bis. So far, the only country where two cases have been

referred to is France,¹⁰⁰ while transfers to Norway and The Netherlands failed for legal reasons.¹⁰¹ The OTP, which submits cases for transfer to the Trial Chamber, has not yet requested the transfer of an accused to any African country other than Rwanda, arguably because of the strict interpretation the Tribunal of Rule 11bis and the inadequate legal frameworks in place in most Southern African countries. Costs of these cases are another issue that may prevent a transfer. As indicated by Mr Majola, many Southern African countries expressed their willingness to take cases from the Tribunal, but were concerned about the costs involved.

This again highlights the shared responsibility for these types of prosecutions: where a state is prepared to take a case from the Tribunal, other states may consider assisting with the relevant **financial and logistical support** to facilitate a fair trial of the accused. Already, UNSC Resolution 1503 calls on all states to assist national jurisdictions where cases have been referred.¹⁰²

Mr Obote Odora emphasized that it is important to distinguish between the transfer of accused whose indictments have been confirmed by a Trial Chamber and the transmission of case files of suspects who are not indicted before the Tribunal to a national prosecution authority for further investigations and prosecutions.¹⁰³ He outlined the details about the application of Rule 11bis in practice, emphasizing that jurisdiction

¹⁰⁰ See *The Prosecutor v. Munyeshyaka*, Case No.ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Munyeshyaka's Indictment to France (TC), 20 November 2007; and *The Prosecutor v. Bucyibaruta*, Case No.ICTR-2005-85-I, Decision on the Prosecutor's Request for the Referral of Laurent Bucyibaruta's Indictment to France (TC), 20 November 2007. During the discussion, Mr Majola emphasized that the ICTR was monitoring the transfer of the two cases to France very closely, and confirmed that the ICTR is concerned about the delays in the start of the trial of the two accused, who had been transferred to France in November 2007.

¹⁰¹ *The Prosecutor v. Bagaragaza*, Case No.ICTR-2005-86-R11bis, Decision on the Prosecution Motion for Referral to the Kingdom of Norway (TC), 19 May 2006 ("*Bagaragaza* (TC) Norway Referral"); *The Prosecutor v. Bagaragaza*, Case No.ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal (AC), 30 August 2006 ("*Bagaragaza* (AC)"); *The Prosecutor v. Bagaragaza*, Case No.ICTR-2005-86-11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of Netherlands (TC), 13 April 2007 ("*Bagaragaza* (TC) Netherlands Referral"); *The Prosecutor v. Bagaragaza*, Case No.ICTR-2005-86-11bis, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of Netherlands pursuant to Rule 11bis (F) & (G) (TC), 17 August 2007 ("*Bagaragaza* (TC) Netherlands Withdrawal").

¹⁰² UNSC, Security Council Resolution 1503, S/RES/1503, 28 August 2003. In terms of this resolution the Security Council called on the "international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes."

¹⁰³ The OTP has for instance transferred twenty five cases of persons investigated, but not indicted by the Tribunal to Rwanda, see UNICTR, 'More Prosecution's Case Files Transferred to Rwanda', 8 June 2010, at <http://unictr.org/tabid/155/Default.aspx?id=1138>.

over genocide, crimes against humanity and war crimes committed in 1994 as well as fair trial assurances are **pre-requisites** for the transfer of cases to national jurisdictions under Rule 11bis. Specifically, under Rule 11bis, a Chamber will accept a Prosecutor's request for transfer once it is satisfied that all the conditions under Rule 11bis are met by the relevant jurisdiction:

- 11bis (A): a **competent** national jurisdiction is a jurisdiction
 - (i) In whose territory the crime was committed, or
 - (ii) In which the accused was arrested, or
 - (iii) Which has jurisdiction and is willing and is prepared to accept the referral;
- 11bis (C): Penalty structures and fair trial:
 - “in determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall **satisfy itself** that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”

With the exception of the ICTR Trial Chamber's decision in the case of Jean Uwinkindi,¹⁰⁴ applications by the Prosecutor for referral of cases to Rwanda have been rejected by the Trial and Appeals Chambers in five cases¹⁰⁵ because: (1) lack of fair trial, independence of the judiciary and working conditions of the Defence and related concerns in regards to witness availability and witness protection;¹⁰⁶ and (2) insufficient financial support to indigent accused.¹⁰⁷ The Appeal Chamber also rejected a transfer of one accused to

¹⁰⁴ See discussion on the ICTR Trial Chamber's Decision in the Case of The Prosecutor v Jean Uwinkindi below, pp. 65-72.

¹⁰⁵ *The Prosecutor v. Munyakazi*, Case No.ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 28 May 2008 (“*Munyakazi (TC)*”); *The Prosecutor v. Munyakazi*, Case No.ICTR-97-36-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis (AC), 8 October 2008 (“*Munyakazi (AC)*”); *The Prosecutor v. Kanyarukiga*, Case No.ICTR-2002-78-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008 (“*Kanyarukiga (TC)*”); *The Prosecutor v. Hategekimana*, Case No.ICTR-00-55B-R11bis, Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda (TC), 19 June 2008 (“*Hategekimana (TC)*”); *The Prosecutor v. Gatete*, Case No.ICTR-2000-61-I, Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, filed on 28 November 2007; *The Prosecutor v. Kayishema*, Case No.ICTR-2001-67-I, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, filed on 11 June 2007

¹⁰⁶ “*African Rights and REDRESS Extradition Report*” *supra* note 78, pp.25-30.

¹⁰⁷ *Ibid.*

Norway because of a lack of jurisdiction and adequate legal framework.¹⁰⁸ In light of the ICTR's jurisprudence on referral requests by the OTP, **Professor Charles Jalloh** of the University of Pittsburgh examined Southern Africa's potential contribution to the ICTR's completion strategy, in particular in respect of the ability of Southern African countries to accept transfers from the ICTR. He said:

“Even if Southern African states are willing to accept transfers, the question is will they be able to meet the requirements of Rule 11bis, the conformance to which Rwanda has struggled with for so many years?”

He emphasized that even though this jurisprudence was developed specifically in regards to Rule 11bis transfers, it could provide the model that states should aspire to in regards to domestic efforts aimed at holding genocide suspects accountable.

Jurisdiction

Overall, in the view of **Mr Obote Odora**, it is the responsibility of the Chambers of the Tribunal to “ensure that when prosecuting crimes stipulated in Articles 2, 3 and 4 of the ICTR statute, national courts meet minimum international standards.”¹⁰⁹ The Chamber must therefore satisfy itself that the transfer state has an adequate legal framework which criminalizes the accused's conduct so that the allegation can be duly tried and determined. The Tribunal may only refer cases to jurisdictions where the state will charge and convict for those international crimes listed in its Statute.

According to Mr Obote Odora, in most of the cases involving transfer to Rwanda, it is undisputed that Rwanda has jurisdiction as the state in whose territory the crimes were committed. The Chambers conduct a more detailed jurisdictional analysis in regards to transfers to a jurisdiction that neither falls within Rule 11bis (i) and (ii), examining whether “the State has a legal framework which criminalizes the conduct of the accused and provides an adequate penalty structure.” The Trial Chamber found in the case of *Bagaragaza* that Norway did not have jurisdiction over the crimes

¹⁰⁸ Bagaragaza (TC) Norway Referral *supra* note 101.

¹⁰⁹ In accordance with Article 8(2) of the Statute of the ICTR, providing the ICTR with primacy over national courts.

of genocide, complicity in genocide and conspiracy to commit genocide as charged in the indictment, since Norway's penal code did not criminalize genocide committed in 1994. Norwegian authorities argued that they could prosecute genocide as multiple homicide which was criminalized in the penal code, yet the Chamber held that the domestic crime of homicide was significantly different in its elements and gravity from the crime of genocide. This was upheld by the Appeals Chamber. While it agreed with the Prosecution's argument that the authorities of the referral state need not necessarily proceed under their laws against each act or crime in the indictment in the same manner as the Prosecution would have before the ICTR, the Appeals Chamber held that the **legal characterisation** and protected legal values for the crimes of genocide and homicide were different, and therefore such referral could not take place. The Chamber further held that it could not sanction referral of the case to a jurisdiction for trial where the conduct could not be charged as a serious violation of international humanitarian law.¹¹⁰

Other issues the Chambers may consider when analyzing whether a country's legal framework is adequate include whether the modes of participation under national law are similar in substance to those found in the ICTR statute; whether the accused to be transferred is an "intermediate or low ranked accused" in accordance with UNSC Resolution 1503 (2003) and 1534 (2004) and, in particular, whether the national jurisdiction provides for an adequate penalty structure.

