

The Challenges of Ensuring that Justice is Done and is Seen to be Done in Post- Ethnic Conflicts: The Case of Rwanda¹

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ABSTRACT The principle of ensuring that justice is done and is seen to be done' in post- ethnic conflicts countries such as Rwanda has been and remains a controversial and a far-fetched objective in post-inter-ethnic conflict countries such as Rwanda. The methodology applied in this paper is essentially a qualitative approach and relies on the analysis of the available literature. Using the analysis of available literature, the paper seeks to demonstrate why it is difficult for the winners of the Rwandan conflict to "ensure that justice is done and is seen to be done" by the alleged suspects of the Rwandan genocide. The paper rejects the claims of impartiality when the judges and the prosecutors have direct and indirect personal interests on the issues they are presiding over. The paper argues that in order for to avoid the "victor's justice", the judges must be impartial and not be part of the conflict they adjudicate. The paper further argues that for the Rwandan judges to be impartial they must not be under external influence. The Rwandan judges have personal interests in the outcome of the Rwandan genocide trials. The paper recommends that the prosecution of crimes of genocide and genocide ideologies in Rwanda be done by competent and independent courts of justice which are not party to the alleged crimes they have prosecuted.

INTRODUCTION

It has to be clarified from the onset that this exploration is not intended to excuse or justify the perpetrators of the genocide and crimes against humanity that have been committed in Rwanda in any way. The purpose of this exploration is to merely understand how it is impossible to expect the people prosecuted for the genocide or any other crime against humanity committed in and outside Rwanda to expect justice to be done to them when the prosecution is done by the victims of the genocide. This paper touches on a sensitive issues which have national and international importance. Academics, should not ignore to apply their critical minds on these issues in order to help the people of Rwanda to achieve sustainable peace and reconciliation. Scholars, policymakers and national and "international organisations such as the United Nations (UN), the World Bank and the International Monetary Fund (IMF)" (Roberts 2009: 2) but especially the ruling group in Rwanda, should appreciate that genuine reconciliation cannot happen till justice is done and is seen to be done by all Rwandans (both Hutus and Tutsis).

Therefore, the objective of this paper is to critically analyse a range of electronic and printed literature to demonstrate why it is difficult for the Rwandan government to ensure that justice is done and is seen to be done by the losers of

the Rwandan war (1990-1994) who have been prosecuted for genocide and genocide ideology related crimes. Initially the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done will be debated. The paper continues with a brief description of the Rwandan laws relating to the punishment of the crime of genocide ideology and a discussion of why it is critically important for judges to be impartial and not be part to the conflict they adjudicate on. The paper concludes with a demonstration that the principle of judges' impartiality cannot be guaranteed in the current political conditions in Rwanda due to the fact that the ruling group in Rwandan has both political and economic interests in the prosecution of its opponents.

INTERNATIONAL LAWS AND CRIMES AGAINST HUMANITY

There are various definitions of the term genocide (Jones 2006). However, according to Uwizeyimana (2014: 2370) the definition which has gained international acceptance and legal status over the years is that provided by Article 2 of the International Convention of the Prevention and Punishment of the Crime of Genocide (ICPPCG). The ICPPCG was adopted by the UN General Assembly on 9 December 1948 (UN 1948: 1). "Article 2 of the UN's General Assembly

Resolution 260A (III) defines the term genocide as any of the acts committed [by anyone] with intent to destroy, in whole or in part, a nation, an ethnic group, a race or religious group" (UN 1948:1). The debate on the Rwandan genocide is based on ethnic group (Hutus and Tutsis) as neither race nor religion was the issue before and during the 1994 genocide.

The UN considers that the acts which constitute genocide may include some or all of the following:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group" (UN 1948: 1).

According to Rummel (2002: 1, also cited in Uwizeyimana 2014: 2370) "genocide is foremost an international crime for which individuals, no matter how high in authority, may be indicted, tried, and punished by the International Criminal Court (ICC)". According to the United Nations Human Rights (2010: 30):

"The ICC... is the only judicial mechanism that has the capacity, the integrity and the independence required to prosecute those who bear the greatest responsibility for the crimes under international law" (United Nations Human Rights 2010: 30).

According to the US Holocaust Memorial Museum (n.d.:1) "article I of the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCPPCG)" states that "genocide, whether committed in time of peace or in time of war, is a crime under international law". As a crimes under international law, it is the duty and responsibility of the Contracting Parties to the UNCPPCG to prevent and punish those who commit genocide (US Holocaust Memorial Museum n.d.: 1).

The above position implies that when genocide or related crimes or any other crime that can be construed as a crime against humanity are committed, the ICC is better placed to prosecute the alleged perpetrators than local courts because of its presupposed independence and impartiality, but also because most local courts, especially in developing countries lack capacity.

Rwanda is a signatory to the international conventions such as ICPPCG. Point 9 of the Preamble of the Rwandan constitution states that the Rwandan government adheres to all the "UN's Conventions and other international conventions from continental bodies such as the African Union/AU" (Republic of Rwanda 2010). This is how the Preamble of the Constitution of the Republic of Rwanda states the country's re-affirmation of its commitment to a number of different international conventions:

"We the people of Rwanda reaffirm ...our adherence to the principles of human rights enshrined in the United Nations Charter of 26 June 1945, the Convention on the Prevention and Punishment of the crime of Genocide of 9 December 1948, the Universal Declaration of Human Rights of 10 December 1948, the International Convention on the Elimination of All forms of Racial Discrimination of 21 December 1965, the International Covenant on Economic, Social and Cultural Rights of 19 December 1966, the International Covenant on Civil and Political Rights of 19 December 1966, the Convention on the Elimination of all Forms of Discrimination against Women of 1 May 1980, the African Charter of Human and Peoples' Rights of 27 June 1981 and the Convention on the Rights of the Child of 20 November 1989" (Republic of Rwanda 2010: Preamble).

Article 190 of the Rwandan Constitution (2010) further states that: *"Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of noncompliance by one of parties."*

It is common practice that "once ratified, all treaties and conventions supersede the national laws of countries that have ratified them" (Chrisjohn et al. 2002). If all international treaties and conventions ratified by the Government of Rwanda supersede Rwanda's national laws (Uwizeyimana 2014: 2371), then all international laws and conventions on genocide also take precedence to national laws because of the severity of that crime.

Thus, in order to deal with the Rwandan "genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens re-

sponsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994” (Peace Resource Centre (PRC) 1994: Internet Source), the UN adopted the Statute of the International Criminal Tribunal with “UN Security Council Resolution 955, S/RES/955” (1994) at its 3453rd meeting, on 8 November 1994 (PRC 1994: Internet Source). This was followed by the adoption and establishment of the International Criminal Tribunal for Rwanda (ICTR) (French: *Tribunal pénal international pour le Rwanda, TPIR*) in November 1994 in Arusha Tanzania. The ICTR’s “*Ratione Personae Et Ratione Loci*” (that is, sole purpose) was to prosecute anybody who is responsible for the “Rwandan Genocide and other serious violations of international law in Rwanda and in nearby states” (UN 1994:1). There was no indication that one side of the Rwandan four years (1990-1994) civil war will not be prosecuted by ICTR. It has to be noted that the UN Security Council’s decision to establish the ICTR was based on the Government of Rwanda’s request (S/1994/1115) to do so (PRC 1994: Internet Source). While war crimes have been committed since the 1st October 1994 when the war between the then Rwandan government and the Rwandan Patriotic Front (RPF). RPF is a Tutsi dominated armed group which started as a rebel group attacking the then Hutu dominated Rwandan government from Uganda and won power through a hard-fought four years civil war) (Grafeld 2001: 1; Umutesi 2006: 157), The ICTR frame of reference was limited to a one year period ranging from 1 January 1994 and 31 December 1994 (United Nations Security Council 1994). The limitation of the period covered by ICTR to one year is itself ironic given the fact that the bloody civil war that culminated in the Rwandan genocide in 1994 was started by RPF invasion on 1 October 1990 (Kuperman 2003: 1). The RPF’s itself knows that the Genocide started “from 1st October 1990 to 31 December 1994” (Republic of Rwanda 2013: 37). It looks like the UN Security Council decided to cover the 12 months of 1994 because the letter sent to the United Nations by Manzi Bakuramutsa, the then Rwanda’s Ambassador and Permanent Representative of Rwanda requesting the UN Security Council to establish the ICTR mentioned twice that “*the genocide started in April this year*” (that is 1994)

