

Lessons Learnt From Rwanda: The Need for Harmonisation of Penalties Between the ICC and its Member States

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MPhil Thesis


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Abstract

An examination of the International Criminal Court (ICC) and its policy of complementarity in the context of the presumption, that for complementarity to be effective, the national courts will have to undertake the majority of the investigations and prosecutions of extraordinary crimes. This will then be discussed in terms of the current setup whereby national courts are permitted by Article 80 of the Rome Statute 1998, to apply their own penalties when conducting trials at the national level. The analysis serves to highlight that the current situation is not conducive to proportionate or consistent sentencing or penalties, as the death penalty may still be applied by national courts, whilst in accordance with human rights norms, the ICC only has custodial sentences available to its judges. In addition to this the discussion highlights that many national jurisdictions where the crimes take place are in need of capacity building so as to rebuild or to reinforce their legal systems to a level where they are able to seek justice for themselves. This leads into a discussion of the potential for outreach whereby the ICC may also be able to lead by example and take the opportunity to impart their sentencing objectives and procedural norms, in an attempt to facilitate consistent and proportionate justice at both the national and international level, so as to aid the fight to close the impunity gap. The case study of Rwanda will be used to reinforce the hypotheses and to serve a real life example of how involvement in capacity building can also lead to legal reform.

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List of Abbreviations

- ACHR – American Convention on Human Rights
- CDR – Coalition Pour la Defense de la Reublique
- DRC – Democratic Republic of the Congo
- EU – European Union
- ECHR – European Convention on Human Rights
- ICC – International Criminal Court
- ICCPR – International Covenant on civil and Political Rights
- ICTR – International Criminal Tribunal for Rwanda
- ICTY – International Criminal Tribunal for the former Yugoslavia
- IMF – International Monetary Fund
- MICT – Mechanism for International Criminal Tribunals
- MRND - Mouvement National pour la Revolution
- NGO – Non-governmental Organisation
- OAS – Organisation of American States
- OUA – Organisation of African Unity
- NGO – Non-governmental Organisation
- RPF – Rwandan Patriotic Front
- SOP – Second Optional Protocol to the ICCPR
- UNAMIR - United Nations Assistance Mission for Rwanda
- UN – United Nations

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Chapter 1: Introductory Chapter

1.1 Background and Study Rationale

The International Criminal Court (ICC), upon which this thesis will centre, was created in 1998 by the Rome Statute of the International Criminal Court (Rome Statute 1998)¹ which began its work on 1 July 2002, after the statute was ratified by a minimum of sixty States.² The aim of the court is to take the work of the 'ad-hoc' tribunals and courts of Rwanda, former Yugoslavia and Sierra Leone a step further, so as to create the permanent criminal court that was envisaged as early as 1937 by the League of Nations.³

The main objective of the ICC is to try the key perpetrators of the most serious crimes known to man, crimes so shocking that they are considered to breach the concepts of '*Jus Gentium*'⁴ (law of the people)⁵ and Human Rights; more specifically the crimes of genocide, war crimes, crimes against humanity and the crime of aggression.⁶ Whilst these crimes may appear to be crimes that should be dealt with at the national level, because they often occur within a sovereign State boundary,⁷ they are considered to be crimes of concern to the international community for the following reasons. Firstly, due to being extraordinary in terms of the scale, with the high numbers of people killed, raped, exiled or displaced from their homes, they become global issue rather than State matters, as they pose a threat to '...

¹ 17 July 1998, The Statute of Rome of the International Criminal Court was adopted by 120 States, at the Food and Agriculture Organization of the UN headquarters. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9

² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 126 states that the court shall come into force on the '... 60th day following the date of the deposit of the 60th instrument of ratification ...'

³ League of Nations Convention for the Creation of an International Criminal Court, League of Nations OJ Special Supplement No 156(1936) LN Doc C.547 (I) M.384 (I) 1937.V (1938)

⁴ *Jus Gentium* – A roman concept, taken to mean the law of the people, which is considered to be common to all civilised societies: Geoffrey Robertson Q.C., *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn, Penguin 2006) 1

⁵ Elizabeth A Martin (eds), *Oxford Dictionary of Law* (5th edn, OUP 2003) 274

⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Arts 6- 8bis

⁷ Morten Bergsmo, Olympia Bekou & Annika Jones, 'Complementarity after Kampala: Capacity Building and the International Criminal Court's Legal Tools' (2010) 2 GoJIL 791, 794

international peace and security.’⁸ Because crimes of this nature and magnitude are often deemed a threat to international peace and security because if no action were taken to stamp out the culture of impunity⁹ that is inherent in crimes of this type, then it is likely that they would cross borders as occurred in Rwanda where the conflicts and violence spilled over into Uganda and Burundi.¹⁰ Secondly the devastating impact of such crimes, which often occur during an internal conflict and very frequently result in the State being decimated or at the very least crippled,¹¹ thus causing social and economic crisis. Another factor is the moral offensiveness of the crimes and their very nature being one that shocks and disturbs,¹² given that whole sections of a society are singled out for persecution simply because of their race, religion, social or tribal group. Therefore in summary, these are crimes that cannot go unpunished and the ICC as well as its predecessors exist so as to close the impunity gap¹³ and ensure that at the very least ‘...those bearing the greatest responsibility...’¹⁴ do not go unpunished.

Indeed the ICC and the concept of an international court or tribunal to prosecute for atrocities is not a new concept, as illustrated by William Schabas who indicates that evidence of trials of this nature can be traced back as far as 1474 to the trial of Peter von Hagenbach;¹⁵ in addition to this there are the more recent International Military Tribunals that took place in Tokyo and Nuremburg following the Second World War. However, a lot has changed since the Nuremburg and Tokyo trials took place and the most notable change

⁸ Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chap VII

⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Paras 3 & 4

¹⁰ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 211-212

¹¹ Ariel Meyerstein ‘Between Law and Culture: Rwanda’s *Gacaca* and Postcolonial Legality’ (June 2007) 32 (2) L & Soc Inquiry 467, 468

¹² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Para 2

¹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Para 5

¹⁴ LIU Institute for Global Issues, Conference Report, ‘Vancouver Dialogue on the Impunity Gap’ Global Justice Program (4 April 2004) 2 <

http://www.ligi.ubc.ca/sites/liu/files/Publications/4Apr2004_VancouverDialogue.pdf> (Accessed on 12/09/2014)

¹⁵ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 1

is that the death penalty is no longer at the disposal of the international courts and ad-hoc tribunals, which can be attributed to the growing trend towards abolition of the death penalty across the globe.¹⁶ This trend exists because the use of the death penalty is deemed contrary to human rights norms as illustrated by the various international treaties that protect human rights and aim to abolish the death penalty.¹⁷ Thus the meaning and impact of these international treaties will be explored in greater depth during the second chapter of this thesis, but all that needs to be noted at this point is that as illustrated by the exclusion of it as an available penalty from the Rome Statute 1998,¹⁸ the death penalty is no longer available at the international level when prosecuting war crimes, genocide, crimes against humanity and aggression.

Subsequently this thesis will focus on exploring what does the removal of the death penalty as an available penalty mean for the ICC? Especially when considered in the context whereby not only is the ICC prosecuting the most shocking atrocities known to man¹⁹ but that the ICC does so only as a court which is complementary to national courts and whereby some States will still be issuing the death penalty whilst the ICC can only issue a custodial sentence of fine.²⁰ The reason some States will still apply the death penalty when prosecuting crimes that also fall under the jurisdiction of the ICC (as per Articles 6 – *8bis* of

¹⁶ Hood R, 'Towards Global Abolition of the Death Penalty: Progress and Prospects' Le Death Penalty Project Lecture (21 January 2010) 5-6
<http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (Accessed on 01/10/2011)

¹⁷ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990) OAS Treaty Series No 73 (1990) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 80 (1992), Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (adopted 6-10 December 1982, entered into force 28 April 1983) ETS No 114, as amended by Protocol No 11 (entered into force 1 November 1998) ETS No 155, Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS No 187 and Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128, 1642 UNTS 414

¹⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 77

¹⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Para 2

²⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9

the Rome Statute 1998), is due the death penalty still being an applicable penalty within their national legislation and Article 80 of the Rome Statute 1998 permits States to apply the penalties available within their national law when prosecuting the crimes also covered by the ICC. Because the ICC is a court established by a multilateral treaty (which currently has 122 member States)²¹ rather than a UN resolution giving it primacy over a particular situation or State, the will potentially have many situations in which it is required to investigate and prosecute and has therefore been created as a court that is complementary because no single court could take responsibility for conducting investigations and prosecutions of atrocities that occur around the globe.

Justice is a key component of the work of the ICC as highlighted by the final paragraph of the Preamble to the Rome Statute where it is stated that the ICC is 'Resolved to guarantee lasting respect for and the enforcement of international justice.'²² Sadly the current situation is that whilst the ICC and national courts have been '... given a very free hand'²³ when it comes to sentencing determination, the national courts have even greater freedom as they may also have the death penalty at their disposal and how this impacts on the standard of justice, is the second main theme of this thesis. Various academics such as Mark Drumbl,²⁴ Jane Stromseth²⁵ and Barbara Hola²⁶ have highlighted that the current situation whereby national courts may have different sentencing objectives and subsequently may give harsher or in some instances more lenient sentences²⁷ than the ICC judges, could be

²¹ 122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. Information taken from:

<<http://www.icc->

[cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> (Accessed on 29/03/2013)

²² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Para 11

²³ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 331

²⁴ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 68-69

²⁵ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 89

²⁶ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 3

²⁷ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 69

detrimental to the shared objective of ensuring that at least the most culpable are brought to justice to facilitate ‘... restoration and maintenance of international [and national] peace and security,’.²⁸ However as Barbara Hola highlights,²⁹ unless there is consistency in the sentencing objectives of both the ICC and the national courts, then there will be inconsistency in the justice facilitated and Barbara Hola asks what kind of justice would this be, as consistency is ‘... fundamental ...’³⁰ to justice.