Penalty Structure

Regarding an appropriate penalty structure, the non-imposition of the death penalty is, in terms of Rule 11bis (C), an absolute prerequisite. As discussions throughout the conference showed, there is a lack of awareness that the death penalty was abolished in Rwanda in 2007. According to Mr Obote Odora, the "Trial Chambers therefore have had little problem in accepting the abolition of the death penalty in Rwanda as fulfilling one of the criteria for a successful Rule 11bis referral."

However, simply abolishing the death penalty is not necessarily sufficient. Although Rwandan law was amended to remove the death penalty, the

¹¹⁰ Bagaragaza (TC) Norway Referral *supra* note 101.

death penalty was replaced by ‘life imprisonment with special provisions’ – a phrase that was interpreted by the ICTR to include detention in solitary confinement contrary to Article 7 of the ICCPR.¹¹¹ Although Rwanda disputed that the “special provision” clause would be applicable under the Transfer Law and thus solitary confinement would not be allowed in transfer cases, the Chambers found that there was an ambiguity under Rwandan law which could subject an accused transferred to Rwanda and convicted to life imprisonment in isolation, contrary to international human rights law.¹¹² This ambiguity in Rwanda’s legal framework was one of the issues that had to be resolved for a transfer to Rwanda to be approved by the Chambers.¹¹³

Fair Trial

Closely connected to the appropriate penalty upon conviction is the right of the accused to a fair trial. In determining whether the accused will receive a fair trial upon transfer to another jurisdiction, the Chambers are often guided by the minimum criteria listed in Article 20 of the ICTR Statute.

Professor Obote Odora pointed out that a significant number of issues relating to fair trials in Rwanda have withstood close scrutiny by the Chambers, and do not pose a problem as such for referral.¹¹⁴ However, while legislative reform in Rwanda has convinced Trial Chambers that the Rwandan legal system generally mirrors the right to a fair trial as enshrined in Article 20 of the Statute, the issue of concern, according to Mr Obote Odora, was whether **these laws can be effectively realized in practice**. This is particularly because the Chambers need to “satisfy themselves” that an accused will receive, in fact and not in theory, a fair trial in Rwanda. Judges therefore went beyond looking solely at the legal framework, and rather considered “all relevant information they felt may be reasonably necessary to satisfy the Chamber that the accused will receive a fair trial in the national jurisdiction, including the actual prevailing practice in Rwanda on fair trial.” The following issues pertaining to fair trial have thus been examined by the ICTR’s Chambers:

¹¹¹ *Munyakazi* (TC), para.28; *Kanyarukiga* (TC), para. 96; *Hategekimana* (TC), para. 25 *supra* note 105.

¹¹² *Hategekimana* (TC); *Kanyarukiga* (TC) *supra* note 101.

¹¹³ See further below, The ICTR Trial Chamber’s decision in the case of *The Prosecutor v Jean Uwinkindi*, pp. 65-72; See also “REDRESS and *African Rights* Extradition Report” *supra* note 78, pp. 26-29.

¹¹⁴ “REDRESS and *African Rights* Extradition Report” *supra* note 78, pp. 25-30.

- Judicial independence;
- Impartiality and capacity of judges and the prosecution;
- Presumption of innocence;
- Double jeopardy;
- Conditions of detention; and
- The right to an effective defence including availability of counsel, legal aid and the availability and protection of witnesses.

In rejecting the transfer of accused to Rwanda in five cases the Chambers expressed particular concern about the ability of defence witnesses to

testify in Rwanda for the accused without fear of threats and intimidation and the ambiguities in Rwanda's sentencing regime. One Trial Chamber, as well as the High Court in the UK in April 2008

additionally raised concerns about the independence and impartiality of the Rwandan judiciary.¹¹⁵

"[A] state must not take it for granted that once an accused is arrested on its territory, it is entitled to try that accused. The law states that any given state must, at a minimum, have jurisdiction, be willing and adequately prepared to try the case; have an adequate legal framework and is able to provide a fair trial. These are the preliminary issues Southern Africa must address before embarking on seeking to prosecute perpetrators of serious international crimes."

Alex Obote Odora

Mr Obote Odora stressed that the "ICTR jurisprudence has set very high standards in the conduct of international criminal prosecutions," standards that require states in Southern Africa and elsewhere to closely examine their legal framework to determine whether they have jurisdiction over genocide, crimes against humanity and war crimes in accordance with the definition of the crimes listed

in the ICTR Statute, and whether there is the capacity to investigate, and where necessary, prosecute and try these cases in a fair manner. According

¹¹⁵ High Court of Justice, Divisional Court on Appeal from the City of Westminster Magistrates Court, Case No: CO/6247/2008, at http://www.haguejusticeportal.net/Docs/NLP/UK/Vincent_Brown_and_others_HighCourt_Judgment_8-4-2009.pdf, at para 121.

to Mr Obote Odora, “these are the preliminary issues Southern Africa must address before embarking on seeking to prosecute perpetrators of serious international crimes.”

6. Legislative Reform in Rwanda in the Context of 11bis Transfers and the Extradition of Suspects

“We in Rwanda are keen that all those who committed heinous crimes during the genocide against the Tutsi in 1994 should not go unpunished and that the culture of impunity is eradicated not only in Rwanda but in the society of nations we live in and in which respect for the rule of law, human rights and democracy are recognised as core values.”

Sam Rugege, Deputy Chief Justice of Rwanda

Sam Rugege, Deputy Chief Justice of Rwanda, provided an overview of the legislative framework and reforms that Rwanda has undertaken in order to prepare itself for receiving transfer and extradition cases.

Mr Rugege explained that the most important legal reforms started in 2003 with the promulgation of the Rwandan Constitution which introduced a number of fundamental rights including, amongst others, the right to equality before the law and non-discrimination, the right of citizenship and the right not to be deported, the right to be presumed innocent, and the right to a fair trial.

Rwanda's Constitution, according to Mr Rugege, enshrines its "respect for the rule of law, separation of powers and the independence of the judiciary."

In order to qualify for transfers in terms of Rule 11bis, Rwanda passed Organic Law No.11/2007 of 16/3/2007 ("Transfer Law"), which provides for the transfer of cases to Rwanda from the ICTR and the extradition of suspects from third countries.¹¹⁶

Penalty Structure

Following the ICTR's decisions not to transfer accused and national courts' decisions not to extradite suspects to Rwanda, the Abolition of Death Penalty Law of 2007¹¹⁷ was amended in 2008 to make clear that life imprisonment with special provisions, including solitary confinement, would not apply where accused are transferred to Rwanda from the ICTR or extradited from other states.¹¹⁸

Fair Trial

a. Witness Protection

Following concerns that defence witnesses may not travel to Rwanda to testify for fear that their testimonies could implicate them in the genocide or lead to an indictment under Rwanda's broad genocide ideology law,¹¹⁹ Rwanda also amended its Transfer Law to provide that, "no person shall be criminally liable for anything said or done in the course of a trial".¹²⁰ Mr Rugege emphasized that even if a witness, an accused or his or her counsel

¹¹⁶ Although most of the Transfer Law expressly deals with issues relating to the transfer of cases from the ICTR under Rule 11bis of the RPE, Article 24 provides that, "This [Transfer Law] applies *mutatis mutandis* in other matters where there is transfer of cases to [Rwanda] from other States or where transfer of cases or extradition of suspects is sought by [Rwanda] from other states".

¹¹⁷ Organic Law No. 31/2007 of 25/07/2007 (Abolition of the death penalty).

¹¹⁸ Ibid, Article 3 of which now provides that, "life imprisonment with special provisions as provided for by paragraph one of this Article shall *not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other States in accordance with the provisions of [the Transfer Law]*." (Emphasis added)

¹¹⁹ Law No. 18/2008, Law Relating to the Punishment of the Crime of Genocide Ideology.

¹²⁰ Article 13, Transfer Law.

Article 13

“Without prejudice to the relevant laws on contempt of court and perjury, no persons shall be criminally liable for anything said or done in the course of a trial.”

Article 14

“All witnesses who travel from abroad to Rwanda to testify in the trial of a case transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials.”

Witness Protection, Transfer Law of Rwanda

makes a statement during proceedings denying the genocide or trivializing it (which are both offences under Rwandan law) she or he will not be prosecuted.