(Bakuramutsa 1994: 2) and again that “*At the height of the genocide in April-May this year*” (Bakuramutsa 1994: 4).

ICTR’s Victors Justice and the Rwandan Genocide

According to the Human Right Watch (2014:6), “the ICTR had tried 75 individuals in 55 cases; 49 individuals were convicted; 14 were acquitted; 12 were awaiting the outcome of appeals. The ICTR is currently winding down its operations and all proceedings are expected to conclude by the end of 2014, with the exception of one case in which the appeal is due to conclude in mid-2015.” While the ICTR’s mandate stated clearly that its reason to exist was to prosecute all people (including all Rwandans) who had committed genocide or related crime inside and outside the Rwandan borders, it has rounded up its work in Arusha Tanzania in 2014 having failed to prosecute a single Tutsi or any other member of the ruling Rwandan Patriotic Front (RPF). The ICTR’s failure to prosecute a single member of the ruling RPF over its ten years period (1994-2014) is described by the Human Rights Watch (2014: 6) as follow:

“Perhaps the most significant failure of the ICTR has been its unwillingness to prosecute crimes committed by the RPF in 1994, many of which constituted war crimes and crimes against humanity. Although the ICTR had a clear mandate to prosecute these crimes (its jurisdiction covers genocide, war crimes and crimes against humanity), not a single RPF case has been brought before the ICTR for prosecution, creating a sentiment among some Rwandans and international legal observers that it provided only victor’s justice”.

ICTR RELUCTANCE TO PROSECUTE MEMBERS OF THE RULING RPF PARTY

The ICTR failed to prosecute any single RPF member despite evidence in reports such as the United Nations Human Right “Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003”. That report, completed in 2010 showed that members of the

Rwandan Patriotic Army (RPA) which currently controls Rwanda, also committed war crimes amounting to genocide against the Hutus. The crisis in Rwanda was called genocide before the establishment of the ICTR (United Nations Human Rights 2010). In addition to the United Nations Human Rights report in 2010, analysis of a number of independent studies such as the ones conducted by Reyntjens in 1996, Des Forges in 1999, Umutesi 2006, Davenport and Stam in 2009 and Staub 2012, lead to the conclusion that both sides in the Rwandan war (1990-1994 and beyond) were guilty of having, one way or the other committed atrocities against Rwandan citizens. That conclusion is supported by testimonies provided by former members of the Rwandan Patriotic Front (RPF/RPA such as Ruzibiza in 2005 and Kennedy Gihana in 2013 (in Pauw 2013:17) who, either because of their guilty conscience or having fallen out with the current Rwandan regime have publicly admitted having received instructions from their military bosses to kill as many civilian Hutus as they can in the 1994 war. For example, according to Umutesi (2006:157) *“in a statement made public in December 1995 after his defection, former RPF intelligence chief Sixbert Musangamfura alleged that 312,726 people were murdered in a selective and deliberate fashion by RPF fighters between July 1994 and July 1995.”* Umutesi (2006:157) further argues that another statement made public in November 1995 “by ex-Prime Minister Faustin Twagiramungu corroborated reports of massacres by the RPF above and beyond those reported by the international media, citing ‘irrefutable proof’ that over 200,000 Hutus were killed” inside Rwanda in the aftermath of RPF taking power in 1994.

In addition, the former RPA senior official Major Alphonse Furuma, a former Rwandese Patriotic Army Political Commissar during the RPA war (1990-1994), and later Aide de Camp (ADC) to the former army Chief of Staff General Kayumba Nyamwasa (1998-2010) and also General Kayumba Nyamwasa himself alleged that Paul Kagame, “the Commander-in-Chief of the Rwandan Patriotic Army (RPA) and Minister of Defence and Vice-President at the time of the alleged crimes (1994-2002) ordered the military to “counter genocide massacres covering the entire nation immediately the genocide started” (Nyamwasa et al. 2010: 15-16). Similar allegations have been made by the late Colonel Karegeya,

former Chief of external spy services; Major Rudasingwa, Kagame’s former Director of Cabinet and Rwanda’s first post-genocide ambassador to the US and Gerald Gahima, Rwanda’s former Prosecutor General and Vice President of the Supreme Court (Gasana 2010: 10).

Finally, academic and scientific researchers such as Reyntjens (1996: 240) and Stam and Davenport (2009: 8-9) and historian and human rights activists such as Alison Des Forges as well as international organisations such as Human Rights Watch and Amnesty International have come to the same conclusion that crimes were committed by both sides of the Rwandan civil war. For example, Reyntjens (1996: 240) reported that “the Rwandan Patriotic Front (RPF) killed tens of thousands, maybe hundreds of thousands of Hutus before, during, and after 1994” (see also Uwizeyimana 2014). Alan Stam, a professor of international politics at the University of Michigan and his co-author and researcher, Professor Christian Davenport, after many years of study, and interviews with survivors [Stam and Davenport] compiled sufficient evidence supporting the conclusion: “a million people died, but, contrarily to popular belief, the vast majority of those who died were not Tutsi, but Hutu” (Davenport and Stam 2009: 8). According to these two academics and researchers, the “current Rwandan President Paul Kagame, a U.S. ally trained at Fort Leavenworth, Kansas, is guilty of war crimes of an extraordinary scale” (Stam and Davenport 2009: 8-9). While Des Forges (1999: 692) reported that “the killings by the RPF were more selective, mainly targeting educated or politically active Hutus”, most senior RPF officials such as Sixbert Musangamfura, Ruzibiza and Kennedy Gihana as well as politicians such as Mr Faustin Twagiramungu, the Prime Minister in 1994 allege that hundreds of thousands of ordinary Hutus (irrespective of age gender or level of education) were systematically selected and deliberately murdered by RPF fighters in Rwanda (Umutesi 2006).

Despite having the mandate to prosecute everyone who committed genocide and war crimes and crimes against humanity irrespective of their ethnic background and the availability of evidence to prosecute, the ICTR has apparently been reluctant to prosecute alleged offences by both sides. The HRW (2014: 6) argues that “Pressure from the Rwandan government, combined with a reluctance to offend the government and jeopardize its cooperation with the

ICTR, resulted in the ICTR focusing exclusively on genocide-related crimes". The fact that an international tribunal such as ICTR seems to have practiced the victor's justice as a result of the pressure from the Rwandan government led some such as Waldorf (2010: 1224) to argue that "international justice is inherently political". The HRW (2014: 7) detailed the ICTR's contribution to what some in Rwanda perceive as victors' justice in the following account:

"In a further demonstration of the ICTR's unwillingness to handle these politically sensitive cases, in 2008 ICTR Prosecutor Hassan Jallow transferred the case of four RPF officers accused of killing 15 civilians in 1994 to the Rwandan national court system, for prosecution inside the country. Human Rights Watch monitored the trial and concluded that it was a political whitewash" (HRW 2014: 7).