Interlinked with the consistency of sentencing objectives is the fact that should there start to be vast inconsistencies between the sentencing of the ICC and the national courts, then this could cause two things to happen. The first is that there is a greater risk of the penalty not being proportionate to the crime, because although there is no penalty that could said to be truly proportionate to the gravity of the crimes covered by Rome Statute 1998, if national courts sentence offenders deemed to have committed crimes of a lower level and moral gravity to death, then surely this would undermine any trials conducted by the ICC? Especially as the ICC, by its very nature of being a complementary court that steps in as a last resort³¹ and will subsequently investigate the higher ranking offenders, who are deemed to be at the centre of the crimes and should therefore proceed on the logic that the higher the gravity of the crime,³² the harsher the penalty should be. Following that principle it would mean that the ICC should be handing out some of the harshest penalties, yet the current situation is that the national courts are more likely to have the harsher penalties at their disposal. Thus because the ICC is not permitted to issue a sentence of death this creates an interesting paradox and the Rwandan case study will be used to highlight what this paradox can mean for the ICC in reality.

²⁸ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 6

²⁹ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 3-6

³⁰ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 3

³¹ Dalila V Hoover, ‘Universal Jurisdiction Not so Universal: Time to Delegate to the International Criminal Court?’ (2011-2012) 73 *Eyes on the ICC* 73, 98

³² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 78 (1)

Nonetheless, this thesis does not propose that the ICC should look to have the death penalty added to the list of its available penalties as provided for in Article 77 of the Rome Statute 1998, nor does it propose that the ICC should try to bully States into following its uncodified sentencing practice. Indeed what this thesis will propose, is to examine whether the ICC can utilise its unique situation as a complementary international court to lead by example³³ and through a combination of outreach and by bringing the situations to the attention of the global community, attract assistance for capacity building from NGO's and other States. In doing this, the ICC along with NGO's and other States will have the opportunity to help re-establish the rule of law, because often a State in the aftermath of atrocities is a State that will have a weakened, corrupt or virtually decimated legal system in place.³⁴ And this would be an ideal time to help the State rebuild its legal system and re-establish the rule of law in a manner that complies with internationally accepted norms of justice,³⁵ thus increasing the chance of consistency between the ICC and the national courts of involved States.³⁶ Having now established a broad sense of the issues this thesis will seek to explore and critically analyse, it is now to a more detailed breakdown of the chapter structure and how the themes identified above will interlink.

1.2 The Global Death Penalty Abolition Trend

Whilst over the recent years there has been a growing wealth of literature speculating and hypothesising how successfully the ICC will function as a complementary court and the lessons it can draw from its predecessors such as the ICTY and ICTR, one notable gap in the literature appears to be that very little attention has been paid to the issues that may arise as a direct result of the member States being able to apply their own penalties, which can

³³ Drumbl MA, *Atrocity, Punishment and International Law* (CUP 2007) 6

³⁴ Meyerstein A, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Inquiry 467, 468-469

³⁵ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 88-89

³⁶ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 23-24

also include the death penalty. Given the growing trend towards abolition for all crimes, as will be established in the chapter dealing with the abolition of the death penalty, it seems that the situation the ICC finds itself in is a difficult one. This difficult situation is because the ICC will ‘... initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators ...’³⁷ meaning that potentially the those who stand trial before the ICC will be subject to more lenient sentences than those in the national courts. And this is problematic because as Mark Drumbl has highlighted in his book ‘Atrocity, Punishment, and International law’ when national courts apply sentences that are harsher than those available at the international courts, then it becomes ‘... difficult to make the extraordinary criminal, who may be responsible for the deaths of hundreds ... actually spend more time in jail than the ordinary criminal who murders one person for profit.’³⁸ This is not ideal because when those found guilty of extraordinary crimes are given more lenient sentences than ordinary criminals, it potentially undermines the value of the justice because if the punishment is not in some way proportionate to the gravity of the crime, then it will neither serve a retributivist or deterrence goal of justice as is often cited by international courts as being their objective, nor will it aid reconciliation which is also cited by to be a purpose of punishment³⁹ by the ICC and often national courts, because the victims are left feeling that justice has not been served when the penalty is not proportionate to the crime.⁴⁰

Thus this thesis will attempt to explore the problems and obstacles that the death penalty being retained by some national legal systems may bring to the ICC and the objective of this exploration will ultimately be to seek to propose how the ICC could seek to overcome these difficulties. Therefore the by expanding upon the global debate of the death penalty and exploring what obstacles remain to its global abolition, it is hoped that it will provide some

³⁷ Office of the Prosecutor (ICC), ‘Paper on Some Policy Issues Before the Office of the Prosecutor’ (September 2003) [hereinafter Policy Issues] 3 <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Accessed on 10/08/2012)

³⁸ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 69

³⁹ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴⁰ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 45

context for the difficulties that may arise for the ICC and the other research questions of this thesis.

The issue relating to the death penalty and its retention at the national level will be addressed in two ways. Primarily it will be achieved through a critical assessment of academic commentary, international treaties which will focus on the American Convention on Human Rights (ACHR),⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention),⁴² the International Covenant on Civil and Political Rights (ICCPR)⁴³ and their additional protocols that seek to abolish the death penalty, will be examined in an attempt to ascertain why some States party to the Rome Statute 1998 still continue to use the death penalty. It will also involve a brief exploration of the social, political and cultural influences upon the retentionist States, in a bid to ascertain why there is such a disparity of penalties at the national level. Secondly this chapter will look at historical texts such as the *travaux préparatoires* for the Rome Statute 1998, so as to trace the logic behind the decision taken in the Rome Statute 1998, to remove the death penalty from the penalties available to the international court (ICC).

In addition to gaining an overview as to the general trends towards the use of the death penalty, the reasoning behind Rwanda's decision to abolish the death penalty in 2007,⁴⁴ so as to align itself with the ICTR and its accepted standards of punishment, will be assessed in the case study chapter. This will be undertaken through an analysis of the various organic laws passed in Rwanda during 2007 that were created specifically to facilitate transferral of cases from the ICTR under Rule 11*bis* of the ICTR's Rules of Procedure and Evidence

⁴¹ American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force July 18 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992)

⁴² Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969

⁴³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

⁴⁴ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law)

(1995),⁴⁵ some of the case law of the ICTR on decisions of transferral to Rwanda under Rule 11*bis* and also through critical analysis of key texts, such as Mark Drumbl's work on punishment in international law⁴⁶ and others such as El Zeidy⁴⁷ and Silvia D'Ascoli⁴⁸ which will be used to explain why the harsher penalties at the national level (as facilitated by Article 80 Rome Statute 1998) than the penalties provided for in Article 77 of the Rome Statute 1998, serve to undermine the justice of the ICC.

1.3 Complementarity and Outreach

As mentioned previously, the ICC is a 'complementary' judicial body to those of the domestic courts of the countries in which the crimes took place or those which have a sufficient interest in the prosecution (universal jurisdiction) as clarified in the Preamble to the Rome Statute 1998 where it is stated that the ICC will be '... complementary to national criminal jurisdiction.'⁴⁹ However, the Rome Statute 1998 is virtually silent about what exactly 'complementarity' involves and to what extent it is to be applied and it is also rather vague in its definition of when it is to be invoked, as will be illustrated by a brief examination of Article 17.⁵⁰ In addition to looking at what the Rome Statute says about how the ICC is intended to act as a complementary court to the national courts, an analysis of various ICC papers and documents will be undertaken to assess how the idea of complementarity has changed since the ICC first became active. One of the key areas for this assessment will be the Review Conference at Kampala which took place between the 31 May and 11 June 2010, where the term 'positive complementarity' was affirmed as being the ICC's current stance. Positive complementarity and what it entails in reality will be analysed through a critical

⁴⁵ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995) Rule 11*bis*

⁴⁶ Mark A Drumbl, 'Punishment, Post genocide: From Guilt to Shame to Civis in Rwanda' (2000) 75(5) *NYL Rev* 1221 & Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007)

⁴⁷ Mohamed M El Zeidy, 'From Primacy to Complementary and Backwards: (Re)-Visiting Rule 11*bis* of the Ad Hoc Tribunals' (2008) 57 *Int'l & Comp LQ* 403

⁴⁸ Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Bloomsbury Pub 2011)

⁴⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Preamble, Para 11

⁵⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9

analysis of ICC documents relating to the Kampala Review Conference⁵¹ and also through analysis of the various academic literature available on the subject, such as works by William Schabas,⁵² William Burke-White,⁵³ El Zeidy⁵⁴ and Katharine Marshall⁵⁵ as well as various other works that discuss the complexities of complementarity and what it entails in reality.