The Transfer Law also provides for witness protection for both prosecution and defence witnesses. Article 14 of that law states that in cases transferred from the ICTR, the High Court “shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure

and Evidence.” Article 14 further protects witnesses who travel to Rwanda to testify from search, seizure, arrest or detention during their testimony and during their travel to and from trials.¹²¹

In 2008, the Chief Justice issued an order creating the Witness Protection Unit within the judiciary to meet the criticism that the Victim and Witness Services Unit was not independent as it was based in the Prosecutor General’s Office and was inadequate to protect witnesses for the Defence. The Witness Protection Unit is now under the responsibility of the Registry of the Supreme Court, though it remains to be seen whether in practice, protection duties will be carried out separately from the Prosecutor’s General’s Office.¹²²

In 2009, the Transfer Law was further amended to provide for alternative ways of obtaining testimonies from persons residing abroad. Article 14 bis of the Transfer Law provides that upon the request of a party, the judge

¹²¹ Ibid, Article 14.

¹²² Created in terms of Ordonnance No. 001/2008 du 15 Décembre 2008 Président de la Cour Suprême portant instruction relative à la protection des témoins dans le cadre du renvoi d’affaires à la République du Rwanda par Le Tribunal Pénal International Pour Le Rwanda (TPIR) et par d’autres Etats.

may, when a witness is unable or for good reason unwilling to appear before the High Court, order his/her testimony to be taken in one of the following ways:

- By deposition in Rwanda or in a foreign jurisdiction before a presiding officer, magistrate or other judicial officer;
- Through a video-link presided over by a judge at the trial;
- By a judge sitting in a foreign jurisdiction for the purpose of recording viva voce testimony.

Testimony given in any of these ways can be made part of the trial record and such evidence will carry the same weight as testimony given in court.¹²³

b. Judicial Independence

According to Article 140 of Rwanda's Constitution, the judiciary shall be independent from other branches of the government and shall have administrative and financial autonomy. Additionally, the Law on the Status of Judges of 2004 and the Law on the Code of Ethics of Judges demand the independence and impartiality of judges.

Mr Rugege said that regulations concerning the appointment and termination of judges also act as a safeguard against undue influence on judges. Only one government official is represented in the High Council of the Judiciary which is otherwise constituted by judges and which oversees the appointment and termination of judges. Mr Rugege emphasized that further, in response to concerns about the limited tenure of Rwandan judges and the potential risk that this would allow judges to be more susceptible to outside pressure so that their tenure might be renewed,¹²⁴ amendments to the Constitution in 2010, according to Mr Rugege, provided that judges now have security of tenure. Accordingly, with the exception of the President and Vice President of the Supreme Court who have limited terms of eight years each, judges are appointed for life.¹²⁵

¹²³ Article 14bis(3), Transfer Law.

¹²⁴ "REDRESS and *African Rights* Report on Extradition" *supra* note 78 pp. 34-35.

¹²⁵ Articles 8 and 14 of the Law on the Supreme Court and Articles 24 and 79 of the Law on the Statutes for Judges and other Judicial Personnel; but see the ICTR Trial Chamber's assessment of the changes to the Constitution in *The Prosecutor v Jean Uwinkindi*, Case No. ICTR-2001-75-I Decision on Prosecutor's Request for Referral of the Case of Jean-Bosco Uwinkindi to Rwanda, 28 June 2011 (TC), at para 183, available at <http://unictr.org/Portals/0/Case%5CEnglish%5CUwinkindi%5Cdecisions%5C110628.pdf>.

According to Mr Rugege, Rwanda's law against corruption also enhances the impartiality of judges in that it provides for strict sentences (double those of ordinary citizens) for judges found to engage in corruption either by soliciting or accepting bribes.

Mr Rugege pointed to various provisions that allow for foreign judges to sit with their Rwandan counterparts. Article 13 of the Draft Organic Law Establishing the Organization, Functioning and Jurisdiction of the Supreme Court,¹²⁶ allows the Chief Justice to ask the UN or other international organisations to facilitate the placement of foreign judges to sit alongside Rwandan judges in cases of accused transferred from the ICTR or where suspects are extradited to Rwanda from third countries. The Chief Justice may exercise that power at the request of the accused, her/ his advocate or by the prosecutor or by a foreign country seeking to extradite a suspect to Rwanda.¹²⁷

¹²⁶ At the time of writing this Law was still not in force.

¹²⁷ On the ICTR Trial Chamber's discussion of the independence of the judiciary, see further below, pp. 65-72.

7. The ICTR Trial Chamber's Decision in the Case of *The Prosecutor v Jean Uwinkindi (Uwinkindi)*¹²⁸

Following these reforms in Rwanda, on 28 June 2011 a Trial Chamber of the ICTR for the first time approved the transfer of an accused, Jean Uwinkindi to Rwanda.¹²⁹ The Trial Chamber considered submissions from the Prosecution and Defence, civil society and the Rwandan government who joined the proceedings as *amicus curiae*, assessing Rwanda's suitability and capacity to ensure compliance with Rule 11bis. The Chamber noted that Rwanda had made material changes to its laws since previous transfer

"[T]he Chamber expresses its solemn hope that the Republic of Rwanda, in accepting its first referral from this Tribunal, will actualize in practice the commitments it has made in its filings about good faith, capacity and willingness to enforce the highest standards of justice in referred cases."

Trial Chamber, *Uwinkindi*

¹²⁸ *Uwinkindi supra* note 125.

¹²⁹ *Ibid.*

applications had failed and had indicated its capacity and willingness to prosecute cases referred by the ICTR in conformity with internationally recognized fair trial standards enshrined in the Tribunal's Statute and other human rights instruments. Most importantly, the Chamber was satisfied itself that Rwanda had the capacity to do so.

Key Findings

Jurisdiction

The Chamber noted that Rwanda's penal code adequately covered the different modes of criminal responsibility and that the law adopted by Rwanda to accept cases on referral from the Tribunal ("Transfer Law") provided that the accused, if transferred, would be tried by the High Court and Supreme Court. The Chamber therefore concluded that on the basis of the Transfer Law, the Rwandan courts have "material jurisdiction over this case" and that jurisdiction concerns are not warranted¹³⁰

Penalty Structure

The Trial Chamber noted that neither party disputed that (a) the death penalty was abolished pursuant to Organic Law No. 31/2007 of 25 July 2007 and (b) that the penalty of life imprisonment with special conditions "is no longer a potential penalty in transfer cases."¹³¹

The Trial Chamber accordingly concluded that the penalty structure in Rwanda is consistent with Rule 11bis and that any ambiguities which existed in previous 11bis applications regarding the nature and scope of Rwanda's sentencing regime in cases referred to Rwanda have been adequately addressed.¹³²

¹³⁰ Ibid at para 21.

¹³¹ Ibid at para 47.

¹³² Ibid at para 51.

Fair Trial

a. Availability and Protection of Witnesses¹³³

A large portion of the decision deals with witness participation and protection. An important component of the right to a fair trial is ensuring the participation of witnesses on behalf of the defence. This in turn requires an environment that is conducive to their protection, safety and wellbeing. In general terms, concerns raised by the Defence and amici included:

- Defence witnesses fear for their safety despite provisions and mechanisms for witness protection and that protection will not be available in practice because of capacity restraints;¹³⁴
- Defence witnesses will be concerned about implicating themselves when giving testimony which may deter defence witnesses from testifying in favour of the accused;¹³⁵
- Many defence witnesses reside outside Rwanda and it may not be possible to secure their participation in proceedings, as a result of practicalities and a combination of the aforementioned factors.¹³⁶

The Trial Chamber stressed that its role is not to determine whether the fears expressed by individuals are legitimate, reasonable or well founded. Rather, the Chamber had to determine in the context of fair trial concerns whether the legislation and mechanisms in place can ensure the participation and protection of defence witnesses under the same conditions as witnesses for the prosecution.¹³⁷ The Trial Chamber held that it:

“Is simply concerned with assessing the likelihood that the Accused will be able to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her if this case were to be transferred to Rwanda.”

The Trial Chamber held that the Transfer Law's provisions of immunities and protection provided to witnesses in Rwanda as well as abroad in terms of Articles 13 and 14 are adequate to ensure a fair trial of the Accused

¹³³ Ibid, paras 61-132.

¹³⁴ Ibid, para 71.

¹³⁵ Ibid, para 100.

¹³⁶ Ibid, para 105.