According to Umutesi (2006:157), most Rwandans, Hutus and Tutsis, as well as some academics agree that there cannot be peace and reconciliation in Rwanda until those RPF members who killed the Hutus are also brought to justice and the Hutus are allowed to remember their own relatives who perished at the hands of RPF soldiers inside and outside the country. In providing protection to the alleged criminals in its ranks and using the courts to prosecute its political opponents, it is difficult to arrive to a different conclusion except that the Rwandan government is involved in revenge and dispensing victor's justice. It appears that both the ICTR and the Rwandan courts have contributed to a perception that the one ethnic group targeted was targeted to promote the victors' justice and have so jeopardised the process of ensuring that everyone seeking justice receives it. Consequently it will be difficult to chart the road for sustainable and genuine reconciliation necessary for peace and reconciliation among the two main Rwandan ethnic groups. "Since people who are harmed deeply yearn for truth and justice, addressing this is essential for reconciliation" in Rwanda (Staub 2012: 2).

RWANDA'S LAWS RELATING TO THE PUNISHMENT OF THE CRIME OF GENOCIDE IDEOLOGY

In general, international laws such as the UN Genocide Convention supersede national laws and any country that has ratified them is legally

bound by them (Chrisjohn et al. 2002: 15). The Rwandan government went further and developed indigenous "Laws relating to the punishment of the crime of Genocide ideology" (Republic of Rwanda 2008a). These have been amended in 2008 and the recent amendment was carried out in 2013 (Republic of Rwanda 2013).

The infraction "Genocide ideology" (also called "*ingengabitekerezo ya jenocide*" in Kinyarwanda, the Rwandan language) is a term coined by the RPF-led government in 1994. As indicated above, the RPF is a Tutsi dominated rebel group which invaded Rwanda from Uganda on the 1st October 1990, fought and overthrew the Hutu dominated government in Rwanda in 1994 (Umutesi 2006:157). The war between the two ethnic groups culminated in the 1994 human tragedy commonly and internationally known as the Rwandan genocide. The Rwandan genocide is specifically referred to by the RPF-led government as the genocide against the Tutsis (*genocide yakorewe abatutsi*). The term Genocide ideology is defined in "articles 3 of "Law n° 84/2013 of 11/09/2013 on the crime of genocide ideology and other related offences" as: "any deliberate act, committed in public whether by oral, written or video means or by any other means which may show that a person is characterized by ethnic, religious, nationality or racial-based thoughts aiming to advocate for the commission of genocide; or to support the genocide"(Republic of Rwanda 2013: 37 also cited in Yakaré-Oulé 2014: 208).

Chapter 2 of Law No 18/2008 relating to the punishment of the crime of genocide ideology (as amended in 2013) deals with the issues of sentencing and the penalties. Article: 4 of Chapter 2 of the 2008 law states that:

"Any person convicted of the crime of genocide ideology as mentioned in Articles 2 and 3 of this Law shall be sentenced to an imprisonment of ten (10) years to twenty five (25) years and a fine of two hundred thousand (200.000) to one million (1.000.000) Rwandan francs. However, the penalty provided for in the preceding paragraph shall be doubled, in case of recidivism" (Republic of Rwanda 2008a: 2).

The 2013 amendments have reduced the jail term in this category to nine years. Article 6 deals with penalties awarded to current and former leaders while Article: 7 deals with penalties awarded to "associations, a political organization and non-profit making organization". According to

Article 6: *“in case the perpetrator of the crime of genocide ideology is a leader in public administrative organs, political organisation, private administrative organs, or non-governmental organs, a religious leader, or a former leader in such organs, he/she shall be sentenced to an imprisonment of fifteen (15) years to twenty five (25) years and a fine of two million (2.000.000) to five million (5.000.000) Rwandan francs”* (Republic of Rwanda 2008a: 2-3).

In addition, Article 7 states that: *“Any association, political organization or non-profit making organisation convicted of the crime of the ideology of genocide shall be subject to a punishment of its dissolution in accordance with legal provisions relating to dissolution of associations, political organisations and non-profit making associations and a fine of five million (5.000.000) to ten million (10.000.000) Rwandan francs without prejudice to individual liability of any participant in the commission of the crime”* (Republic of Rwanda 2008a: 2-3).

Article: 9 deals with *“Penalties awarded to children guilty of the crime of genocide ideology, parents and other guardians of the child”* (Republic of Rwanda 2008a). This section states that *“In case a child under twelve years (12) of age is found guilty of a crime of genocide ideology, he or she shall be taken to a rehabilitation centre for a period not exceeding twelve (12) months”* (Republic of Rwanda 2008a; ACERWC 2012). *“In case a child who is found guilty of the crime of genocide ideology is between twelve (12) and eighteen (18) years, he or she shall be sentenced to a half of the penalty referred to in Article 4 of the 2008 (and now 2013 amended) Law, without prejudice to the possibility that a part or whole of the sentence may be served in the rehabilitation centre”* (Republic of Rwanda 2008a, also FDU-Inking 2015: 2). In terms of Penalties awarded to parents and to other guardians of the child, Article: 11 states that: *“In case it is evident that the parent of the child referred to in Article 9 of this Law, the guardian, the tutor, the teacher or the school headmaster of the child participated in inculcating the genocide ideology, they shall be sentenced to an imprisonment of fifteen (15) years to twenty five (25) years (Republic of Rwanda 2008a). A teacher or a director referred to in the preceding paragraph cannot be reintegrated into his teaching career”* (Republic of Rwanda 2008a).

The interpretation and application of this law has generated widespread controversies both internally within Rwanda and internationally in terms of its ambiguity and harsh penalties meted to those accused and convicted under this law. Indeed, it is the fearless criticism by international organisations such as the Human Rights Watch which led to some changes to the law of genocide ideology in 2013. Following is a brief discussion of the new [proposed] amendment of this law.

The 2013 Amendments to the 2008 Law of Genocide

In response to national and international outcry about the injustice resulting from the absurdity and confusion of the law of genocide ideology of 2008, the Rwandan cabinet approved a draft law aiming to clarify aspects which were not clear. Among other deficiencies of the 2008 law was that it could not differentiate between genocide ideology and related offences such as minimizing, negating, and justifying the genocide. However, while Yankuriye (cited in Tabaro 2012:1), the principal State Attorney, claimed that the new draft law makes that difference clear the Human Right Watch Report 2012 still believed that the changes made by the Rwandan government, while pointing into the right direction, were not good enough to eliminate all ambiguities in the Law. For example, *“vague offenses such as approving of the genocide by ‘mocking’ a person or group on the basis of shared characteristics are still included in the [amended] draft and are ripe for abuse”* (Human Right Watch 2012: 3). In the amended draft punishments for *“Genocide ideology and related offenses”* have been reduced from between 25 years and life imprisonment to between 5 and 9 years. The fines also seem to have been capped at between Frw 100,000 to 1,000,000 from between two million and five million Rwandan francs. Another new element in the new law is that the *“offenses must have been committed in public. In the 2008 law, people were held responsible for things that were said in private, which led to many false accusations”* (Human Right Watch 2008: 1).