In relation to the principle of 'complementarity' within the context of this thesis, it will be explored with the following two questions in mind. The first questions posed will be if complementarity places the majority of the burden for the investigation and prosecution of these extraordinary crimes upon the national courts and these national courts are potentially giving harsher penalties than the ICC, then what does this mean for the status of the ICC and its justice? Secondly as will become evident during the course of the critical analysis of academic commentary on the subject of complementarity and the materials from the Review Conference in Kampala (2010), many of that States in which the crimes take place, are also in great need of capacity building before they could reasonably be described as being in a position to undertake prosecutions themselves. Which leads into the subject of outreach and the potential the ICC has for through outreach and education to '... whittle away operational differences between national modalities and [international] norms ...'.⁵⁶ And in doing so, the ICC would then be able to ensure that death penalty is removed from available national penalties and that the national sentencing objectives more closely follow their own, so as to ensure more consistent and hopefully proportionate sentences for the

⁵¹ ICC Review Conference Annex V(c), 'Stocktaking of international criminal justice: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap - Informal Summary by the Focal Points' RC/11 107 <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.c-ENG.pdf> (Accessed on 28/01/2013), Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) and ICC Review Conference Resolution ICC-ASP/8/Res.9 (adopted at the 10th plenary meeting 25 March 2010) <http://www.icccpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf>

⁵² William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011)

⁵³ William W. Burke-White, 'Complementarity in Practise: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of the Congo' (2005) 18 LJIL 557

⁵⁴ Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) 23 MJIL 869 & Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill 2008)

⁵⁵ Katharine A Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) 17 (2) HR Brief 21

⁵⁶ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007)121

extraordinary crimes prosecuted.⁵⁷

Linking in to this identified issue of the potential for outreach, it should be noted that the ICTR only began to realise the significance of outreach once it had begun its prosecutions for the Genocide in Rwanda during 1994. Rwanda at this point was in the aftermath of an internal conflict that resulted in Genocide and as direct result of this had what could only be described as a decimated legal system,⁵⁸ as illustrated by the following figures (see table 1 below).

Table 1⁵⁹

<u>Prior to Genocide</u>	<u>Aftermath of Genocide</u>
758 Judges	244 Judges
70 Prosecutors	12 Prosecutors
631 Support Staff	137 Support Staff

The table illustrates that the Rwandan judiciary and legal profession, had been virtually destroyed by the genocide and internal conflict of 1994.

In response to this realisation the ICTR created 'outreach programmes' specifically designed to help rebuild Rwanda's legal system and to help re-educate not only legislators, but the few remaining legal professionals, so as to facilitate Rwanda's quest to attain its own justice for the many victims of the genocide. Thus having explored the principle of complementarity and the potential for influencing national legislation and process when

⁵⁷ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 95

⁵⁸ Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3(4) JICJ 944, 947

⁵⁹ Ariel Meyerstein 'Between Law and Culture: Rwanda's *Gacaca* and Postcolonial Legality' (June 2007) 32 (2) L & Soc Inquiry 467, 468

assisting with capacity building, it neatly leads into the next chapter of the thesis, where the reasons for proportionality and consistency in sentencing are essential to justice, so as to highlight why this should be a key consideration for the ICC when undertaking its outreach activities.⁶⁰

1.4 Proportionality and Consistency

Having established that proportionality and consistency are fundamental to the process of justice required by the ICC and national courts when seeming to close the impunity gap,⁶¹ this chapter will explore the paradox created by Article 80 of the Rome Statute 1998, where it is stated that, 'Nothing in this part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this part.' A paradox whereby there is the potential for great inconsistencies between the sentencing of the national courts and the ICC, as well as no discernible proportionality between the gravity of the offence and the punishment given.

Moreover, this also links back to the ICC's objective which is to act as an international court that is complementary to the national courts, that can step in to take legal action when States are unable or unwilling to do so themselves. This objective is something which seems highly improbable given that there is no alignment of penalties for the crimes between the ICC and its member States and how can such varied legal systems possibly hope to ensure that justice is brought about in a consistent and proportionate manner. Perhaps then, the ICC should use its position to lead by example⁶² and act as a benchmark for the legal systems of not only those States who require capacity building, but to also set a precedent

⁶⁰ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 87

⁶¹ Office of the Prosecutor (ICC), 'Paper on Some Policy Issues Before the Office of the Prosecutor' (September 2003) [hereinafter Policy Issues] 3 <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Accessed on 10/08/2012)

⁶² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6

for the well-established national legal systems.⁶³ Because as has already been established, these are not ordinary crimes which are dealt with on a daily basis, meaning even the most established legal system will not be overly familiar with dealing with these types of crimes.

Furthermore, the current situation where there it is unlikely that there will be consistency between sentencing practice of the ICC and the national courts, also undermines some of the key legal philosophies of punishment and their purposes, such as the retributivist theory that a penalty should be proportionate to the crime, deterrence theory whereby the punishment must be swift and certain⁶⁴ and also the established legal principle of '*Nulla Poene Sine Lege*',⁶⁵ which provides that there can be 'No punishment except in accordance with the law.'⁶⁶ The purpose of exploring the different philosophies of punishment is to illustrate that when courts have differing sentencing objectives due to applying varying theories of punishment, they are also likely to come to very different determinations as to what is deemed an appropriate sentence for similar crimes; which will be highlighted in the chapter prior to this one, it is not an ideal situation when trying to stamp out impunity.

This chapter will initially through a discursive analysis of the various theories of punishment review what they key objectives of punishment are, so as to highlight the wide ranging objectives that could be being pursued by the ICC and the national courts. The key texts that will be used here will range from some of those considered to be the founders of punishment theory such as Cesare Beccaria,⁶⁷ Jeremy Bentham,⁶⁸ to the more modern

⁶³ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 23

⁶⁴ Ronald L Akers, *Criminological Theories: Introduction and Evaluation* (Routledge 2013) 17

⁶⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 23 makes reference to the principle of '*Nulla Poene Sine Lege*', but only in relation to persons convicted by the ICC, who are to be convicted and sentenced by the ICC only in accordance with the articles of the statute.

⁶⁶ Leslie Rutherford & Sheila Bone (eds), *Osborn's Concise Law Dictionary* (8th edn, Sweet & Maxwell 1998) 233

⁶⁷ Cesare Beccaria, 'On Crimes and Punishment', in Stanley E Grupp (ed), *Theories of Punishment* (Indiana Uni Press 1971)

interpretations of H L A Hart⁶⁹ and Andrew Von Hirsch.⁷⁰ Once the theories of punishment have been established so as to provide a context in which it is illustrated how varied sentencing can be depending on which punishment objectives the courts are seeking to apply, it is then to an assessment of how this has caused problems for the ad-hoc tribunals, with particular reference here to the inconsistent sentencing practice of the ICTY. Case law of the ICTY will be discussed and compared to illustrate disparities in sentencing, such as the disparity between *Prosecutor v Biljana Plasic* (Sentencing Judgement) IT-00-39 & 40/1-S (27 February 2003) and *Prosecutor v Goran Jelisic* (Judgement) IT-95-10-T (14 December 1999), which highlights vast variances, that certainly cannot be conducive to the attainment of justice.⁷¹

Finally this chapter will also take a look at what this means for the ICC and will do so through a mixture of secondary sources such as academic commentary, most of which will be journal articles from academics such as Barbara Hola,⁷² Mark Drumbl⁷³ and Dragana Radosavljevic,⁷⁴ by comparing the sentencing rationale of the two cases that the ICC has completed to date⁷⁵ and by assessing the relevant section of the Rome Statute 1998 and its Rules of Procedure and Evidence (2002) in order to ascertain what guidance is given to the judges of the ICC.

⁶⁸ Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in Burns JH and Hart HLA (eds), *An Introduction to the Principles of Morals and Legislation: Jeremy Bentham* (Methuen Pub 1982) (Originally pub 1780)

⁶⁹ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008)

⁷⁰ Andrew Von Hirsch, 'Censure and Proportionality' in Duff A & Garland D (eds), *A Reader on Punishment* (OUP 1994) & Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (NE Uni Press 1976)

⁷¹ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3,3

⁷² Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3

⁷³ Mark A Drumbl MA, 'Punishment, Post genocide: From Guilt to Shame to Civis in Rwanda' (2000) 75(5) *NYL Rev* 1221 & Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007)

⁷⁴ Dragana Radosavljevic, 'Restorative Justice Under the ICC Penalty Regime' (2008) 7(2) *LPICT* 235

⁷⁵ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) and *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012)

As Jeremy Sarkin has noted, ‘... the study of punishments in international criminal law is one area that remains underdeveloped.’⁷⁶ Whilst there are many journal articles that tackle the worrying lack of codification and consistency of the penalties handed out by the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY), there appears to be very little literature that focuses on the ICC, although the ICC does have slightly more comprehensive penalty guidelines provided for in Articles 77 and 78 of the Rome Statute 1998,⁷⁷ with additional guidance given in Rule 145 of the Rule of Procedure and Evidence, which is more guidance than its predecessors had. Research has shown Mark Drumbl’s book⁷⁸ to be the only comprehensive assessment of the function and issues surrounding penalties in international criminal and national law, which also identifies the new issues that have arisen following the creation of the permanent ICC. In addition to Drumbl’s fairly comprehensive study, there are now journal articles highlighting the potential flaws of complementarity such as the potential for inconsistent and proportionate justice as well as the fact that much work to rebuild or educate the legal systems of the States involved is required before complementarity can function and these are by academics such as Venus Baghi and T R Maruthi⁷⁹ and even Cherif Bassiouni⁸⁰ who has been described as the ‘... father of international criminal law ...’.⁸¹ Which, illustrates that this thesis is addressing a timely issue that is of growing concern amongst the international legal world and will take a

⁷⁶ Jeremy Sarkin, ‘Book Review of Mark A Drumbl: *Atrocity, Punishment, and International Law*’ (2007) 30 (4) Hum Rts Q 1028, 1030

⁷⁷ Art 77 of the Rome Statute 1998 states: 1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

⁷⁸ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007)

⁷⁹ Venus Ghareh Baghi & T R Maruthi, ‘The Principle of Proportionality in international Criminal Law’ (2011) 70 (3) AUDJ 5

⁸⁰ Cherif M Bassiouni, ‘The International Criminal Court- Quo Vadis’ (2006) 14 J Int CJ 421

⁸¹ Renee Doplick, Inside Justice Report ‘Bassiouni ‘Quite Doubtful’ International Criminal Court Will Succeed -- The Failures, Challenges, and Future of International Criminal Law’ (March 31 2010)

http://www.insidejustice.com/law/index.php/intl/2010/03/31/cherif_bassiouni_international_criminal

>(Accessed on 01/08/2013)

real life example as a case study to illustrate how all these concerns about the relatively new ICC and what it needs to achieve through outreach before complementarity can be effectively applied and to also avoid repeating the mistakes of the ad-hoc tribunals.