¹³⁷ Ibid, para 85.

before the High Court of Rwanda.¹³⁸ However, the Chamber noted that even though Rwanda acknowledges that there might be ambiguity in the law on **genocidal ideology**, and even were the government to carry out an evaluation of that law, this was still an **unsatisfactory state of affairs**. The Trial Chamber requested Rwanda to “inform the ICTR President about the studies carried out on the law and any measures taken to amend it **before** the Accused’s trial begins in Rwanda.”¹³⁹

Specifically in regards to witnesses residing abroad, the Chamber noted that Chambers in previous transfer requests decided that the use of video-link testimony in cases where defence witnesses feared to travel to Rwanda was inadequate to ensure fairness in the trial in that there would be inequality of arms between the prosecution and defence. However, in the present case, the Chamber found the additional option of taking testimony by a judge sitting in a foreign jurisdiction with the possibility of presence of the accused via video link to examine or cross-examine witnesses, to be adequate guarantees of equality between the parties.¹⁴⁰

The Chamber then turned to the protection mechanisms in place, in particular the Victim and Witness Support Unit (VWSU) under the responsibility of the Prosecution, and the Witness Protection Unit (WPU) under the auspices of the judiciary. The Chamber considered the increase in staff size, funding and awareness raising of the programmes of the VWSU, as well as the fact that the WPU has not yet assisted any witnesses, as it was specifically established for transfer cases, of which there had been none.

On this basis, the Chamber considered the concerns raised by the Defence and *amici* as “**premature**”. It held that:

“It is impossible to evaluate the effectiveness of a reasonable law in the abstract. Accordingly the relevant Rwandan laws must be given the chance to operate before being held to be defective.”¹⁴¹

It also held that the existence of the WPU indicates that witness safety will be monitored directly by the Rwandan judiciary (rather than the prosecution) and that “external monitors” would oversee these witness protection

¹³⁸ Ibid, para 90.

¹³⁹ Ibid, para 95.

¹⁴⁰ Ibid, paras 109-114.

¹⁴¹ Ibid, para 103.

programmes. The Trial Chamber appointed the African Commission of Human and Peoples' Rights (ACHPR) to act as a monitor in the case, concluding that:

“the issue of protective measures for Defence witnesses is *prima facie* guaranteed ensuring a likely fair trial of the Accused.”¹⁴²

b. Independence of the Judiciary

In assessing the independence of the judiciary in Rwanda, the Chamber considered the applicable international law and Rwanda's legal framework, the competence and qualification of judges as well as security of tenure for judges. The Defence and *amici* in support argued that although Rwandan law provides judicial independence, in practice this does not occur. It also was put forward that despite legislative safeguards, judicial authorities in Rwanda are susceptible to political interference and judicial corruption which negates their independence and impartiality. Following changes to the Constitution, it is now unclear whether judges actually have security of tenure for life. The Trial Chamber agreed that Rwanda no longer ensures life tenure for judges, but emphasized that:

“it is too early to conclude whether this change in the Constitution will have any impact on the independence of the judiciary.”¹⁴³

The Trial Chamber also noted that although there were instances which brought into question judicial independence, this is not necessarily a true reflection of Rwanda's judiciary: “Rwandan law provides for conditions conducive to an independent and impartial judiciary.”¹⁴⁴ Referring to law reform and the draft law providing for foreign judges to sit together with Rwandan judges on transfer or extradition cases, the Trial Chamber also emphasized that it expected Rwanda to **adopt the relevant legislation upon referral** of the case and found that “this measure will enhance the Accused's fair trial rights.”¹⁴⁵

¹⁴² Ibid, para.132.

¹⁴³ Ibid, para 183.

¹⁴⁴ Ibid, para 196.

¹⁴⁵ Ibid, para 114.

In any event, the Trial Chamber also stressed that all referred cases will be closely monitored and if the accused's fair trial rights are not respected the ICTR will be able to invoke the revocation clause under Rule 11bis and recall the case.¹⁴⁶

c. Safeguards: Monitoring and Revocation

The Trial Chamber held that “it would be in the interest of justice that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda. Furthermore it is important that any system of monitoring the fairness of the trial should be cognizant of and responsive to the genuine concerns raised by the Defence, as well as the Prosecution.”¹⁴⁷

In addition to general monitoring and reporting, the ACHPR is required to monitor and report on the observance of fair trial standards (with a special emphasis on the availability and protection of witnesses before during and after the proceedings); compliance with Article 13 of the Transfer Law, conditions of detention; and the work of the VWSU and WPU.¹⁴⁸ Rwanda is required to facilitate the work of and cooperate with ACHPR in its monitoring of the trial.

Potential Impact

The Trial Chamber's decision clearly recognizes the progress made in Rwanda in regards to law reform as well as putting in place mechanisms designed to guarantee a fair trial of the accused. However, as the Chamber repeatedly emphasized, this was the first time that an accused would be transferred to Rwanda, and it is impossible to predict how reforms and mechanisms in place would be applied in practice. Arguably, the fact that the Chamber could appoint the ACHPR as a monitor of the proceedings in Rwanda and, as a possibility of last resort, could revoke the transfer should the accused's right to a fair trial not be respected, helped the Chamber in approving the transfer to Rwanda.

This decision, if approved by the Appeals Chamber, will go a long way to ensuring that the ICTR will be able to complete its mandate in accordance

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, para 208.

¹⁴⁸ See in this regard the Order of the Trial Chamber, *ibid*, pp. 57-59.

with the completion strategy. However, as the case of *Uwinkindi* will test Rwanda's ability to conduct trials that meet international standards, it is the trial itself that will ultimately provide an answer as to the accuracy of the ICTR's findings.

Aside from setting a precedent and helping the Tribunal to meet the objectives of its completion strategy, the decision may also have an impact beyond the transfer of cases from the Tribunal. Already during the conference, some participants from national authorities took the ICTR's decision as a sign of approval to extradite all suspects present on their territory to Rwanda. Drawing on the *Uwinkindi* decision, it is clear that the ICTR's approval of a transfer to Rwanda will inform decisions relating to the extradition of suspects to Rwanda, which were in the past denied on the basis of fair trial concerns, often based on previous ICTR decisions denying transfer to Rwanda.¹⁴⁹ The decision of the European Court of Human Rights (ECtHR) of 27 October 2011 is but one example of how courts national and regional will interpret the ICTR's decision.

Whereas **Mr Rugege** expressed his hope that the decision in *Uwinkindi* will lead to future transfers and also lead to European and Southern African countries extraditing suspects to Rwanda, some were concerned about the potential consequences of large numbers of cases being sent to Rwanda for trial. **Mr Jaffer** warned that the experiences at the ICTR have underlined that these cases are highly complex and challenging for any national jurisdiction. They take a very long time, and according to Mr Jaffer, "dumping all cases on Rwanda can be a disaster."

In this regard, overreliance cannot be placed on the *Uwinkindi* decision or that of the ECtHR. Instead, countries contemplating the extradition of genocide suspects to Rwanda should be cautious, and rather seek to increase their own domestic capacity to try cases on the basis of universal jurisdiction. Irrespective of the judgment of the ECtHR, and the decision of the ICTR Trial Chamber in *Uwinkindi*, countries should only extradite suspects to Rwanda after carrying out a case by case assessment and only after Rwanda's capacity to try suspects in accordance with international fair trial standards has been confirmed in practice. Where suspects are being extradited or transferred, simultaneous efforts should also be undertaken to build Rwanda's capacity to handle such cases. Consultations with Rwandan

¹⁴⁹ See discussion on Transfers under Rule 11bis above, pp. 51-59.

authorities about Rwanda's capacity to try extradited suspects should also take place prior to any decision to extradite. Importantly, the extradition of a suspect to Rwanda differs substantially from a transfer from the Tribunal. Indeed, the Trial Chamber in *Uwinkindi* considered that following extradition, the requested state does **not exercise any control** over the trial of the extradited person, whereas the referring Tribunal retains the power to revoke its decision, if fair trial rights are not respected. The Tribunal can also impose stringent monitoring conditions, as the ICTR Trial Chamber did in *Uwinkindi*, something that is not an option for states wishing to extradite a suspect to Rwanda.

The *Uwinkindi* decision does not therefore absolve Southern African countries from their role in ensuring that their own legal frameworks are sufficient for the investigation and prosecution of those suspected of involvement in the Rwanda genocide. Instead it should provide an incentive to support and learn from Rwanda and the ICTR with a view to initiate domestic prosecutions.

8. Ensuring Justice for Survivors

As **Mr Kargeruka** and **Mr Ngagbo** outlined at the start of the conference, efforts to provide survivors with justice to date have largely failed. Indeed, the complexities involved in finding adequate answers to the challenges of holding large numbers of suspects accountable in and outside Rwanda often ignored the need and rights of survivors. This is particularly true in regards to survivors' right to reparation.

"When we speak about justice for the 1994 genocide it is pertinent to also ask what this justice means for survivors, and what justice should do for survivors, whose perspectives, needs and indeed whose rights are often ignored in the discourse about justice and accountability."