These changes do not address the issue that people (children and adults) and organisations (private and political) of ethnic Hutu background are the exclusive targets of this law of genocide ideology. Nor do they address the problem of

mostly Tutsi people bringing accusations against their Hutu neighbours perhaps through jealousy (Human Right Watch 2008). Furthermore, the prosecution may be based- not on actual statements, but on ‘the speaker’s alleged underlying philosophy, and not on an analysis of whether speech constitutes advocacy of hatred that amounts to violence, discrimination or hostility.’ (HRW 2012: 1) The so called ‘underlying philosophy’ is determined by the state or its agents so it is not clear what objective measure may be used to determine beyond reasonable doubt that the philosophy behind someone’s thoughts constitute the crime of genocide ideology. The ambiguities and lack of factual and objective basis in the determination of the philosophy underlying the accused’s thinking and which remain in the proposed amendments led the Human Right Watch Report 2012 to argue that “*draft revisions of the laws on genocide ideology and media leave open the possibility for inappropriate prosecutions for ‘genocide ideology’*” (HRW 2012: 1-3). Finally, the characteristics of the crimes of genocide ideology as summarised in articles 2 and 3 of Law No 18/2008 of 23/07/2008 discussed above were not further amended in the 2013 version of this Law (Nishimwe 2013: 1).

THE PRINCIPLE THAT JUSTICE SHOULD BE DONE BE SEEN TO BE DONE IN RWANDA

In 1923, Lord Hewart coined the famous aphorism “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” (Spigelman 1999:1-2). Spigelman, the chief justice of New South Wales, Chief Justice Burger (1980: 564-575) and researchers Baylis (1991: 21) and Kelly (1993: 241) argued that ‘Lord Hewart aphorism [merely] encapsulates a principle that had been long known and often expressed’. This fundamental principle is also encapsulated in the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 14 of the ICCPR relevantly provides that: “All persons shall be equal before the courts and tribunals” (UN 1966). However, as Lord Atkin once said “Justice is not a cloistered virtue” (Spigelman 1999: 259). Therefore, according to Lord Bowen, in order for justice to be done, and manifestly and un-

doubtedly be seen to be done, “...Judges, must be like Caesar’s wife; that is, they should be above suspicion...” (Spigelman 1999: 254). The ICCPR goes further to state that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent”, but most importantly “independent and impartial tribunal established by law” (Spigelman 1999: 254).

The principle of an independent and impartial tribunal is of critical importance in dispensing justice in post-inter-ethnic conflict countries such as Rwanda in order to avoid what has been called “Victors’ justice”. The term “victor’s justice” (in German, *Siegerjustiz*), is a situation in which “an entity partakes in carrying out prosecution on the basis of applying different rules to judge what is right or wrong for their own forces and for those of their conquered enemies” (Butt 2003: 1). According to Tanguay-Renaud (2003: 1) “Victor’s justice is so capacious that one could perhaps be forgiven for mistakenly confusing it with morality writ at large”. Tanguay-Renaud (2003:1) argued that victims “generally argue that the victors’ application of different rules to the conquered side amounts to conquerors’ hypocrisy” and that without doubt, the practice of victors’ justice “leads to injustice.” For the purpose of argument in this paper, the victor’s justice is considered to happen when the victorious forces, “ex post facto justice” establish the courts and the terms and conditions under which members of the losing side are prosecuted and punished. It also denotes a situation in which the Victors decide on the crime, establish laws and the judges to adjudicate, decide who is to be prosecuted and who is not and most importantly, shield their own members suspected of having committed similar crimes from being prosecuted (Buchanan 2008) as was the case in Rwanda after 1994. The credibility of the judicial system is heavily dependent on the independence and impartiality of its Judges (Chandel 2012). It is however even more important that the laws and statutes being applied by the judges be seen to be fair by the citizens of the country. The question is what challenges hamper the independence and impartiality in the Rwandan justice system and why the Law of genocide ideology is considered to be unfair by some, especially those it is targeting?

Importance of Judges' Independence and Impartiality

The principle of judges' impartiality bind the judges to recuse themselves from presiding or hearing cases on which they have direct or indirect conflict of interests. According to an Online Dictionary (<http://legal-dictionary.thefreedictionary.com/Recuse> Accessed 13 December 2015), "judge's recusal (or the judge's act of disqualifying him/herself from presiding over a court proceedings), is based on the maxim that judges are charged with a duty of impartiality in administering justice" (see also Federal Judicial Center 2010; Abramson 2011; Nemukuyu 2015). A judge must recuse him/herself if he/she has a personal bias or prejudice concerning a party to the lawsuit or has personal knowledge of the facts that are disputed in the proceeding (Abramson 2011). Two sections of Title 28 of the United States Code (the Judicial Code) provide standards for judicial disqualification or recusal. Section 455 [of Part I in Chapter 21 of Title 28] of the US judicial Code deals with issues of "Disqualification of justice, judge, or magistrate judge". This is how Section 455 of Title 28 deals with the issue of recusal when the judge or the judges' relatives are party to the dispute:

"(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Such circumstances in which Any justice, judge, or magistrate judge shall disqualify himself include: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could

be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding" (Legal Information Institute (LII) 1992:1; Ducat 2009: 12).

The above definition is much broader than the limited Rwandan rules on judges' recusal where according to Article 99 of the civil, commercial, labour and administrative procedures "a trial judge may be disqualified if he/she has already intervened in the case as a judge, mediator, prosecutor, judicial police officer, party, witness, arbitrator, interpreter, expert or public servant" (Kisambira 2013: 1). This law does not say what happens in other cases listed in Title 28 of the US judicial Code summarised above.

Rwandan Government Expressed Opinion on the Guilt of Hutus

It can be argued that the Rwandan government have expressed opinion on Hutu guilt simply because they are Hutus. Such expressed opinion can be found through Rwandan leadership statements. President Paul Kagame "spoke of genocide and even stated that genocide was committed by all Hutus" when he addressed over "800 Rwandan youth at the closing of the Youth Connect Dialogue which took place on 30/06/13 at the Serena Kigali Hotel" (Mugisha and Rwema 2013:1). These youth, according to Rwandan Platform for Dialogue, Truth, and Justice Rwanda (RDTJ) and the International Women Network for Democracy and Peace (IwnFDP), were attending an event organised by the Ministry of Youth together with President Kagame's wife Janet Kagame's "Imbutu Foundation as a part of nationwide indoctrination campaigns" (RDTJ 2013: 1). In the same speech President Kagame went on to say that "he was the paramount example of tolerance because he accepts to live in the same country with an ethnical group of genocidaires" (Habiyaremye 2013: 1). President Kagame "called for every child, adolescent, and young adult of Hutu descent or blood including those who were not born at the time of

the massacre to apologize for the crimes committed in their name, by their parents and relatives during the 1994 Rwandan genocide" (RDTJ 2013: 1). Amongst those who when young Hutu children apologised for crimes they never committed, is Mr Edouard Bamporiki, a 29 year old filmmaker (Mugisha and Rwema 2013: 1). According to Mugisha and Rwema (2013: 1) Bamporiki was only 10 years old during the 1994 genocide. Members of Parliament from the Hutu tribe such as Christopher Bazivamo and Boniface Rucagu as well as the former Prime Minister Pierre Habumuremyi also apologized during this 'Imbuto Foundation's ceremony' (Mugisha and Rwema 2013: 1). The President publicly announced that "all Hutus from all corners are genocidaires" (Rudasingwa 2013: 1) despite the "Rwandan government liking to pretend that there is no ethnic groups in Rwanda". The question is then if ethnic groups indeed do not exist in Rwanda, on what criteria were these young people selected, labelled as Hutus by the President of the republic of Rwanda and then forced to apologise for other Hutus? This contradiction led Warigi (2013: 1) to argue that "As much as Kagame's Rwanda claims to have forcefully moved to disband its old ethnic categories, it is an open secret that the Hutus are made to feel the burden of the guilt". Indeed the official name of the crime of genocide ideology as recorded in section 1 of Article One in the preamble of the Rwandan constitution does not recognise non-Tutsis who died during the Rwandan genocide, calling it the '*jenocide yakorewe abatutsi*' or '*genocide against the Tutsis*' (Republic of Rwanda 2010: 3; Nsanzimana 2013: 1).