1.5 The Rwanda Case Study

As the ICC has not been in existence for a substantial period of time and has thus not completed many prosecutions to date, it will be difficult to assess the impact which the disparity of penalties may have on the ICC's status amongst its member States and those States in which it is seeking to carry out investigations and prosecutions. However, this lack of co-operation from States as a result of their lack of respect, for what they might view as a 'paternalistic' response '... [towards] weaker States, which serves only to assuage the West's guilt at inaction ...'⁸² can potentially undermine the effectiveness of the ICC, as has been the case with the African Union when in 2010 they appealed to African States not to cooperate with the ICC over the arrest warrant of President Bashir of Sudan.⁸³ Similarly in 2011, the African Union supported and encouraged Kenya's request to delay the ICC trials of six Kenyan suspects, because Kenya now claimed it wanted to prosecute them within their national courts, despite failing to do so in 2007-2008.⁸⁴ The reasons cited by Kenya for this sudden change of opinion on prosecuting the six high ranking political figures initially identified by the ICC, were that they felt that by conducting the trials in their domestic courts it would '... boost [their] efforts [for] peace, justice and reconciliation as well as uphold [their] national dignity and sovereignty; and prevent the resumption of conflict and violence.'⁸⁵ But their capability to do so impartially and fairly given the political ties of those being accused to those currently in power in Kenya, makes it seem more likely that they

⁸² Jeremy Sarkin, 'Book Review of Mark A Drumbl: *Atrocity, Punishment, and International Law*' (2007) 30 (4) Hum Rts Q 1028, 1037

⁸³ Alana Tiemessen, 'Does the ICC Need to Reconcile with Africa? Bensouda Comes out Swinging' (Justice in Conflict, 25 May 2012) < <http://justiceinconflict.org/2012/05/25/does-the-icc-need-to-reconcile-with-africa-bensouda-comes-out-swinging/> > (Accessed on 22/08/2014); International Justice Desk, 'AU: Still Fighting with the ICC' (Radio Netherlands Worldwide, 14 February 2012) < <http://www.rnw.nl/international-justice/article/au-still-fighting-icc> > (Accessed on 22/08/2014)

⁸⁴ - - 'African Union Backs Kenya Call to Delay ICC Case' (BBC News Africa, 1 February 2011) < <http://www.bbc.com/news/world-africa-12332563> > (Accessed on 22/08/2014)

⁸⁵ Ibid (BBC News Africa, 1 February 2011)

wanted to conduct their own sham trials and added to this, the African Union has over recent years made accusations that the ICC is singling out Africa whilst ‘... ignoring war crimes elsewhere in the world ...’⁸⁶ and of their being a ‘... pro-Western, anti-African bias ...’.⁸⁷ This does not portray the ICC in a positive light or signal that there is much respect and subsequently little promise of cooperation from the African States where its services and guidance are required most; these issues have been highlighted as the ICC’s two most significant challenges by Fatou Bensouda, the new ICC Prosecutor during an interview in May 2012.⁸⁸

However, by carrying out a comparative study between the ICTR and the domestic Rwandan courts, it will be possible to illustrate the potential problems that the ICC may encounter, as it begins to complete trials and investigations of its own alongside complementary prosecutions in national courts, such as lack of consistency and proportionality in penalties, as well as the realisation that much work is necessary before many of the States under investigation by the ICC are in a position to help themselves. The reason Rwanda has been chosen as a comparative study, is due to the fact that at the outset of the prosecutions for the genocide in 1994, the Rwandan courts freely gave out death sentences,⁸⁹ whilst the ICTR like the ICC only had imprisonment at its disposal for those help most culpable. Furthermore, the Rwanda case is a timely and well documented example, which also illustrates many parallels to the ICC, such as the difficulties encountered when prosecuting alongside national courts that have very different ideas on suitable penalties for the same

⁸⁶ - - ‘African Union Backs Kenya Call to Delay ICC Case’ (BBC News Africa, 1 February 2011) <<http://www.bbc.com/news/world-africa-12332563>> (Accessed on 22/08/2014)

⁸⁷ Alana Tiemessen, ‘Does the ICC Need to Reconcile with Africa? Bensouda Comes out Swinging’ (Justice in Conflict, 25 May 2012) <<http://justiceinconflict.org/2012/05/25/does-the-icc-need-to-reconcile-with-africa-bensouda-comes-out-swinging/>> (Accessed on 22/08/2014)

⁸⁸ Ibid (Alana Tiemessen, 25 May 2012)

⁸⁹ 24 of April 1998, Rwandan Government executed by firing squad 22 people convicted of genocide in five sports stadiums across Rwanda. Amnesty International Report, ‘Major step back for human rights as Rwanda stages 22 public executions’ AFR 47/14/98 (24 April 1998) <<http://www.amnesty.org/pt-br/library/asset/AFR47/014/1998/en/dc612aa9-cb11-41b2-b223-ded5df4cccd8/afr470141998en.pdf>> (Accessed on 22/03/2012)

crimes and also highlighting the importance of establishing the rule of law⁹⁰ and imparting the norms of international law to the national level so as to try and facilitate some consistency in approach.⁹¹ In addition to this, both the ICTR and the ICC have or will be involved in prosecutions where the successful trials and what is deemed appropriate sentencing by those affected, could be the difference between helping a State repair itself or could spark a return to further conflict and bloodshed.⁹²

Thus the case study on Rwanda will begin with a brief overview of the events leading up to the genocide and the events the discussions leading to the creation of the ICTR, which will involve an analysis of UN Security Council Resolutions,⁹³ correspondence between the Rwandan representative and the UN,⁹⁴ academic commentary⁹⁵ and also some additional sources such as the invaluable true stories from the victims, recorded by Philip Gourevitch.⁹⁶ Then once the correct context has been established an examination of the structure and work of the ICTR will be made and will be closely followed by a comparison of what happened at the national level in Rwanda to bring about justice for the crimes of genocide. This will also involve an examination of the Statute of the ICTR (Resolution 955) and the provisions it contained on the sentencing objectives of the ICTR, which then be compared to

⁹⁰ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 88

⁹¹ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 69

⁹² William A Schabas, 'The Rights of the Accused Versus Accountability' in Ramesh Thakur & Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press, 2004) 161

⁹³ UNSC Resolution 935 'Requesting the Secretary-General to Establish a Commission of Experts to Examine Violations of International Humanitarian Law Committed in Rwanda' (1 July 1994) UN Doc S/RES/93, UNSC Res 929 'Establishment of a Temporary Multinational Operation for Humanitarian Purposes in Rwanda Until the Deployment of the Expanded UN Assistance Mission for Rwanda' (22 June 1994) UN Doc S/RES/929 and Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

⁹⁴ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994)

⁹⁵ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000), Tom A Adami & Martha Hunt, 'Genocidal Archives: The African Context—Genocide in Rwanda' (2005) 26(1) JSA 105 and Paul J Magnarella, 'How Could it Happen?: The Background and Causes of the Genocide in Rwanda' (2005) 3(4) JICJ 801

⁹⁶ Philip Gourevitch, *We Wish to Inform you that Tomorrow we will be Killed with our Families: Stories from Rwanda* (Picador Press 1998)

the more codified Organic Law No 08/96 of 30 August 1996⁹⁷ where levels of sentence for certain types of crime were pre-determined.⁹⁸ In addition to this a comparison of the national efforts to achieve justice and those of the ICTR, also serves to illustrate that especially in Africa where the vast majority of ICC investigations are currently taking place, then alternative traditional methods may be employed, that do not necessarily fit in with the standard ideals of justice as employed by the ICC.

This will then lead into the issue of the death penalty and the obstacles it caused to the transferral of cases from the ICTR under Rule 11bis,⁹⁹ whereby all of the themes of the thesis, such as the need for pro-active outreach including capacity building and education, the necessity of adherence to human rights standards when prosecuting the crimes covered by the ICC and also the reasons why consistency and a level of proportionality in sentencing are important. These topics will be analysed using a mixture of primary sources such as UN resolutions,¹⁰⁰ the Organic Laws of Rwanda; with particular attention to the law reforms of 2007¹⁰¹ and an abundance of academic commentary. What is most timely and relevant about the Rwanda case study is that the death penalty was a major obstacle to the transfer of cases from the ICTR¹⁰² and as this thesis looks to see what problems the application of the death penalty by national courts when prosecuting in manner complementary to the ICC will have for the retributive and deterrence values of justice as well as seeking to highlight how this obstacle may eventually be overcome. It should be noted however, that the availability

⁹⁷ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990

⁹⁸ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, Arts 14-18

⁹⁹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995)

¹⁰⁰ UNSC Res 1503 'On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda' (28 August 2003) UN Doc S/RES/1503, UNSC Res 1512 'On the International Criminal Tribunal for Rwanda' (27 October 2003) UN Doc S/RES/1512 and UNSC Res 1534 'Necessity of trial of persons indicted by the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (26 March 2004) UN Doc S/RES/1534

¹⁰¹ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) and Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States

¹⁰² - - 'Rwanda - Amnesty International Report 2007' (Amnesty International Annual Report, 2007) Para 26 <<http://www.amnesty.org/en/region/rwanda/report-2007>> (Accessed on 02/03/2013)

of resources relating to the outreach work of the ICTR and how much of its work can be attributed to the legislative changes that occurred in Rwanda from 2007 onwards, is very scarce and therefore this thesis attempts to bridge that gap to some degree and based on the information known, to also make predictions about what the ICC may need to do in order to avoid some of the difficulties the ICTR had to overcome.