**Juergen Schurr, Legal Advisor
REDRESS**

Survivors' Access to Reparation

Mr Juergen Schurr, Legal Advisor with REDRESS, outlined that the majority of survivors seem to be disenchanted with the justice processes that have taken place in and outside Rwanda so far, mainly because of the lack of access to adequate reparation, in particular restitution and compensation. The right of survivors to obtain reparation, and the corresponding obligation of states to provide reparation is enshrined in international law, and reflected in

particular in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the “UN Basic Principles”).¹⁵⁰ According to the UN Basic Principles, the obligation to provide reparation rests on the state, as well as the individual perpetrator of the violation.¹⁵¹ Furthermore, such reparation “should be proportional to the gravity of the violations and the harm suffered” and the victims

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”

UN Basic Principles

should be provided with full and effective reparation.¹⁵² This can take different forms, including:

- *Restitution* seeks to restore the victim to the original situation before the violation occurred. However, as this is generally not possible, forms of restitution can include restoration of liberty, return to one’s place of residence, restoration of employment as well as return of property;
- *Compensation* can include any ‘economically assessable damage’ resulting from the crimes, including physical and emotional pain and suffering (‘moral damage’), material damages and loss of earnings, including the loss of earning potential and costs required for legal or expert assistance, medicines, medical service and psychological and social services; compensation can be particularly important in cases where restitution is no longer possible, given the nature of the crime such as, for instance, rape or torture;
- *Rehabilitation* can include legal, medical, psychological and other assistance;

¹⁵⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147 of 16 December 2005, at <http://www2.ohchr.org/english/law/remedy.htm>.

¹⁵¹ Ibid, Principle 9, para.15.

¹⁵² Ibid, Principle 9, para.18.

- *Satisfaction and guarantees of non-repetition* can take different forms, including public apologies and acknowledgment of the crimes committed, commemorations and memorials dedicated to victims, and investigation and prosecution of those responsible.¹⁵³

Mr Schurr emphasized that the nature of the crimes committed during the genocide in Rwanda, the losses of survivors cannot be compensated and that compensation, or indeed, any form of reparation, cannot fully repair what is inherently irreparable. However, reparation can serve as an important acknowledgment of the crimes committed, and help survivors to move forward, for instance, through restitution of stolen property or compensation of property that was pillaged and looted, including houses, livestock and farmland. Compensation and rehabilitation help survivors to address medical consequences of the genocide. As the vast majority of survivors depend on income from farming, the huge loss of family members and friends also means that today, many survivors do not have the necessary manpower to adequately farm their fields, often resulting in extreme poverty. Compensation can enable survivors to address that loss of income.

In 1998, the Rwandan government established a fund for the most vulnerable survivors (the 'Fonds National pour l'Assistance aux Rescapés du Génocide' (FARG)) that seeks to rehabilitate/support orphans, the elderly, disabled

"Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services."

UN Basic Principles

¹⁵³ Ibid, Principle 9, paras.19-23.

persons, widows and widowers. FARG provides critical assistance in the areas of education, housing and health to a large number of survivors, yet the vast majority of survivors do not qualify as beneficiaries of FARG.¹⁵⁴

Despite the establishment of FARG, Mr Schurr said hardly any efforts were undertaken in Rwanda or abroad, to ensure that survivors obtain adequate compensation. While many survivors succeeded in the late 1990s and early 2000s with their claims for compensation before domestic courts in Rwanda, none of the compensation awards by courts are known to have been fully enforced in Rwanda. This is because the vast majority of perpetrators meant to pay compensation were unable to do so, and in the limited instances in which they had funds or property available, the process to secure enforcement of the compensation awards proved highly cumbersome. Also, despite the fact that the Rwandan state was determined to be jointly liable in many of such judgments, it did not pay out the awards.¹⁵⁵

Over the years, the Rwandan government sought to introduce a specific law on compensation with a view to establishing a compensation fund. However, as the law was never adopted, no compensation fund has to date been established. The absence of a compensation fund was also a major impediment for the enforcement of compensation awards by gacaca courts.¹⁵⁶

Survivors also sought to obtain compensation in proceedings initiated abroad on the basis of universal jurisdiction, as for instance in Switzerland, Belgium and The Netherlands. However, Mr Schurr explained that while this possibility of obtaining compensation is fundamentally important, also contributing to the legitimacy of universal jurisdiction proceedings, only a small number of survivors will ever benefit from such processes: to date there have been relatively few universal jurisdiction prosecutions and within this small group of cases, of those that resulted in a conviction and for which judges had the ability to award compensation at the end of the

¹⁵⁴ See REDRESS, *African Rights* and IBUKA, "Access to Reparation for Survivors of the 1994 Genocide in Rwanda" Conference Background Paper, available at http://www.redress.org/downloads/17August2011_Torture_Survivors_Conference_BackgroundNote.pdf.

¹⁵⁵ *Ibid*, p.5; contrary to international law and the 'principle of continuity', the government of Rwanda refused to honour compensation awards in which it was adjudged to be jointly liable and declared all compensation suits against the state inadmissible, arguing that it is already paying 5 % of its budget into FARG and that it had accepted its role in the genocide.

¹⁵⁶ Lars Waldorf, 'Goats & Graves: Reparations in Rwanda's Community Courts', in Carla Ferstman, Mariana Goetz, Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity- Systems in Place and Systems in the Making*, pp. 515-539.

criminal trial, efforts to enforce the awards over assets located in Rwanda remained a challenge.

In considering survivors' access to compensation on an international level, Mr Schurr pointed out that the ICTR does not provide survivors with any avenues for compensation. The Tribunal's statute does not allow survivors to participate in proceedings (other than as witnesses) and judges of the Tribunal cannot order convicted perpetrators to pay compensation to victims. While there is some scope for the Tribunal's judgments to be used in national jurisdictions and so enable victims to bring actions before national courts to obtain compensation, in reality survivors' access to compensation has not been facilitated.¹⁵⁷ Recognising the Tribunal's limited impact on survivors in Rwanda and abroad and the important role of compensation for survivors of the genocide, ICTR judges in 2002 proposed to the UN Secretary General at the time that a specialized UN agency be established "to administer a compensation scheme or trust fund that can be based upon individual application, or community need or some group based qualification." The then President of the ICTR, Navanathem Pillay, in her address to the UNSC in October 2002 reminded the Council that "compensation for victims is essential if Rwanda is to recover from the genocidal experiences."¹⁵⁸ However, none of the proposals submitted by Judge Pillay or indeed others have to date been put into place.

Survivors are increasingly frustrated with justice processes and their lack of agency in these. Moreover, survivors fear that the closing down of the ICTR, as well as Rwanda's gacaca courts, could mean that their right to reparation will be ignored forever. Efforts are currently under way within Rwandan civil society to engage the government of Rwanda in a discussion about the establishment of a compensation fund and to address the shortcomings of gacaca.¹⁵⁹ Having prioritised until now the large task of bringing genocide suspects to justice, it remains to be seen whether Rwanda, and indeed, the international community, will now show similar vigour in providing survivors with adequate reparation.

¹⁵⁷ Rule 106 of the Tribunal's RPE provides that survivors seeking compensation against a perpetrator convicted by the ICTR must apply to a court in Rwanda or "other competent body" and that they may rely on judgments of the ICTR in such proceedings, which are considered final and binding as to the criminal responsibility of the convicted person for such injury, see UN ICTR Rules of Procedure and Evidence of 29 June 1995, as amended on 1 October 2009, at <http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf>.

¹⁵⁸ Statement by Judge Navanathem Pillay, President of the ICTR, to the United Nations Security Council, 29 October 2002, at <http://www.unictr.org/tabid/155/Default.aspx?id=1086>.

¹⁵⁹ See REDRESS, *African Rights* and Ibuka, "Access to Reparation for Survivors of the 1994 Genocide in Rwanda" supra note 150.

Standards of Protection

Gerhard van Rooyen, a consultant with the UN Office on Drugs and Crime (UNODC), emphasized that it is a fundamental right of everyone to be protected by the government. This right to protection, also enshrined in the African Charter, also applies in the context of accountability for serious international crimes, as accountability requires a functioning judicial system that enables victims and witnesses to come forward to tell their stories. Without the creation of an adequate protection system that victims can trust, there will be no justice. As such, victims and witness protection is a precondition for justice.