Another expressed opinion is that the government of Rwanda considers every Hutu a genocide perpetrator. This is evident from an interview by researchers of the International Panel of Eminent Personalities (IPEP) with both the post-1994 president, Mr Pasteur Bizimungu, and the current President Paul Kagame in 2000. When asked why the RPF soldiers were killing everyone instead of targeting those that have committed genocide, both former President Bizimungu and current President Paul Kagame argued that "it is not always easy to distinguish between innocent and guilty Hutus" (OAU 2000: 235; Doxtader and yVilla-Vicencio 2003: 12). The fact that two successive presidents did not know the difference between "innocent and guilty Hutu" may well explain why they both consider

all of them guilty and explain the RPF-led Rwandan government's desire to have all of them apologise for the crimes of genocide. Finally, the expression of the Hutus guilt and the presumption of the Tutsis innocence could be found in the way the Rwandan government has used to *Gacaca* courts to "affirm group *personas of victim and perpetrator, innocent and guilty*" (Le Mon 2007: 18-19). For example, the penal code and the genocide ideology law purport to punish "any person" (Republic of Rwanda 2002). This would logically include both Hutu and Tutsi but this has not been the case since RPF took over government in 1994. However no record has been found of a single Tutsi being punished under the Rwandan law of genocide ideology.

Three reasons may be used to explain such lack of records. First, records identifying ethnic background do not exist because of the government's prohibition on recording Rwandans according to their ethnic background. According to following the Rwandan Patriotic Front overthrow of General Habyarimana's regime in 1994; "the mention of Muhutu/Mututsi on identity cards was quickly abolished and replaced by the word Munyarwanda". Secondly, if statistics on ethnic representation in the judiciary and the people convicted for genocide exist, it remains government top secret and difficult for the public and researchers to access.

Finally it would be risky to conduct an independent research on this issue in the current environment. According to Kok (2012: 1), "in a country where there is a taboo on identifying someone as either Tutsi or Hutu, and where journalists and ordinary people may be imprisoned when speaking of the genocide in which Rwandans killed one another" finding statistics of the suspects prosecuted by Rwandan normal and *Gacaca* courts on the basis of their ethnic background would be virtually impossible. Despite these challenges to finding data on the ethnic composition of the many people convicted for alleged genocide related offences, Le Mon (2013: 18-19) argued convincingly that "*Gacaca* court proceedings assigned collective guilt to Hutus by ignoring crimes committed by the RPA, and permitting primarily Tutsi survivors to stand in judgment of primarily Hutu perpetrators". The fact that the *Gacaca* courts have not addressed the crimes of the Rwandan Patriotic Front (RPF) - after taking Kigali in 1994 and also later in the DRC - was also highlighted by Dr Phil Clark a

Lecturer in Comparative and International Politics, specialising in conflict and post-conflict issues in Africa at Oxford University. In an interview with Stefanowicz in 2011, Clark argued that the judges in *Gacaca* courts did not prosecute crimes committed by RPF members because they “know very well how opposed is the Rwandan government to hearing cases in which the RPF members are accused of crimes against Humanity” (Clark 2011: 1; Umudendezo News 2012: 1). As he puts it “judges were concerned that if they transfer the transcripts of the trials back to central authorities and it becomes known that they have allowed open discussions of RPF crimes then they themselves could get into trouble” (Clark 2011: 1). Most Rwandans are know well that “What goes on during *gacaca* trials is a reasonably well-hidden secret in a lot of communities” (Umudendezo News 2012: 1). The failure to target RPF commanders and other high-ranking officers’ has led Katherine Iliopoulos, an international lawyer based in The Hague, Netherlands to seriously doubt the independence of the Rwandan judiciary (Iliopoulos 2011: 1). Based on the fact that Tutsis were not prosecuted during the *Gacaca* courts, it can be reasonably argued that all 1.3 million who have been prosecuted and condemned some to death penalties or longer jail terms are from Hutu families. The appearance that people prosecuted under the law of genocide are more likely to be Hutus and that Tutsis have been protected by the same laws, challenges the assumption that the penal code and the genocide ideology law punish ‘any person’.

Maintaining Power Through Muzzling Political Opponents

The Amnesty International Report in 2010 is full of testimonies of human right organisations and individuals who are scared to say anything or to criticize the wrong done by people of the Tutsi ethnic group or government for fear of being accused of genocide ideology. According to Amnesty International Report (2010: 92) one Rwandan human rights activist said that, “If you dare to criticize what is not going well, it is genocide ideology”. Thus, the few civil society organisations remaining in Rwanda and the general population prefer to “shut up” Another representative of an international NGO working in Rwanda said ‘the population has to shut up’

[that is, do not complain about the offense committed by the Tutsis neighbours or government], otherwise you risk being accused of genocide ideology” (Amnesty International Report 2010: 92). There is also ample evidence to show that the Rwandan government has “used the law of genocide ideology to silence political opponents rather than to provide justice” (Kabonero 2010; Onyiego 2010; Dalporto 2012: 867). According to Grant (2010: 2-3), “just before the 9 August 2010 elections, only the Hutu opposition candidates were targeted for arrest, jailed and charged with divisionism and genocide ideology”. Prior research conducted by Uwizeyimana in 2012 found that “among them were former president Pasteur Bizimungu, the president of the Party for Democracy and Renewal-Ubuyanja (PDR-Ubuyanja), who was arrested in 2002 and sentenced to 15 years’ imprisonment for divisionism” (Amnesty International 2012: 1 cited in Uwizeyimana 2012: 153). “The offence was allegedly committed in the course of a magazine interview in which Bizimungu predicted Hutu violence and civil war unless the RPF started sharing power in a concrete and genuinely democratic way” (Uwizeyimana 2012: 153). Allegations of ‘genocide ideology’ were also used to justify extrajudicial killings of people from the ethnic Hutu in police custody from November 2006 to May 2007 (Amnesty International 2010: 27). Another example, according to Patten (2004: 1) is Faustin Twagiramungu, “the main opposition candidate in the 2003 presidential election who ‘opted to run as an independent candidate after the government banned his party, the Movement Democratic Republican (MDR), and had many of its members imprisoned’ under the laws of genocide ideology” (also Patten 2004: 1 in Uwizeyimana 2012: 120). At the time Twagiramungu, as Patten (2004: 2) continues to argue, “the first Prime Minister of the RPF government (1994-2002), had just left the RPF to form his own party after falling out of favour with Paul Kagame” (Patten 2004: 2 in Uwizeyimana 2012: 120). Perhaps, as Uwizeyimana 2012: 124) continues to argue, “the most classical case of incarceration under the law of genocide ideology because of political views is Victoire Ingabire the president of the party - FDU Inkingi. Ingabire, who returned to Rwanda from the Netherlands with the intention of running in the 2010 presidential elections.” When Ingabire arrived in Kigali, she called for the prosecu-