The overall aim Rwanda case study is to understand how it was possible to align the penalties of a decimated and war torn State, such as Rwanda, with those of the ICTR and to highlight that the alignment of penalties not only made the facilitation of justice far more effective with increased co-operation between the national and international courts, it also ensured that the victims would feel that justice would now be served in a more consistent, proportionate and impartial manner.¹⁰³

¹⁰³ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 88

Chapter 2: Global Trend Towards Abolition of the Death Penalty

The latest statistics from Amnesty International in their report entitled 'Executions and Death Sentences in 2012', show that there are currently 97 countries that have completely abolished the death penalty, 35 that are abolitionist de facto, 8 that have abolished it for ordinary crimes, with 58 remaining retentionist and only 21 of those countries actually carrying out executions during 2012.¹⁰⁴ When contrasted with the fact that only 15 countries had abolished by 1950,¹⁰⁵ it becomes clear that in the latter half of the last century and especially the last two decades,¹⁰⁶ there has been an increase in the number of countries abolishing the death penalty altogether; with many more that have abolished it in practice or are considering a moratorium.

It is evident that there is a global trend towards complete abolition of the death penalty, both at the national and international level as illustrated by the fact that none of the recent ad-hoc tribunals or courts and nor the ICC have had the death penalty as an available penalty; one which has gathered growing momentum over the past two decades.¹⁰⁷ However, what is less clearly defined is what drives this trend and the question of whether complete global abolition is a realistically attainable goal. Whilst the global trend towards abolition of capital punishment could be described as more of a human rights issue, rather than the issues surrounding the ICC and its complementary prosecution of atrocities which this thesis will be addressing, an overview of the abolitionist trend and the driving factors behind the reform is necessary to put the content of this thesis into context. More specifically, to highlight the peculiarity of the Rome Statute 1998 in Article 77 allowing States to retain the death penalty within their domestic law and permitting them to apply it when prosecuting for offences covered by the statute. However, before embarking upon an

¹⁰⁴ Amnesty International Report, 'Executions and Death Sentences During 2012', Index ACT 50/001/2013 (April 2013) 50 < http://www.amnesty.org.uk/uploads/documents/doc_23136.pdf > (Accessed on 13/08/2013)

¹⁰⁵ Death Penalty statistics < <http://www.infoplease.com/ipa/A0777460.html> > (Accessed on 03/10/2011)

¹⁰⁶ Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (4th edn, OUP 2008) 14

¹⁰⁷ Foreign and Commonwealth Office, Human Rights and Democracy Department, 'HMG Strategy for Abolition of the Death Penalty 2010-2015' (October 2011) 3 < <http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/death-penalty-strat-october-2010> > (Accessed on 01/10/2011)

examination of the various reasons given for the growing abolition momentum, it is necessary to look to the four key international instruments that can be described as being at the core of the global trend towards abolition.

In the years directly preceding the Second World War the attitude in Europe let alone the rest of the world could hardly have been described as abolitionist. As illustrated by the eagerness with which the post war tribunals of Tokyo and Nuremburg handed down death sentences to the Nazi and Japanese war criminals.¹⁰⁸ Similarly some of the countries which now champion the abolitionist cause, such as the UK and France, continued to use the death penalty within domestic criminal law as a penalty for murder until the late sixties and early seventies.¹⁰⁹ Clearly illustrating the fact following the Second World War many countries, whom now champion the abolition cause, were not primarily concerned with abolition of capital punishment, is the Universal Declaration of Human rights.

2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (Universal Declaration) was adopted by the General Assembly of the United Nations on the 10 December 1948 and was never intended to be a binding treaty, simply more of an authoritative declaration of ‘... certain aspirations.’¹¹⁰ However the Universal Declaration has since its inception ‘... gained binding

¹⁰⁸ The Nuremberg Tribunals sentenced 12 of the 24 indicted to death, 10 of which took place on the 16 October 1946, conducted by executioner Master Sergeant John C Woods. Who is reported to have told TIME magazine that the 10 executions took only a total of 103 minutes – History Channel Website Article, ‘Nuremburg Trials’ < <http://www.history.com/topics/world-war-ii/nuremberg-trials>> (Accessed on 28/08/14)

¹⁰⁹ France formally abolished the death penalty in 1981, but the last execution took place on the 10 September 1977 ([Hamida Djandoubi](#) , for the torture and murder of his girlfriend) <www.wired.com/science/discoveries/news/2007/09/dayintech_0910> (Accessed on 30/10/11) The UK formally abolished the death penalty for murder on the 16 December 1969, when the House of Commons affirmed that the Murder (Abolition of the Death Penalty) Act 1965, should not come to an end. However, until 1998, when the UK passed the Criminal Justice Bill outlawing capital punishment for High Treason and Piracy with Violence and the amendments to the Human Rights Bill were made in the October of that year, capital punishment was still available as a punishment for extraordinary or military crimes <<http://www.capitalpunishmentuk.org/abolish.html>> (Accessed on 31/10/11)

¹¹⁰ United Nations Treaty Collection, ‘ Definitions of Key Terms used in the UN Treaty Collection’ <https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml> (Accessed on Footnotes continued on next page

character as customary law at a later stage ...'¹¹¹ and serves as the starting point for what is the exploration of the global trend towards abolition. However an overview of how the Universal Declaration came into being, the preparatory discussions and various amendments made to the final version of Article 3 (The Right to Life), only serve to illustrate that it never intended abolition of capital punishment to be interpreted from a reading of its Article 3.

The Universal Declaration was conceived prior to the end of the Second World War and is believed to have stemmed from the United States State Department, who had envisaged an international bill of rights, loosely based upon its own American Bill of Rights.¹¹² Whilst Article 3 of the Universal Declaration states, 'Everyone has the right to life, liberty and security of person.'¹¹³ This clearly makes no reference to any exceptions to this right, which is ambiguous and could be interpreted as being abolitionist. However examination of the other articles together with the background information known about the various drafts and the discussions that took place amongst the drafting committees, show that whilst the Declaration did not intend to abolish the death penalty, it did intend to create some customary international norms, that would restrict it. For example Article 5 of the Universal Declaration states that, 'No one shall be subjected to torture or to cruel, inhuman and degrading punishment ...'¹¹⁴ is often cited by those arguing against the death penalty, especially in relation to the length of time spent on death row whilst awaiting execution. Similarly Articles 10 and 11 of the Universal Declaration, whilst not directly making any reference to the death penalty, do put in place procedural norms that provides those facing the death penalty with some degree of protection, by ensuring that procedural fairness is upheld in criminal trials and that death penalties cannot be applied retroactively. All of

20/09/2014) & William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 23

¹¹¹ United Nations Treaty Collection, 'Definitions of Key Terms used in the UN Treaty Collection' https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml > (Accessed on 20/09/2014)

¹¹² William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 25

¹¹³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) <<http://www.un.org/en/documents/udhr/index.shtml>> (Accessed on 31/10/11)

¹¹⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Art 5

which being legal principles that went on to be affirmed in international legal treaties in the years that followed.¹¹⁵ Similarly a brief assessment of the discussions of the drafting committee, particularly those of the third committee, serve to illustrate that whilst many acknowledged that the death penalty was increasingly being considered as a morally reprehensible act during times of peace, to include any such suggestion of such a view within the Declaration would be 'premature'¹¹⁶ and could potentially make it difficult for many States to accept such an obligation.¹¹⁷ Therefore, whilst the Universal Declaration does not expressly mention abolition of the death penalty, it must be noted that it played a pivotal role in establishing the customary norms that form the basis of the international treaties that have followed; which have set about pushing for abolition.

Having established that the Universal Declaration did not directly approach the issue of abolition of the death penalty, but instead laid the foundations of the principles that indicate '... a climate that advocated, in the name of democracy and freedom, the protection of citizens from the power of the state ...';¹¹⁸ we now turn to look at some of the international treaties that have subsequently followed the Universal Declaration. The creation of these treaties and covenants which sought to push the boundaries and establish the customary norms relating to the use of the death penalty, can be interpreted as being indicative that the global opinion on the death penalty was set to change; as was affirmed by the creation of the International Covenant on the Civil and Political Rights, which was adopted by the UN General Assembly in 1966¹¹⁹ and was intended to be binding.