In explaining that protection is more than just a name change or the relocation of a victim or witness, Mr van Rooyen said that measures must be taken “in and out of court, before, during and after testimony.” Physical protection measures can include police escorts to court, additional security in the court room, as well as additional protection for the witness’ family. Video conferencing of witness testimonies or shielding a witness behind a screen during his/her testimony can also offer protection. Psychological measures should be taken to ensure that a victim or vulnerable witness is not re-traumatized by giving testimony, taking into account, for instance, the age and/or gender of the victim.¹⁶⁰

Ideally, according to Mr van Rooyen, a **victim and witness protection programme** is established which includes trained personnel that carry out risk/threat assessments for individual witnesses and victims, and finds adequate solutions of how such risks can be minimized. Such an assessment takes into account:

¹⁶⁰ See for instance Special Court for Sierra Leone, *Prosecutor v Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, where the Court ordered special protective measures for child witnesses, at <http://www.sc-sl.org/LinkClick.aspx?fileticket=35fSEHUaE%2fU%3d&tabid=155>; for further examples of measures to be taken, see, REDRESS, “Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A call to Action”, December 2009, pp. 36-38, at <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

- The origin of the threat;
- The patterns of violence;
- The level of organization and culture of the threatening group; and
- The group's capacity, knowledge and available means to carry out threats.¹⁶¹

Whether a witness will gain access to a protection programme depends on the “value of the testimony, absence of other effective means of protection, existence of serious threat, and personality of the witness.”¹⁶² Mr van Rooyen emphasized that the risk assessment must be carried out continuously for as long as witnesses stay within a programme.

Any adequate witness protection programme would need to enjoy a large degree of autonomy and “total confidentiality”. This is particularly true in the context of political crimes, where, as for instance was the case in Kenya, those in charge of the budget of the witness protection programme, also had a vested interest in the outcome of a particular trial. Such a lack of autonomy, according to Mr van Rooyen, quickly leads to undermining the establishment of an effective witness protection programme. In small countries like Rwanda, where protection is challenging as a result of the size of the country and the large number of inhabitants, regional cooperation and capacity is important, as is the development of best practices.

Participation and Protection: Experiences of the ICTR

According to **Sylvie Becky**, Head of the Witness and Victim Support Section (WVSS) established within the ICTR's Registry, one of the core functions of the WVSS is the support given to Chambers in terms of ensuring timely availability of witnesses for testimony in court and their fitness to travel and testify. The WVSS implements court orders relating to all witnesses, prosecution and defence. Furthermore, the WVSS may be asked by a Trial Chamber to confirm that a protected witness consents to any variations of protective orders, for instance when a closed session testimony of

¹⁶¹ UNODC, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime ('UNODC Good Practices Study'), February 2008, p. 62, at <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

¹⁶² Ibid, p. 21

Rule 34: Victims and Witnesses Support Unit

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to:

(i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;

(ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and

(iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.

(B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.”

Rules of Procedure and Evidence, ICTR

that witness is requested by domestic authorities for the prosecution of a suspect before a domestic court.¹⁶³ The other core functions of the WVSS relate to extensive diplomatic outreach directed towards states and UN Specialized Agencies in the pre-trial, trial and post-trial phases and ensuring the logistical support to guarantee the safety of witnesses to the extent possible.

The WVSS operates within the legal framework set by the ICTR’s Statute and RPE. The decision that a witness or victim requires protection is taken by a judge or Trial Chamber upon the request by one of the parties to the proceedings. Such a protection order can be extended to family members. Once a protection order has been made, Ms Becky outlined that it is the Registry that determines how to protect the witness bearing in mind the following criteria:

- The background/status of the witness (victim, ex- detainee, detainee);
- His/her connection or not with the accused person;

¹⁶³ See for instance decision of the Tribunal in *The Prosecutor v Pauline Nyiramasuhuko et al*, Joint Case No. ICTR-98-42-T, Decision on the Re-filing of Prosecutor’s Ex-parte Motion to Vary Protective Measures for Witnesses, 1 September 2011, varying applicable protective measures so as to allow Danish prosecution authorities to have access to closed session transcripts of two witnesses’ testimonies, at <http://unictr.org/Portals/0/Case/English/Nyira/decisions/110901.pdf>.

- Outcome of a threat assessment, risk assessment;
- Level of security in the area where the witness resides;
- Psychological and physical state of the witness; and
- The consent of the witness.

Like Mr van Rooyen, Ms Becky underlined that it is only thanks to the victims and witnesses who testified before the Tribunal that the Tribunal could attempt to ascertain the truth about the 1994 genocide.¹⁶⁴ According to Ms Becky, by accepting victims' testimonies as a "true reflection of the facts and of the ordeal that they have endured", the ICTR has offered an important forum for victims of rape and other crimes to tell their story and to receive public acknowledgement and condemnation of their victimization.¹⁶⁵

Ms Becky outlined the importance of state **cooperation** in ensuring adequate protection, particularly in the absence of the ICTR's own police force. She explained that security arrangements are put in place in each country where witnesses are residing, including a "security referral process" in case ICTR witnesses encounter protection issues and a methodology on how to address these. Governments appoint focal points to handle all cooperation requests in regards to ICTR witnesses. Government cooperation is also crucial in cases where the ICTR adopts provisional measures such as temporarily accommodating a witness away from his home (at a relative's residence or another safe location) or protection of witnesses within their own community with the assistance of national authorities and where applicable in collaboration with the UNHCR. By virtue of Article 28 of the Statute which obliges states to cooperate with the Tribunal, the Registrar can further request national authorities to act upon allegations of witnesses' intimidation in their country of residence.

WVSS, in the conduct of its activities, takes the following non-exhaustive measures to ensure that the identity of the witness remains confidential:

¹⁶⁴ According to Sylvie Becky, more than 3000 witnesses from over forty countries have testified in proceedings before the ICTR.

¹⁶⁵ Alice Leroy, The ICTR Contribution to the Prosecution of Sexual Violence, para 41 page 32, in the Gender Justice and the Legacy of the ICTR, Quarterly edition of AFLA, July-December 2008; see however, *African Rights* and REDRESS, "Survivors and Post-Genocide Justice In Rwanda: Their Experiences, Perspectives and Hopes", pp.55-72, available at <http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>.

- Covert operations;
- Extra care while establishing contact with witnesses for the first time and during the course of witness travel preparation;
- Arrangement for alternative transportation means for the witness;
- Temporary/transit accommodation of witnesses in a new area prior to travel;
- Encourage witness to temporarily relocate to a relative within his/her own community;
- Advance planning and mobilization of resources for witnesses with special needs, including medical;
- Relocation in a third country being a last resort measure.”

Outlining measures at the ICTR’s disposal in the case of interference with witness protection orders, Ms Becky referred to the case of a defence investigator at the ICTR, Léonidas Nshogoza, who was sentenced to ten months imprisonment for interfering with a prosecution witness.¹⁶⁶ He was found guilty of “disclosing the protected information of witnesses in knowing violation of, or with reckless indifference to protective measures ordered by the court.”¹⁶⁷

Furthermore, according to Ms Becky, the Registrar, acting upon instructions by various Trial Chambers, appointed several amici curiae to investigate allegations of intimidation, retaliation, interference and/or bribery of witnesses.

Victim Participation before the ICTR

Ms Becky stressed that without victims’ testimony it would have been impossible for the ICTR to try those most responsible for the genocide. Victims, however, only participate before the ICTR as witnesses. As such there is no legal and financial provision for direct reparation of a victim, which, according to Ms Becky, is one of the key structural weaknesses of the ICTR.

¹⁶⁶ UNICTR, Appeals Chamber, *Léonidas Nshogoza v The Prosecutor*, Case No. ICTR-2007-91-A, Judgment, at <http://unictr.org/Portals/0/Case/English/Nshogoza/decisions/100315.pdf>.

¹⁶⁷ UNICTR, Trial Chamber III, *The Prosecutor v Léonidas Nshogoza*, Case No. ICTR -07-91-T, Judgment, para.188, at <http://unictr.org/Portals/0/Case/English/Nshogoza/decisions/090707-judgement.pdf>.

9. Going Forward

The conference discussions and presentations outlined a possible framework of the steps that need to be taken to ensure the accountability of genocide suspects in Southern Africa. These include first and foremost extensive law reform in all Southern African countries and ratification of relevant treaties so as to put Southern African countries in a position to effectively contribute to the fight against impunity. Accountability will also require a significant increase in the resources made available to national authorities to adequately investigate and prosecute suspects of the 1994 genocide on the basis of universal jurisdiction.

The extensive law reforms in Rwanda may facilitate the extradition of suspects to Rwanda in the near future, thereby opening up another avenue for accountability of suspects currently living in Southern Africa. However, given the costs and time involved in these types of cases and in light of the number of suspects potentially to be extradited, Rwanda will need considerable assistance to ensure that suspects extradited to Rwanda are brought to justice in a fair trial. Such assistance could include financial and logistical support as well as capacity building. There was a consensus among participants, however, that Rwanda will not be able to prosecute all suspects currently benefiting from impunity. Complementary investigations and prosecutions of suspects on the basis of universal jurisdiction will be necessary to hold as many suspects to account as possible.