tion of those responsible for crimes against Hutus during the 1994 Rwandan genocide (Uwizeyimana 2012: 124). Because of that call, she was arrested and jailed shortly after making her statement “*for allegedly collaborating with a terrorist organization, dividing the people of Rwanda and denying the 1994 genocide*” (van Leeuwen and Houttuin 2012: 1). Ingabire has been in jail since 2010 for ‘the Orwellian crime of genocide ideology’ and was finally handed an eight years jail term under the laws of genocide ideology in October 2012 (Human Rights Watch 2009: 2). Another prominent victim of the Rwandan law of genocide is “Bernard Ntaganda, president of the party PS Imberakuri who was handed a four years jail term (2010-2014) for criticising the RPF government’s lack of human rights and democratic rule in Rwanda” (Garrison 2010:3). According to Uwizeyimana (2012: 128) “*such draconian steps as refusing to register opposition parties and the prosecution, harassment, killing and imprisonment of those who challenged Kagame’s re-election explains why Kagame got 95.5% of the votes in 2003 and 93.08% of the votes in 2010*” (see also BBC 2010: 1). The 75 percent majority of Hutus in the Rwandan population would be capable of easily unseating any RPF candidate, if the Rwandan elections were free and fair. Des Forge (1999: 728) argued that “while the Rwandan government’s effort to reshape Rwandan political culture to eliminate divisiveness has been widely lauded, other political motivations have influenced the government’s political program and undermined the government’s ability to unify the country”.

As Des Forge (1999: 728) further argued, “*the RPF leaders have a strong sense of their own moral rectitude and great certainty of their right to rule, and as a result, they have been willing to use brutal force to maintain their power.*”

The return of undemocratic minority rule in Rwanda has also been reported by former RPA members (of the Tutsis ethnic background) such as General Kayumba Nyamwasa, the former Chief of Staff of Rwanda’s armed forces; Colonel Karegeya, the former Chief of external security/spy services; Major Rudasingwa, Kagame’s former Director of Cabinet and Rwanda’s first post-genocide ambassador to the US and Gerald Gahima, Rwanda’s former Prosecutor General and Vice President of the Supreme Court (Gasana

2010: 10). In their analysis of the challenges that faced Rwanda in the aftermath of the war and genocide, Nyamwasa, Karegeya, Rudasingwa and Gahima (2010: 15-16) argued that “the Hutu community is marginalised from a meaningful share of power”. According to these former senior members of the RPF, “the Hutu who serve in RPF-led government are only surrogates of the RPF who lack legitimacy in their community”. Such people, according to Nyamwasa et al. (2010: 15) “are kept in office, often for very brief periods, for the sole purpose of giving the government an appearance of embracing political pluralism”. Their observation as senior members of the RPF and the Rwandan government for about two decades was that “the Hutu community perceives the RPF as an instrument of political domination by the minority” and that the current Rwandan “government is not considered legitimate by the majority of the population in general, and the Hutu community in particular” (Nyamwasa et al. 2010: 15-16).

Economic Benefits of the Rwandan Laws of Genocide

A review of literature shows that the benefits of the Rwandan laws of genocide ideology are not limited to maintaining the ruling elites in power. For example, according to Rugege (2007: 422):

Rugege (2007:422), citing the *Organic Law Establishing the Organization, Competence, and Functioning of Gacaca Courts*, art. 73 (*charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990, and December 31, 1994*, argues that “the law provides that persons convicted of crimes of genocide in the second and third categories, that is, those who killed or damaged property but were not in leadership positions at the time get lesser sentences, and more importantly, serve half of their sentences in community service activities if they confess to their crimes and plead for forgiveness”. The types of community work include, according to Rugege (2007: 422): “building and repairing rural roads; repairing and maintaining public buildings; growing food for prisoners, orphans, and indigents cared for by the state; and protecting the environment (for example, planting forests and clearing rivers and lakes)” (Rugege 2007: 422).

The financial magnitude of financial and non-financial benefits which accrue to the state and its supporters as a result of the conviction of the ‘accused’ and maintaining the status quo in terms of the official narrative of the genocide needs further systematic investigation. The Rwandan government provides between 5 and 6 per cent (4.3 billion Rwandan francs, estimate 1999) of the annual budget to the Tutsi Genocide survivors fund (IRIN Rwanda 1999: 1). The government contribution is complemented by funding from local and international business and civic organisations (News Time 2012), but the greatest contribution comes from the free labour provided by the many Hutu suspects who are found guilty by the highly politicised judicial system as the following paragraphs are going to show.

LACK OF IMPARTIALITY AND INDEPENDENCE OF THE JUDGES IN RWANDA

Lord Justice Sankey once said: ‘The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire – namely that justice should not only be done, but should appear to have been done’ (de Jersey 2003: 5; Hobbs v Tinling 1929: 2). This statement says nothing about a situation in which the ruling elite have the upper-hand on these institutions (that is, the Bar and the Bench). It also ignores that in a dictatorship system such as Rwanda, both the Bar and the Bench are only willing to be as fair and just as the political environment in which they operate allows them to be. In his analysis of “*Court–Executive Relations in Argentina under dictatorship and democracy*” Helmke (2002: 291) found that the only time when judicial independence motivates judges to “strategically defect” against the government, or be willing to make anti-government decisions is once it begins losing power (also Graver 2015: 46). According to the UK Ministry of Justice (1997: 73) “there are two aspects to the question of ‘impartiality’”. First, according to the Parliament (2002: 5) “*the tribunal must be subjectively free of personal prejudice or bias.*” Secondly, as the UK Parliament (2002: 5) continues to argue, it must be impartial from an “*objective viewpoint in that it must offer sufficient guar-*

antees to exclude any legitimate doubt in this respect.” While the concepts of independence and objective impartiality are closely linked, even competency and independence of the courts do not necessarily translate into fair justice (UK Parliament 2002: 5). This is because- while the competency of the court could be determined by laws that govern its jurisdiction, and the competency of the Judges could be achieved through and determined by, the judges qualifications (training and expertise etc.); the judges can only dispense justice fairly with the necessary integrity if there is conducive environment. Therefore, not only ‘the judges should be purer than politicians ... , [they should also] ‘be as white as a lily’ (Gammmanpila and Shirani 2012: 4). How can justice be or appear to be done when the state has influence over the people manning the judiciary and the persecuted is considered the enemy of the ruling elite? Examples of lack of independence of courts and judges in Rwanda have been documented by the Human Right Watch Report of 2012. In a letter titled written by Human Rights Watch (HRW) to the “*World Bank Vice President for Africa On Rwanda*” on the 5 September 2012 the HRW argues that “a number of legal reforms have improved the performance and efficiency of the justice system in Rwanda”. However, in spite of these reforms, the HRW argued that, Rwanda’s “judiciary still suffers from a lack of independence, and the government has interfered with the conduct and outcome of a number of trials, especially in cases of a political nature, such as the prosecution of opposition politicians and journalists” (Human Right Watch Report 2012: 10).