¹¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969 and the American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force July 18 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992)

¹¹⁶ Draft of the International Declaration of Human Rights, General Assembly 3rd Session UN Doc A/C.3/SR.102 (30 September - 7 December 1948) 4-5 < http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/SR.102 > (Accessed 08/10/2010)

¹¹⁷ Ibid(Draft of International Declaration of Human Rights, 1948)9, as stated by the UK representative

¹¹⁸ Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (4th edn, OUP 2008) 18

¹¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

2.2 The ICCPR and Second Optional Protocol

The International Covenant on the Civil and Political Rights (ICCPR) like the Universal Declaration does not directly address the issue of abolition of the death penalty, in fact its stance on the application can be said to be very similar to that of the Universal Declaration. For example the ICCPR in Article 6(1) states that ‘Every human being has the inherent right to life’ which is very similar to the Universal Declaration’s, wherein Article 3 states that ‘Everyone has the right to life, liberty and security of person.’¹²⁰ However the ICCPR does illustrate progression on the path towards abolition, as unlike the Declaration it does expressly make reference to the death penalty in Article 6, where it makes restrictions upon the application of the death penalty. These restrictions take the form of a vague limitation upon its use only for ‘... the most serious crimes in accordance with the law...’¹²¹ and the bolder prohibition against it being applied to pregnant women and those who were under the age of eighteen when they committed the offence.¹²² Nonetheless, the most progressive statement in the whole of the ICCPR is that made by Article 6(6) where it is stated that ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’

The above statement as expressed in Article 6(6) is undoubtedly a sign that the momentum of the abolitionist movement was finally beginning to gather pace.¹²³ Furthermore, it should be noted that the ICCPR is binding upon all States that have ratified it, unlike the Universal Declaration, which was never initially intended to be binding, but has since ‘... gained

¹²⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Art 3

¹²¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 6(2), which also goes on to state that the death penalty cannot be applied retroactively, which is a distinct parallel to Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Art 11(2) which states ‘No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.’

¹²² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 6(5)

¹²³ Roger Hood & Carolyn Hoyle, *The Death Penalty: Worldwide Perspective* (4th edn, OUP 2008) 11

binding character as customary law...'.¹²⁴ However, whilst it is intended to be binding upon all those who have ratified the covenant, it should be noted that some States, such as the United States of America have made reservations to Articles 6 and 7 of the ICCPR¹²⁵ at the time of ratification which took effect from the 8 September 1992.¹²⁶ Not only do such reservations undermine the intended purpose of the ICCPR, it also contravenes Article 4(2) of the ICCPR, which states that 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.' This simply serves to illustrate that whilst the ICCPR and other international treaties, are intended to be binding upon those who ratify them, they are only effective to the extent that States are willing to apply them and given States continued reluctance to surrender their sovereignty and it should be noted that these reservations are not uncommon. However, in turning now to the Second Optional Protocol (SOP) to the ICCPR,¹²⁷ we see that international treaties are further restricted by the fact that there is no necessity to sign up to them, merely a moral sense of duty and sometimes a political benefit; a fact that is clearly illustrated when it is noted that not all of the States whom have ratified the ICCPR have ratified the Second Optional Protocol.

The most obvious explanation as to why fewer States have opted to ratify the SOP is that unlike the ICCPR, the SOP is clearly intended to bring about abolition of the death penalty, whilst the ICCPR through article 6(6) merely '... points ... in the direction of abolition of the death penalty.'¹²⁸ The SOP, which was adopted twenty three years after the ICCPR, via UN

¹²⁴ United Nations Treaty Collection, 'Definitions of Key Terms used in the UN Treaty Collection' https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml > (Accessed on 20/09/2014)

¹²⁵ The most notable issue resulting from this reservation to the two articles, is the fact that the United States of America, which is often held to the role model for an ideal democratic society, still continues to execute those who commit crimes whilst under the age of 18, which is not only a direct contravention of Art 6(5) of the ICCPR, but is also considered morally unacceptable even by some the biggest advocates of the death penalty.

¹²⁶ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 79

¹²⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128, 1642 UNTS 414

¹²⁸ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 138

General Assembly Resolution 44/128 of 15 December 1989,¹²⁹ clearly illustrates that in the twenty three years that had passed between the two there had been a marked shift in attitudes towards capital punishment, seeing a shift from a desire by a few mostly European and South American States to encourage others to follow their abolitionist ideals, to a definitive ‘... international commitment to abolish the death penalty.’¹³⁰ Unlike any of the previously discussed international instruments, the SOP to the ICCPR does not seek to restrict the application of the death penalty nor does it seek to ensure procedural fairness where capital punishment remains in force. In stark contrast it unequivocally requires that in order to be able to ratify it, that State must have abolished the death penalty. Article 1(1) of the SOP to the ICCPR clearly says that, ‘No one within the jurisdiction of a State Party to the present Protocol shall be executed’ which is a dramatic leap from the language of the ICCPR that merely suggested that abolition was desirable, through attempts to restrict the scope of the penalty and the categories of people eligible to its application. However, once again like the ICCPR and the Universal Declaration, there is no mandatory requirement that States should ratify the SOP to the ICCPR, but it does nonetheless serve to illustrate that the abolitionist cause was gathering momentum and support.

2.3 From International to European

Europe has often been cited as the champion of the abolitionist cause and given that membership to the European Union now comes with the prerequisite of complete abolition of the death penalty,¹³¹ it certainly seems fair to say that if not the definite champion of the abolition, it is most certainly one of the most influential. However before going into greater depth on the European Union and its conditions for membership, a brief examination of the

¹²⁹ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128, 1642 UNTS 414

¹³⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128, 1642 UNTS 414, Preamble

¹³¹ Council of Europe News, ‘The Council of Europe, a Death Penalty Free Area’ < <http://hub.coe.int/what-we-do/human-rights/death-penalty>> (Accessed on 20/06/2013)

European Convention on Human Rights (ECHR)¹³², its Sixth and Thirteenth Protocols and how they have contributed to the abolitionist cause will now be undertaken.

The European Convention on Human Rights (ECHR) like the ICCPR and Universal Declaration of Human Rights, does not set to abolish the death penalty, as is evident from the fact that the only reference to the death penalty is in Article 2(1) where it is stated that, 'No one shall be deprived of his life intentionally save in the execution of a sentence of a court following the conviction of a crime for which this penalty is provided by law.'¹³³ This is not surprising given that the ECHR was created on the 4 November 1950,¹³⁴ when the majority of European and other States across the globe, considered the death penalty to be an acceptable form of punishment, especially for murder and also in consideration of the proximity to the Second World War and the Nuremburg and Tokyo Trials. However, the Sixth Protocol, which was created on the 28 of April 1983 and came into force on the 1 of March 1985 after being ratified by the requisite number of States, makes a dramatic leap from Article 2 of the ECHR, as an examination of the Sixth Protocol will illustrate.

It is worth noting, that the need for an abolitionist piece of legislation within Europe was acknowledged as early as 1973, when the Consultative Committee of the Council of Europe sent a draft resolution aimed at abolition, to the Committee on Legal Affairs.¹³⁵ This trend towards abolition has been identified as being in part due to the fact that capital punishment was increasingly being viewed as contradicting Article 3 of the ECHR, which prohibits cruel, inhuman and degrading punishment. By May 1980 the European Ministers of Justice also felt that Article 2, which lawfully permits the retention of the death penalty,

¹³² Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969

¹³³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969 Art 2(1)

¹³⁴ European Convention on Human Rights entered into force on the 3 September 1953

¹³⁵ European Committee on Legal Affairs, 'Motion for a Resolution on the Abolition of Capital Punishment' (May 18 1973, 8th sitting) OJC Doc 3297 Proposed by Bergegren, Wiklund, Aasen, Stewart, Dankert,, Radinger, Renschler, Bohman, Sjonell, Waag and Hansen.

was contrary to the actual practice of the majority of European States, who had by this point in time,¹³⁶ become abolitionist or were in the process of becoming abolitionist. As a result of this acknowledgement it was decided that new human rights norms needed to be established and that the ECHR needed to be made consistent ‘... with the new trends in criminology and criminal law...’,¹³⁷ which would also reinforce the true meaning of Article 3 of ECHR.

Following in the footsteps of the United Nations and the ICCPR, the European Committee of Ministers felt that the most successful way of introducing abolitionist legislation, was via an optional and subsequently an additional protocol to the existing human rights instrument. In September 1981, the European Committee of Ministers instructed the Steering Committee on Human Rights¹³⁸ to draft an additional protocol to the ECHR. Subsequently in September 1982, only twelve months later, the draft protocol was approved and formally adopted at the 354th meeting of the European Committee of Ministers in December 1982.

Whilst it may seem a relatively short and easy process of drafting and approving what would become the Sixth Protocol to the ECHR, it must be remembered that this had been in the offing since the European Committee on Crime and Problems first raised the issue of evolving norms in human rights law and global attitudes towards the death penalty in 1957¹³⁹, as well as an investigation that was led by the famous scholar and lawyer, Marc

¹³⁶ Belgium (1950), Austria (1950), Denmark (1978), Federal Republic of Germany (1949), Finland (1972), France (no executions since 1977, formally abolished 1981), Italy (1947, ordinary crimes), Malta (1971, ordinary crimes), Netherlands (1870, ordinary crimes), Norway (1979), Portugal (1976), San Marino (1865), Spain (1975, ordinary crimes), Sweden (1972), Switzerland (1942, ordinary crimes), United Kingdom (1973, ordinary crimes). Data taken from: Amnesty International, ‘Death Penalty: Countries Abolitionist for All Crimes’, <http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes> (Accessed on 25/06/2013)

¹³⁷ Council of Europe, Parliamentary Assembly Resolution 727, ‘Abolition of Capital Punishment’ (18 March 1980) OJC Doc No 4509, 14

¹³⁸ Note that the Steering Committee on Human Rights had been previously engaged by the European Committee of Ministers in 1978 to analyse the European trend towards abolition, following the Amnesty International conference at Stockholm in December 1977, where Amnesty International called for complete abolition.