Against this background, and taking into account the large number of suspects currently benefitting from impunity in Southern Africa, conference participants stressed the need for a regional approach based

on close cooperation and mutual legal assistance. A regional approach will contribute to the exchange of information on suspects residing in Southern Africa, information on witnesses and other evidence and ideally lead to the development of best practices. It will enable national authorities to benefit from lessons learned and experiences of the ICTR. European authorities with experience in the investigation and prosecution of genocide suspects can also assist to build capacity, share information and lessons learned about how to carry out investigations relating to the genocide both inside and outside of Rwanda.

A regional approach should reflect and take account of existing mechanisms, such as the African Prosecutor's Association, Interpol and the 'EU Genocide Network' as well as the ICTR. It could benefit universal jurisdiction proceedings as well as extradition to Rwanda, or potentially to third countries able and willing to contribute to accountability efforts.

The imminent closure of the ICTR as well as the gacaca jurisdictions in Rwanda will also provide an opportunity for the Rwandan government, as well as the international community, to deliver on promises made to survivors, whose rights and needs remain unmet. Unless survivors have access to adequate reparation, accountability efforts run the risk of being abstract and meaningless to survivors.

In closing, **Nicole Fritz**, Director of SALC, emphasized that the large number of government officials attending the Conference was very encouraging. It underlined that a political will exists to tackle impunity, together with civil society. The Conference was therefore a first step towards accountability of genocide suspects in Southern Africa, which governments and civil society now can build upon to take the process of accountability and justice further.

10. Recommendations

To Angola, Botswana, Malawi, Swaziland and Zambia:

- Ratify the Convention on the Prevention and Punishment of the Crime of Genocide.

To Angola and Zimbabwe:

- Ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

To Angola Swaziland, Zimbabwe, and Mozambique:

- Ratify the Rome Statute of the International Criminal Court.

To all Southern African States:

- Recall that states have the primary responsibility and the obligation under international law to conduct thorough and effective investigations and prosecutions for serious crimes in violation of international law, including the obligation to prosecute or extradite suspects of such crimes;
- Comprehensively integrate into domestic legislation and ensure the effective implementation in practice of the principle of *aut dedere aut judicare*; the definitions of the crimes in accordance with international law; international fair trial standards; the rights of victims, including the right to information, participation, protection and reparation as

enshrined in the UN Basic Principles on the Rights to a Remedy and Reparation;

- Ensure that such incorporating legislation enables domestic courts to exercise criminal and civil jurisdiction to try crimes under international law (including, but not limited to, crimes identified by the Rome Statute, the Geneva Conventions, the UN Convention against Torture), irrespective of where, by whom and against whom they were committed. Domestic legislation must provide for the independent exercise of such jurisdiction by investigative, prosecutorial and judicial authorities without any political interference;
- Ensure that such jurisdiction is applicable retrospectively to the moment when the crimes were recognised as such under international customary law in accordance with Article 15 of the International Covenant on Civil and Political Rights;
- Arrest those accused by the ICTR and who are found in Southern African states and transfer these accused to the ICTR / the Residual Mechanism; cooperate closely with the ICTR and the Residual Mechanism in other aspects, such as providing access to ICTR investigators, protection of victims and witnesses and hosting those convicted as well as those acquitted and those who have served their sentence so as to enable both institutions to fulfil their mandates;
- Follow up promptly reports by Rwandan authorities, the ICTR, survivors, NGOs and media about genocide suspects living on your country's territory;
- Ensure that relevant capacity exists on a national level to carry out thorough and effective investigations and prosecutions of persons allegedly responsible for serious crimes; where possible, establish specialized 'war crimes' units within the investigation and prosecution authorities;
- Cooperate closely with other countries in the region, with Rwanda and countries with experience in the investigation and prosecution of crimes under international law and lend one another all relevant assistance to investigate and, where necessary, prosecute suspects of crimes committed in the 1994 genocide;
- Develop a regional strategy that ensures that Southern Africa is no longer used as a safe haven for genocide suspects. Such a

strategy should include the establishment of a regional Network of investigators, prosecutors and other judicial officials involved in the investigation and prosecution of serious international crimes to exchange information and develop best practices; the African Prosecutors' Association, Interpol and the EU Genocide Network as well as civil society should be consulted in the process of establishing such a Network;

- Facilitate survivors' access to national authorities in your country, for instance by ensuring that survivors are informed about possibilities to submit complaints and about the authorities in charge of such complaints. Inform complainants on a regular basis about the current state of affairs of their complaint and potential obstacles national authorities may encounter;
- Put in place procedures within the immigration as well as police and prosecution services to ensure that all suspects on Interpol's Red Notice list, and all suspects subject to a national arrest warrant in third countries, are adequately investigated and, where necessary, prosecuted. Alternatively, where an extradition request has been issued for such suspects, ensure that a framework is in place that allows the extradition of suspects of crimes under international law, subject to international human rights law;
- Where extradition of a suspect is refused, ensure that domestic proceedings are initiated with a view to investigate, and, where sufficient evidence exists, prosecute the suspect before domestic courts.

To Rwanda

- Ensure information pertaining to genocide suspects believed to be living in Southern Africa is made available through the appropriate channels and in the appropriate form to the respective states, regional bodies and, where possible, civil society;
- Continue to carry out law reform as necessary providing a legal framework to facilitate transfer and extradition of genocide suspects, in particular in regards to legislation on 'genocide ideology' to specify precisely the terminology of the different laws and restrict relevant legislation to instances of 'hate speech';

- Adopt *Draft Organic Law Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court*, which, in Article 13, allows the panel for any case referred for trial in Rwanda to include judges from foreign or international courts;
- Conclude mutual legal assistance agreements in criminal matters with Southern African countries to facilitate close cooperation of the 'Genocide Fugitives Tracking Unit' with authorities in Southern Africa, including providing necessary assistance to such authorities in identifying, investigating and, where necessary, prosecuting suspects found in those countries;
- Put in place and implement effective measures to secure the property and other assets of defendants, including effective and transparent measures to seize assets and establish clear criteria for the rate of compensation;
- Consult with survivors and stakeholders to establish without delay the compensation fund promised to survivors over previous years.

To the International Criminal Tribunal for Rwanda

- Assist police and prosecution authorities from Southern African countries in the investigation and prosecution of genocide suspects, including, but not limited to, training, awareness raising, information exchange and, where possible, providing specific information to relevant authorities on genocide suspects residing in Southern African countries;
- Consider providing targeted training to judges and court personnel in Southern African countries on international criminal law on the basis of the jurisprudence of the ICTR;
- Provide assistance to Southern African countries willing to accept 11bis transfers in bringing such countries' legal and practical frameworks in line with the standards set by the ICTR Trial and Appeals Chambers;
- Increase outreach activities in Rwanda to raise awareness about the completion strategy, the responsibilities of the Residual Mechanism, and generally the achievements and shortcomings of the Tribunal; ensure that all outreach activities take into account the perspectives of survivors.

To Civil Society

- Advocate for efforts in reviewing, amending and developing comprehensive law reform reflecting all international legal obligations to prosecute or extradite and all related efforts;
- Urge respective national authorities to undertake thorough and effective investigations into the alleged presence of genocide suspects within Southern African countries.