Threats and Intimidation of Jurists

Threatening courts and judges is not a new phenomenon in Rwanda. In its report titled “*Enforcing the Rule of Law in Rwanda: Prosecuting Genocide in Rwanda: A Lawyers Committee report on the ICTR and National Trials, July 1997*” the UnWatch (1997: internet source) argues that “some jurists who have attempted to apply the law fairly have suffered from threats, arrest and worse”. The same report further argues that “Two prosecutors, one of them being former Kigali deputy prosecutor Silas Munyagishali was arrested in February 1996, have been arrested and charged with genocide. Silas Munyagishali “had previously been cleared of alle-

gations of participating in the genocide” (UnWatch Report 1997). The UnWatch Report (1997) argued that the original reason given for Munyagishali’s arrest was “mismanagement and corruption”; but those who follow how the laws of genocide ideologies have been used and abused to get rid of critical elements to the ruling elite were convinced that “the real reason was “his refusal to arrest people on genocide charges when there was little or no supporting evidence” (UnWatch Report 1997). Another law enforcement agent who was arrested for failing to force people to self-incriminate is Célestin Kayibanda. According to the UnWatch Report (1997), Kayibanda was the acting prosecutor in Butare where he was arrested on May 2, 1996 on charges of genocide and crimes against humanity. According to the UnWatch Report (1997) Kayibanda was arrested after having “publicly criticized interference by the military, the local mayors (*bourgmestres*) and other local officials in the administration of justice”. In particular, as the UnWatch Report (1997) puts it: “*mayors, their counsellors and others with no legal competence to make arrests were in fact making many arrests in the district, often on the merest denunciation and without any investigation*” (UnWatch Report 1997). According to the UnWatch Report (1997) there were reports that “*Mr. Kayibanda and several Judicial Police Inspectors also had disagreements with a number of prefectural and communal executives (such as mayors) “over their respective responsibilities and direct influence on “the functioning of the screening commission”*” (UnWatch Report 1997). Kayibanda and Munyagishali cases were not unique or isolated. According to the UnWatch Report (1997) “*Fidèle Makombe, the chief prosecutor in Kibuye, was dismissed from his post, beaten by army officers and forced to flee to Kigali in May 1996*” after having “*had a series of disagreements with the Préfet*”. According to the UnWatch Report (1997), Makombe was suspended from his post on May 10, 1996 after refusing to “*arrest certain people for having participated in the genocide*” as instructed by the *Préfet*. The *Préfet* was angered by the prosecutor’s refusal to make any arrests before his office could investigate (UnWatch Report 1997). “*Mr. Makombe described his differences with the Préfet and the beating in an interview he gave to Radio France Internationale (RFI)*” (UnWatch Report 1997). There were also sum-

marily killing and disappearance of witnesses willing to testify for those accused of genocide crimes and lawyers willing to represent them in courts. For example, “*Innocent Murengezi, one of the few Rwandese lawyers willing to represent the accused and civil claimants in genocide trials, disappeared on 30 January 1997*” and was never seen again (UnWatch Report 1997: 155).

Since Murengezi’s disappearance without trace, according to the Human Right Watch Report (2012:11) “*Lawyers have been reluctant to take on cases relating to state security, political issues, media freedoms and genocide ideology, as well as cases in which Hutu suspected of genocide have been illegally detained or tortured, limiting a defendant’s right to legal representation.*” According to Human Right Watch Report (2012: 11) “*many suspects in these types of cases are asked to pay exorbitant fees that they cannot afford, in order for the lawyers to balance that risk.*” Thus, as argued in the Freedom House Report (2012: 2) “*in spite of recent improvements in the judicial system which include an increased presence of defence lawyers at trials, improved training for court staff, and revisions to the legal code; the Rwandan judiciary has yet to secure full independence from the executive*”, the military and politicians.

Political Influence

The Rwandan Ministry of Justice claims that “*Post-reform, however, the system calls for judges to decide their cases based solely on the law and on the merits of the cases, without pressure from any other quarter*” (The Rwandan Ministry of Justice 2008: 18). However, in terms of personal independence, the same Ministry of Justice makes it clear that “*judges must recognize that they play a critical role in the application of the law, but that this role is limited and played out within a greater context*” (The Rwandan Ministry of Justice 2008: 18). In 2013, the minister of Justice (that is, Minister Karugarama) was dropped from President Paul Kagame’s cabinet. The former Minister Karugarama’s crime was, apparently, “*to hold fast to the Rwandan Constitution which does not allow any head of state to hold power longer than two 7 year terms – 14 years in all*” (Himbara 2013: 1). Karugarama “*was dropped from the government a few days after the Rwandan government leader General Paul Kagame criticised him for being opposed to a*

third presidential term” (AfroAmerica Network 2013: 1). How can judges and the courts be independent if their boss (that is, the Minister of Justice) is not free to uphold the countries constitutional principles? The Rwandan Constitution was amended in 2015 and the limit of the presidential office to two terms (of 14 years) removed. According to the Amnesty International Report (2010) “Conventional courts still fell short of fair trial standards despite continued improvements to Rwanda’s justice system” (Amnesty International Report 2010: 1).

Although judges have security of tenure in addition to their guaranteed independence, they have a responsibility to be accountable to the citizens of Rwanda and, as such, it is imperative that they operate within the social and economic context of the country (Rugege 2007: 411). The Ministry contradicts its claim to independence in its argument that, even though “the Constitution and subsequent statutes address issues of tenure, independence and impartiality, and security... judges do not and cannot act in total isolation, judicial independence is not infallible” (The Rwandan Ministry of Justice 2008: 18). The Ministry gives no indication as to whether this is possible in the current socio-economic and political environment prevailing in Rwanda and no details of how this will be achieved. However, while the difficulty in analysing the impact of judicial independence is grave and sometimes political influence is hard to ascertain because it is “usually exercised in subtle ways and may come from both unofficial and official actors” (Des Forges 2008); this difficulty is exacerbated in Rwanda because of widespread state censorship. Purdeková (2011: 493) describes the situation in Rwanda as follows:

“People suggest there is a spy per organisation and perhaps per office... [There are] so many staff in government who are not paid for what they have in job description, but for intelligence”. In fact, as Des Forges (2008 in Purdeková 2011: 493) argues “surveillance is present not only inside organisations and government administration, but at the lowest levels of the administrative hierarchy”.

The ‘Government of Rwanda is like MTN – everywhere you go. A joke passed around Kigali’ (Purdeková 2011: 493). This is because, as Purdeková, continues, the ‘state aims at ‘totality’ of influence’ in all branches of government and civil societies (Le Mon 2007: 19). The result

is that ‘neither religious organisations, schools, nor associations or even private sector and the family escape the state’s reach in Rwanda’ (Purdeková 2011: 493). There is no doubt that the Rwandan government crackdown on criticism has served to silence those best positioned to speak frankly about the ‘Gacaca’ process (Le Mon 2006: 19). In a situation like this, as Purdeková puts it ‘you cannot openly oppose and often everyone are urged to align with and assist the state’ (News Time 2012: 1-2). The independence and impartiality of the courts and the judges cannot be established or seen to be established when the courts or the judges are under the control or influence of non-judicial entities. In the words of Cobban (2011: 1) “it is not possible for domestic trials which have been politicized and of which many Rwandans view as one-sided, which compromises their ability to promote the rule of law”. This political control over all sectors of life in Rwanda has led Des Forges and Thomas Longman (2004: 60) to argue that “many observers, both inside and outside Rwanda, believe the trials of genocide suspects have been unduly influenced by political considerations. Des Forges and Thomas Longman (2004: 60) observed that:

“Military and government officials have harassed and intimidated prosecutors and other judicial officials and pressured some of them into arresting and, in some cases, convicting individuals based on flimsy evidence. Arbitrary arrests have particularly targeted Hutu, especially if they were perceived to be opponents of the new regime. In the initial trials of genocide suspects, the defendants had few rights, with no legal representation and limited access to their case files, even though they faced capital charges. Military and government officials regularly sought to influence the outcome of trials.”