¹³⁹ - - ‘Les activités du Comité européen pour les problèmes criminels du Conseil de l’Europe’ (1961) 16 *Revue de science criminelle et de droit pénal comparé* 646, 646

Ancel. This was a subject that gained greater momentum from 1973 onwards when the Consultative Assembly of the Council of Europe sent a draft resolution proposing abolition of the death penalty, to the Legal Affairs Committee.¹⁴⁰ The resolution, was spurred on by the recent decision of the United Kingdom's House of Commons¹⁴¹ approval to the continued application of the private members bill abolishing the death penalty for murder in the United Kingdom; and compounded by the growing census that the death penalty was viewed as '... inhuman and degrading within the meaning of Article 3 of the ECHR.'¹⁴² Following this the Legal Affairs Committee, which was headed by Bertil Lidgard, submitted a revised report to the European Consultative Committee in 1976, which identified a single fundamental issue, which was 'What is the right whereby men presume to slaughter their fellows?'¹⁴³

The report also noted that the United Nations had progressively moved towards an abolitionist stance and were keen to follow. However the momentum of this abolitionist movement was lost following the objections of the British delegates at the meeting of the Legal Affairs Committee in January 1976, as it was felt that the timing was not appropriate and it was feared that to push the issue too early could lead to the failure of any attempt to create European norms abolishing the death penalty.¹⁴⁴ Nonetheless, the issue only lay dormant for a few years before it was reignited by the Amnesty International Conference of December 1977.

¹⁴⁰ European Committee on Legal Affairs, 'Motion for a Resolution on the Abolition of Capital Punishment' (May 18 1973, 8th sitting) OJC Doc 3297

¹⁴¹ 16 December 1969, the House of Commons voted 343 to 185 that the Murder (Abolition of the Death Penalty) Act 1965, should not expire, thus abolishing the death penalty for ordinary crimes in times of peace in the United Kingdom. < <http://www.capitalpunishmentuk.org/abolish.html> > (Accessed on 06/07/2012)

¹⁴² William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 229

¹⁴³ A question posed by Cesare Beccaria more than two centuries previously and as cited in Council of Europe, Parliamentary Assembly Resolution 727, 'Abolition of Capital Punishment' (18 March 1980) OJC Doc 4509, Section 1

¹⁴⁴ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 234

Having now established a bit about the background of the European journey to the abolitionist stance and the creation of the Protocol No 6 to the ECHR, which entered into force on the 28 April 1983 after being signed by twelve member States¹⁴⁵, it is to the wording of the protocol and its applied interpretation that we turn, in order to ascertain the European stance on the death penalty. The Preamble to the Protocol No 6 to the ECHR states:

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

This Preamble clearly illustrates that Protocol No 6 to the ECHR was created due to a growing consensus among the member States of the Council of Europe that the death penalty was no longer considered an acceptable method of punishment. As affirmed by Article 1 of the Protocol No 6 to the ECHR, which states that ‘The death penalty shall be abolished. No one shall be condemned to such penalty or executed’; if read in isolation this would suggest that the European attitude was one of complete abolition. However, when Articles 2 and 5 are considered, it becomes clear that whilst Europe was most certainly at the forefront of the abolitionist movement, it was also restricted in the same ways that the UN was when it created the Second Optional Protocol and the Inter American Commission when it created the Protocol to the American Convention on Human Rights in 1990.¹⁴⁶ In the sense that the drafters of all three abolitionist optional/additional protocols, acknowledged that whilst in principle the only way to create a truly abolitionist legislative instrument, would be to prohibit the use of the death penalty for all offences and both during peacetime and times of war. However, at the same time they were pragmatic enough to realise that the only way to guarantee States that were newly abolitionist or abolitionist de facto, would

¹⁴⁵ France, Austria, Belgium, Denmark, Germany, Luxembourg, Netherlands, Norway, Spain, Portugal, Sweden and Switzerland – All signed the Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (adopted 6-10 December 1982, entered into force 28 April 1983) ETS No 114, as amended by Protocol No 11 (entered into force 1 November 1998) ETS No 155. Art 8 of Protocol No 6 states: ‘This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.’

¹⁴⁶ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990) OAS Treaty Series No 73 (1990) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 80 (1992)

sign up to the additional protocols, was to deal only with abolition during peacetime, so as not to appear too radical and off putting. As is clearly illustrated in Article 2 of Protocol No 6 to the ECHR, which states:

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.

The language of Article 2 expressly gives the States permission to retain and apply the death penalty for crimes committed in times of war or when war appears imminent, so long as it is codified within that State legislation. Furthermore, Protocol No 6 to the ECHR does not expand further upon its definition of the situations that could be classed as an ‘... imminent threat of war ...’¹⁴⁷; nor does it make reference to whether or not the conflict or threat of conflict must come from an outside State, thus leaving States open to apply the death penalty for offences committed during internal conflicts. Yet another compromise, inserted in order to encourage even States that were uncertain about abolition to consider ratifying Protocol No 6 to the ECHR.

Following on with the theme of compromise, Article 5 (1) of Protocol No 6 to the ECHR also allows States that choose to ratify the protocol, further flexibility in relation to how and where within their territories they choose to apply the protocol. Whilst Article 5 (2) of Protocol No 6 to the ECHR allows for States to ‘... extend the application of [the] Protocol to any other territory specified in the declaration ...’ at a later date, suggesting that the drafters were simply allowing States greater flexibility in the hope that it would encourage expansion of the abolitionist ideology on a staggered basis. These appear to be acceptable and understandable compromises, given that they are aiming at gradual expansion of the abolitionist movement. However, in stark contrast is Article 5 (3)¹⁴⁸ which states that those

¹⁴⁷ Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (adopted 6-10 December 1982, entered into force 28 April 1983) ETS No 114, as amended by Protocol No 11 (entered into force 1 November 1998) ETS No 155 Art 2

¹⁴⁸ Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (adopted 6-10 December 1982, entered into force 28 April 1983) ETS No 114, as amended by Protocol No 11 (entered into force 1 November 1998) ETS No 155

who have ratified the protocol are given permission to withdraw areas of territory from being bound by the protocol, so long as they do so by sending notification to the European Secretary General. Whilst this is shocking given the strong abolitionist sentiment that swept through Europe following the aftermath of the Second World War. It must be understood in the relevant context, which is that the Protocol No 6 to the ECHR was the earliest of the three main abolitionist additional or optional protocols and as such, ‘... was a seminal development in the abolition of the death penalty ...’,¹⁴⁹ that led the way for both the United Nations and the American States to follow. Therefore it is only logical that the later protocols would seek to go one step further and prohibit reintroduction of capital punishment once it has been abolished, nonetheless neither seek to go as far as to prohibit the use of capital punishment during times of war.

Furthermore, in 1989 the European Parliament adopted the ‘Declaration of Fundamental Rights and Freedoms’,¹⁵⁰ where Article 22 unequivocally states ‘The Death Penalty shall be abolished’;¹⁵¹ illustrating an evolving and more definitive attitude towards making the death penalty and relic of the past within Europe. The rights and protections set out in the Declaration of Fundamental Rights and Freedoms are afforded to all citizens of the European community and are not to be ‘... interpreted as implying any right to engage in any activity aimed at restricting or destroying the rights and freedoms set out ...’¹⁵² within the declaration. The growing European stance, whereby complete abolition is the only acceptable option, has been further highlighted in recent years by complete abolition having been made a prerequisite of membership to the European Union¹⁵³ as facilitated by the

¹⁴⁹ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 247

¹⁵⁰ European Declaration of Fundamental Rights and Freedoms OJC No C 120//51 (12 April 1989) Doc A2-3/89

¹⁵¹ Ibid Declaration of Fundamental Rights and Freedoms (1989) Art 22

¹⁵² European Declaration of Fundamental Rights and Freedoms OJC No C 120//51 (12 April 1989) Doc A2-3/89 Art 28

¹⁵³ Parliamentary Assembly of Council of Europe, ‘On the Abolition of the Death Penalty in Europe’ (28 June 1996) OJC Res 1097 Doc 7589 Para 6 states: ‘With reference to Resolution 1044 (1994), the Assembly reminds applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 to the European Convention on Human Rights and to introduce a moratorium upon accession has become a prerequisite for membership of the Council of Europe on the part of the Assembly. It thus recommends applicant states to review their policy on capital punishment in time.’

creation of Protocol No 13 to the ECHR (2003),¹⁵⁴ which calls for the death penalty to be abolished in all circumstances (generally States have abolished the penalty in ordinary law, but retained it for war crimes and piracy). In addition to this there has been an increase of cases where European member States have refused to extradite criminals to countries where they may potentially face the death penalty or other forms of treatment that would be held to violate the protections afforded them under the ECHR. This principle was established in the case of *Soering v UK* App no 14038/88 (ECtHR 7 July 1989), where the European Court of Human Rights upheld Soering's claim that to extradite him to the USA, where he would potentially face the death penalty and therefore be exposed to a long period awaiting execution (the death row phenomenon)¹⁵⁵ '...would expose him to a real risk of treatment going beyond the threshold set by Article 3[ECHR].'¹⁵⁶ Whilst the principles established in *Soering v UK*¹⁵⁷ have gone on to be used more frequently in cases opposing deportation for illegal asylum seeking, it nonetheless serves to illustrate that the European Court of Human Rights is opposed to sending those residing within Europe, back to States where they risk torture or cruel and unusual punishment; as *Soering v UK*¹⁵⁸ has illustrated awaiting execution for long periods of time on death row, satisfies this criteria.