11. Annexures

Agenda

Closing the Impunity Gap: Southern Africa's Role in Ensuring Justice for the 1994 Genocide in Rwanda

Moving Beyond the Tribunal's Completion Strategy and Residual Mechanism

Conference Agenda

30 June and 1 July, 2011
Johannesburg, South Africa

DAY 1

0830-0900

Registration

0900-0930

Welcome

African Rights, SALC and REDRESS

0930-1000

Keynote Address

Dumisa Buhle Ntsebeza, Advocate of the High Court of South Africa

1000-1030

Accountability and Justice for the 1994 Genocide in RwandaJustice and Accountability

Adv. Menzi Simelane, National Director of Public Prosecutions, South Africa

A Survivors Perspective

Kageruka Bonaventure and Xavier Ngabo, Community of Tutsi Genocide Survivors in South Africa

1030-1130

Panel 1**Accountability of Genocide Suspects in Southern Africa**

Chair: Nobuntu Mbelle, Coalition for an Effective African Court

Genocide Suspects in Southern Africa - An Overview

Rakiya Omaar, *African Rights*

Ensuring Accountability of Suspects in Southern Africa – a Perspective from Rwanda

Tharcisse Karugarama, Minister of Justice/Attorney General, Rwanda

Securing Justice - Perspective from Malawi

Rosemary Kanyuka, Director of Public Prosecutions, Malawi

Discussion

1130-1200

BREAK

1200-1330

Panel 2

Closing the Impunity Gap - National Capacity and the Challenges Facing Southern Africa

Chair: Bonita Meyersfeld, University of the Witwatersrand

Legislative Framework for Prosecuting Genocide Suspects in Southern Africa

Chacha Murungu, Centre for Human Rights, University of Pretoria

Capacity to Detect, Investigate and Prosecute Suspects in Southern Africa

Otilia Anna Maunganidze, Institute for Security Studies, International Crime in Africa Programme

Domestic Prosecutions on the Basis of Universal Jurisdiction – Challenges and Lessons Learnt

Siri Frigaard, Ministry of Justice, Norway

Discussion

1330-1430

LUNCH

1430-1600

Panel 3

Victims' Rights to Reparation and Protection

Chair: Hugo van der Merwe, Centre for the Study of Violence and Reconciliation

International Standards

Juergen Schurr, REDRESS

Guaranteeing Participation and Ensuring
Credibility: Lessons Learnt from the ICTR

Sylvie Becky – Head, Witness and Victim
Support Section, ICTR

Ensuring Adequate Victim and Witness
Protection in Southern Africa

Gerhard van Rooyen, UNODC Witness
Protection Advisor

Discussion

1600-1630

**Reflecting on the Discussions of Day
One**

Murtaza Jaffer, Special Assistant to the
Prosecutor, ICTR

SALC/REDRESS/AFRICAN RIGHTS

DAY 2

0900-1100

Panel 4

Transfers and Extradition

*Chair: Lloyd Kuvuya, Southern Africa
Litigation Centre*

The Principle of *aut dedere aut judicare*
(Extradite or Prosecute) in Relation to
Genocide Suspects in Southern Africa

Christopher Gevers, University of
Kwazulu-Natal

Putting the Principle of *aut dedere aut
judicare* into Practice

Chantal Joubert, Ministry of Justice, The
Netherlands

Transfers Under Rule 11bis

Charles Jalloh, Assistant Professor of Law at the University of Pittsburgh School of Law

Legislative Reform in Rwanda in the Context of 11bis Transfers and the Extradition of Suspects

Sam Rugege, Deputy Chief Justice of Rwanda

Discussion

1100-1130

BREAK

1130-1300

Panel 5

Facilitating National Cooperation and the Role of the ICTR

Chair: Nicole Fritz, Southern Africa Litigation Centre

The Completion Strategy, the Residual Mechanism and the Need for State Cooperation

Cecile Aptel, Senior Fellow, United States Institute of Peace

Assisting National Authorities in the Investigation and Prosecution of Genocide Suspects

Bongani Majola, Deputy Chief Prosecutor – ICTR

The Jurisprudence of the ICTR: Ensuring State Compliance with the Standards and Thresholds of the ICTR

Alex Obota Odora, Former Chief of Appeals, OTP, ICTR

Discussion

1300-1330

Closing Remarks

REDRESS/SALC/*African Rights*

1330-1430

LUNCH

1430-1700

CIVIL SOCIETY ROUNDTABLE

1700-1730

**CONCLUSION AND
RECOMMENDATIONS**

Conference Speakers/Participants

Speakers/Chairs

Cecile Aptel	Senior Fellow, United States Institute of Peace
Sylvie Becky	Witness and Victim Support Section, International Criminal Tribunal for Rwanda
Kageruka Bonaventure	Community of Tutsi Genocide Survivors in South Africa, Rwanda/South Africa
Siri Frigaard	National Authority for the Prosecution of Serious Crimes, Norway
Nicole Fritz	Executive Director, Southern Africa Litigation Centre
Christopher Gevers	University of Kwazulu-Natal, South Africa
Murtaza Jaffer	Special Assistant to the Prosecutor, International Criminal Tribunal for Rwanda
Charles Jalloh	Assistant Professor of Law, University of Pittsburgh School of Law, United States
Chantal Joubert	Ministry of Justice, The Netherlands
Rosemary Kanyuka	Director of Public Prosecutions, Malawi

Tharcisse Karugarama	Minister of Justice / Attorney General, Rwanda
Lloyd Kuveya	Southern Africa Litigation Centre, South Africa
Bongani Majola	Deputy Chief Prosecutor, International Criminal Tribunal for Rwanda
Otilia Anna Maunganidze	International Crime in Africa Programme, Institute for Security Studies, South Africa
Nobuntu Mbelle	Coalition for an Effective African Court, South Africa
Bonita Meyersfeld	University of the Witwatersrand, South Africa
Chacha Murungu	Centre for Human Rights, University of Pretoria, South Africa
Xavier Ngabo	Community of Tutsi Genocide Survivors in South Africa, Rwanda / South Africa
Adv. Dumisa Ntsebeza	Advocate of the High Court, former Commissioner of the South African Truth and Reconciliation Commission, South Africa
Alex Obote Odora	Former Chief of Appeals, International Criminal Tribunal for Rwanda / International Law Consultant
Rakiya Omaar	<i>African Rights</i>

Sam Rugege	Deputy Chief Justice, Rwanda
Jürgen Schurr	REDRESS, United Kingdom
Adv. Menzi Simelane	National Director of Public Prosecutions, South Africa
Hugo van Der Merwe	Centre for the Study of Violence and Reconciliation, South Africa
Gerhard van Rooyen	UNODC Witness Protection Advisor

Participants

Dr. Jane Ansah	Former Attorney General and Justice of the Supreme Court of Malawi
Gigi Arlene	Vice President, Swaziland Law Society
Gray Aschman	Gender, Health and Justice Research Unit, University of Cape Town, South Africa
Gilberto Carrerio	Human Rights Lawyer, Mozambique
Dzimbabwe Chimbga	Zimbabwe Lawyers for Human Rights (ZLHR)
Mary Chisanga	Legal Resources Foundation, Zambia

David Cote	Lawyers for Human Rights, South Africa
Leopoldo de Ameral	Open Society Institute of Southern Africa (OSISA)
Pauline Dempers	Breaking the Wall of Silence, Namibia
Cathal Gilbert	Freedom House
Mabvuto Hara	Former President of the Malawi Law Society / Human Rights Lawyer
Berber Hettinga	Community Law Centre, University of the Western Cape, South Africa
Musa Hlope	Human Rights Lawyer, Swaziland
Kate Holland	SPEAK Human Rights, Mauritius
Sarah Jackson	Amnesty International, Uganda
Caroline James	Southern Africa Litigation Centre
Yvonne Kabanyana	Rwanda Genocide Widows Association (AVEGA), Rwanda
Priti Patel	Deputy Director, Southern Africa Litigation Centre
Tiseke Kasambala	Human Rights Watch, South Africa
Sharon Wekwete	Director of Governance and Legal Affairs, Office of the Prime Minister, Zimbabwe
Mubanga Kondolo	Solicitor General, Zambia

James Majahenkhaba Dlamini	Attorney General, Swaziland
John Makhubele	Deputy Chief State Law Advisor in International Legal Relations, Department of Justice and Constitutional Development, South Africa
Noel Kututwa	Amnesty International, South Africa
Thulani Maseko	Human Rights Lawyer, Swaziland
Nthateng Matima	Senior State Law Advisor in International Legal Relations, Department of Justice and International Affairs, South Africa
Dr. Angelo Matusse	Deputy Attorney General, Mozambique
Charles Mironko	Genocide Scholar, Royal Bafokeng Institute, South Africa
Tali Nates	Johannesburg Holocaust & Genocide Centre, South Africa
Aristarque Ngoga	Groupe des Anciens Etudiants Rescapés du Genocide (GAERG), Rwanda
Joao Nhampossa	Mozambique Human Rights League
Mangaliso Nkomondze	Human Rights Lawyer, Swaziland
Polycarpe Ntagwabira	Ibuka, Rwanda
Marie-Pierre Olivier	International Bar Association, Human Rights Initiative

Piers Pigou	International Crisis Group
Jeff Severson	Southern Africa Litigation Centre
Gabriel Shumba	Zimbabwe Exiles Forum (ZEF)
Adam Sitte	Southern Africa Litigation Centre
Sarah Swart	International Committee for the Red Cross, Pretoria Delegation, South Africa
Reetseng Moroke	Department of Justice and Constitutional Development, South Africa
Jacob van Gaderen	Lawyers for Human Rights, South Africa
Joseph Mungarulire	University of the Witwatersrand
Isake Nkuwane	Department of Justice and Constitutional Development, South Africa
Alan Wallis	Southern Africa Litigation Centre