According to Des Forges and Longman (2004: 62), “given this politicization of the judiciary, it is not at all clear that investing more in the Rwandan justice system would have promoted the rule of law and encouraged reconciliation in the country” which is so ethnically divided.

Armed Force Influence: Gacaca Courts

Perhaps most importantly, the army, the police, and the local defence forces (LDF), (a Tutsi

militia which according to Cobban (2002: 1) is “intimidating and killing people on hills of Rwanda) were influential in the preparation (that is, coercion) of witnesses of *Gacaca* courts where over a million Hutu genocide suspects were tried”. According to Purdeková (2011: 478), “when it comes to *Gacaca*.... the police superintendent is more important than the ‘*inyanga-mugayo*’” (*Gacaca* judge), especially when it comes to “backstage preparing of witnesses”. Unfortunately, there is currently no independent research to find out how many who confessed having committed the genocide crime had not committed any. Carina Tertsakian, a Human Rights Watch’s Senior Researcher on Rwanda (but writing from London) and the author of a book on Rwandan prisons titled “*Le Château: the lives of prisoners in Rwanda*” believes that many of the current 55 000 to 60 000 current prisoners in Rwandan jails could be innocent. Tertsakian describe the possibility in the following terms:

“Although all Rwandans know that many of those arrested for alleged participation in the genocide were innocent, these accusations still carry a stigma, and even prisoners who were released after being tried and acquitted have found it hard to shed the label of génocidaire” (Tertsakian 2014: 9).

Specifically, the “*Gacaca courts faced criticism from legal experts not only because of their failure to address genocide-era crimes allegedly committed by the RPF, but also because they routinely tried politically motivated cases*” (Freedom House Report 2012: 2). According to the Freedom House Report (2012: 2) “Individual police officers sometimes used excessive force, and local officials periodically ignored due process protections”. In this context, according to the US Department of State (2011: 14 citing the Human Rights Watch Report 2010) it is highly possible and unavoidable that “witnesses might have given false testimony in a sizable number of *Gacaca* cases, despite penalties for such conduct”. Observers also expressed concern that some suspects confessed to avoid lengthy prison terms (Human Rights Watch 2010 in US Department of State 2011: 14). For example, an interview with the detainees conducted by Drumbl in 2000 found that “the overwhelming majority of the detainees ... do not believe they did anything wrong. Almost all proclaimed, often very eloquently, their innocence” (Drumbl

2000: 289). There is no doubt that some (or even many) of the interviewees did indeed participate in the genocide. However, given the political environment in which these trials are taking place and the role of the military and police, it would not be surprising to find that some people admitted committing crimes in desperation to avoid lengthy prison terms while they have actually not committed any. It is also possible that the decisions of those who presided over the *Gacaca* courts (especially the Hutus) could have been influenced by the fear of being charged with genocide denial if they failed to convict other Hutus accused of genocide related crimes. Perhaps the main reason for Hutus belief that they are cannot get fair trials is because of the inclusion of Tutsi Survivors as judges in the *Gacaca* courts. Article 14 of the Organic Law n° 13/2008 of 19/05/2008 establishing the organisation, competence and functioning of *Gacaca* Courts states that ‘Any person of integrity who is at least twenty-one (21) years old and meeting all the conditions required by this organic law, can be elected a member of an organ of a *Gacaca* Court without any discrimination whatsoever, such as that based on sex, origin, religion, opinion or social position’ (Republic of Rwanda 2008b). Therefore, having been a victim of genocide would not debar one from being a judge.

The unfortunate situation in which suspected Hutus found themselves led Hough (2012: 1) to ask fundamental questions linked to whether the current Rwandan government fulfils the principle of ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’. As he put it: “But if and when there is uncertainty in the distinction between perpetrator and victim, who has the right to decide which side attains justice and which side is tried?” (Hough 2012: 1; also World Without Genocide 2012).

CONCLUSION

The objective of this paper was to analyse a range of printed and electronic literature to show why the Hutus genocide suspects can neither get justice nor perceive justice to be done by Rwandan government. While the “post-genocidal society should strive to assure the prevalence of the rule of law, respect for human rights and for comity” among the Rwandan peoples (both Hutus and Tutsis as well as the Twas); it

is practically impossible for the current RPF-led Rwandan government to assure the Hutus suspected and prosecuted under the Rwandan law of genocide ideology that they are getting justice from their Tutsi counterparts. The evidence presented in this paper shows valid reason why the prosecuted cannot trust the Rwanda government to do them justice. The challenges in Rwanda have been exacerbated by a number of factors including: political and military influence on courts such as *Gacaca* courts where most Hutu suspected of crimes were tried, found guilty, and handed heavy sentences described in the paper.

The identification of Hutus as the only guilt part by the Rwandan government in the 'Law of Genocide Ideologies' and the failure of the Rwandan government to apply the same law to the Tutsis who have committed the same crimes may confirm the Hutu suspicion that they are not getting fair justice. The fact that the judges and the courts are not independent from the political and military control and manipulation seem to confirm the accused and prosecuted suspicion. Finally, without suggesting that every one of the Hutu suspects who have been prosecuted was unfairly prosecuted, and without justifying genocide or defending those who committed crimes (both Hutus and Tutsis); the fact that no Rwandan court has not tried Tutsis for the crimes of genocide to this date tends to create an impression of the victor's justice. This is where the challenges and one would argue the failure of both national courts and ICTR failed to ensure that justice is done and is seen to be done in Rwanda comes from. Failure to achieve this principle does not augur well with sustainable stability and reconciliation in Rwanda.

The findings and conclusion of this paper lead to the following reconditions:

- ♦ The Rwandan government should respect Article 16 of its Constitution which states that "all human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law". Based on the findings of this paper, one would add that no Rwandan including those in power, should be above the law.
- ♦ The fact that members of the Rwandan judiciary have vested interests in the prosecution of the alleged genocide criminals failed to recuse themselves clouds the fairness the trials. There is a need for an inde-

pendent investigation to find out whether their judgement was not clouded by their personal and or political interests.

- ♦ The fact that ICTR failed to act as an impartial arbiter between the two ethnic groupings in Rwanda but bowed to the political pressures leaves much to be desired. There is a need for the second ICTR prosecute the RPF leadership and all RPF members especially Tutsis who have committed crimes which are similar to those Hutus were prosecuted since 1994. Many Hutus were killed along the Tutsis in 1994 and in revenge attacks by the Tutsi-led RPF afterwards. Rwandan peace and reconciliation depend on this. The ICTR failure to remain impartial in the prosecution of the genocide criminals have created more problems for Rwanda than it has solved. The ICTR should demonstrate that no one, including those in power in Rwanda is above the international law.

NOTE

- 1 Special note: The views expressed in this article are solely the author's views in his capacity as a critical thinker and not the views of the Department of Public Management at the University of Johannesburg.

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