Having established that Europe played an central role in the abolitionist movement following the Second World War due to a drastic change in attitude towards cruel and degrading forms of punishment, which can partly be attributed to abhorrence felt towards the shocking treatment of war criminals, Jewish people, Gypsies and many other unfortunate sectors of society by the Nazis;¹⁵⁹ and also in part due to the evolution of social

¹⁵⁴ Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS No 187

¹⁵⁵ *Soering v UK* App no 14038/88 (ECtHR 7 July 1989) Para 109

¹⁵⁶ *Soering v UK* App no 14038/88 (ECtHR 7 July 1989) Para 111

¹⁵⁷ *Soering v UK* App no 14038/88 (ECtHR 7 July 1989)

¹⁵⁸ *Soering v UK* App no 14038/88 (ECtHR 7 July 1989)

¹⁵⁹ Andrew Hammel, 'Civilized Rebels: Death Penalty Abolition in Europe as Cause, Mark of Distinction, and Political Strategy' in Austin Sarat & Jurgen Martschukat (eds), *Is the Death Penalty Dying: European and American Perspectives* (CUP 2011) 188

and cultural norms where there was a growing aversion to pain and suffering.¹⁶⁰ It is now the American States that we turn in order to assess the final of the three treaties and its additional protocols, which have helped to shape the global abolitionist trend.

2.4 The American Stance

As has previously been illustrated there are many parallels between the abolitionist instruments of the European Union and those of the United Nations, so it does not come as a surprise that the Inter American instruments also have many similarities and appear to have followed a similar chronological path of development. It therefore seems appropriate, to start with the period following on from the Second World War, as this has clearly been highlighted as the period in which human rights and abhorrence for capital punishment first came to the head of political agendas. The Declaration of the Rights and Duties of Man,¹⁶¹ was adopted by the Organisation of American States at the ninth international conference of American States in Bogota, Colombia in 1948. It must be noted that the Declaration of the Rights and Duties of Man, makes no reference at all to the death penalty, in fact there is a strong resemblance to the Universal Declaration of Rights created by the United Nations. As is illustrated by the fact they both state that, 'Every human being/everyone has the right to life, liberty and the security of his person.'¹⁶²

The only difference between the wordings of the two declarations is that the Universal Declaration uses the phrase 'everyone', where the American Declaration uses 'human being', a negligible variation of wording. Similarly both Declarations make no direct

¹⁶⁰ Andrew Hammel, 'Civilized Rebels: Death Penalty Abolition in Europe as Cause, Mark of Distinction, and Political Strategy' in Austin Sarat & Jurgen Martschukat (eds), *Is the Death Penalty Dying: European and American Perspectives* (CUP 2011) 182-183

¹⁶¹ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992)

¹⁶² Both the American Declaration of the Rights and Duties of Man (1948) Art 3 and Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Art 3 state the same right to life.

reference to the death penalty, unlike Article 2 (1) of the ECHR (1950),¹⁶³ which gives the sentence of death given by a court of law as an exception to the right to life, as well as an exception when death occurs due to lawful self-defence or in the course of lawful arrest and when necessary to quell riots. Again illustrating that Europe was has at the forefront of the abolition movement following the Second World War. However, it is worth noting that whilst the American Declaration does not expressly prohibit the death penalty, it does prohibit the use of ‘...cruel, infamous or unusual punishment’ as stated under the Right to Due Process of Law.¹⁶⁴ Furthermore it should be noted the working group which created the American Declaration decided in light of the *travaux préparatoires* (preparatory works) to remove any direct reference to the death penalty, which had in any event only been considered for ‘serious crimes’, due to a lack of consensus amongst State parties.¹⁶⁵ So as to make the declaration acceptable to all Inter- American States, some of who were then and still are strong advocates of the death penalty. This justification for the removal of the issue of capital punishment was expressed by Commissioner Marco Gerardo Monroy Cabra, when he explained ‘... [that] there was a consensus to delete any reference to the death penalty from Article 1 in view of the differences that existed among the States on this matter.’¹⁶⁶ However it has been suggested that whilst the American Declaration is ‘... textually silent on the death penalty, [it] is a norm that prevents arbitrary use of capital punishment’¹⁶⁷ an issue that was debated in the case of *Roach & Pinkerton v United States* (Case No 9647, Res No 3/87) Inter-American Court of Human Rights (22 September 1987) 147,

¹⁶³Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969 Art 2 (1) states: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

¹⁶⁴American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) Article XXVI

¹⁶⁵William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 255

¹⁶⁶*Roach & Pinkerton v United States* (Case No 9647, Res No 3/87) Inter-American Court of Human Rights (22 September 1987) 147

¹⁶⁷William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 263

where the Commission of American States held that the American Declaration was silent upon capital punishment, but emerging customary norms were not.¹⁶⁸

Having established that the American Declaration makes no express reference to the abolition of the death penalty, but has been construed as suggesting that customary norms restricting its arbitrary usage has emerged it is not surprising that like the United Nations and Europe, the Organisation of American States over time came to feel that an agreement that was more binding in nature was necessary in order to ‘... advance the protection of human rights in the Western hemisphere ...’.¹⁶⁹ At the Fifth meeting of Consultation of the Ministers of Foreign affairs, which was held in Santiago (Chile) between August – September 1959, it was decided that the necessary steps to make such advancement should commence and the Inter-American Juridical Committee was engaged to prepare a draft convention. The first draft that was given serious consideration by the Inter-American Commission on Human Rights, was that put forward by Uruguay, which in paragraph two of the section dealing with the right to life, stated:

The Contracting Parties shall abolish capital punishment. Reservations to this provision shall be admitted solely on condition that the sentence of death may be imposed only as a penalty for exceptionally serious crimes and pursuant to the final judgement of an independent and impartial regular court, which will satisfy due process of law, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.¹⁷⁰

However this Uruguay draft was abandoned in July 1968 when at a special session of the Inter-American Commission of Human Rights, it was decided to bring the text of the ‘right to life’ provision closer to the text of the ICCPR. Whilst the revised draft was not as definitively abolitionist as the Uruguayan initial draft, due to what Uruguay acknowledged to be

¹⁶⁸ *Roach & Pinkerton v United States* (Case No 9647, Res No 3/87) Inter-American Court of Human Rights (22 September 1987) 147, Para 52

¹⁶⁹ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 263

¹⁷⁰ OAS Doc on Inter-American Commission of Human Rights, ‘ Report on the Work Accomplished in its Eighteenth Session’ OEA/Ser.L/V/II.19, Doc 30 ENG (12 September 1968) 26

‘unavoidable compromises’¹⁷¹ in order to appease the staunch retentionists of the death penalty, additional sections were added in which it is stated that ‘The application of such punishment shall not be extended to crimes to which it does not presently apply ...’¹⁷² and that ‘The death penalty shall not be re-established in States that have abolished it.’¹⁷³ Thus making the provision into one that was forward thinking; looking towards a future in which abolition would become the norm, whilst at the same time not seeking too many radical changes so as to ostracise the staunchly retentionist States.

In addition to the above mentioned restrictions upon signatory States, the American Convention on Human Rights (ACHR)¹⁷⁴ also stipulates several other conditions for the application of the death penalty, which can be described as proactively abolitionist, as they seek to clearly reduce the scope of those who it may be applicable to. The first of which is Article 4 (4) of Chapter II of the ACHR, which states the following about the death penalty, that ‘In no case shall capital punishment be inflicted for political offenses or related common crimes’, something which the USA has refused to agree to, based upon the argument that this would interfere with their right to execute anyone who assassinated as US president.¹⁷⁵ Secondly Article 4 (5) of the ACHR makes further restrictions by stipulating certain categories of people, who are to be exempt from the death penalty, which includes those under the age of 18 or over the age 70 at the time the crime was committed and pregnant women. Again this is clearly an attempt at gradual abolition by requiring retentionist States to slowly make changes and as a result of this, slowly decreasing the sections of the population that are eligible to receive the death penalty. However, a brief

¹⁷¹ OAS ‘The Inter-American Specialized Conference on Human Rights’ (San Jose, Costa Rica) Doc OEA/Ser K/XVI/1.1 Eng Doc 6 (1969) 2

¹⁷² American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force July 18, 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) Art 4(2)

¹⁷³ Ibid (American Convention on Human Rights) Art 4(3)

¹⁷⁴ American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force July 18 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992)

¹⁷⁵ OAS ‘The Inter-American Specialized Conference on Human Rights’ (San Jose, Costa Rica) Doc OEA/Ser K/XVI/1.1 Eng Doc 6 (1969) 1-2

overview of the effect the ACHR has had upon those States which have ratified it, will illustrate whether or not the intended goals have been attained.

The ACHR which came into force on the 18 July 1978 following ratification by eleven States, has to date been ratified by a total of 25 States. However it should be noted that the USA has signed but not ratified the ACHR and several other States have ratified the ACHR but have made reservations to the articles pertaining to the death penalty. For example both Barbados and Trinidad & Tobago have ratified the ACHR but made reservations to Article 4 (5) as it contradicts their domestic legislation.¹⁷⁶ More surprising is the fact that, in-line with the Vienna Convention on the Law of Treaties (1979)¹⁷⁷ neither reservations have been objected to within the 12 month period and therefore are now permitted to stay, furthermore in 1982 (just twelve months after ratification) Martin Marsh was executed by Barbados for a crime he committed whilst seventeen years of age,¹⁷⁸ a clear contravention of Article 4 (5) of the ACHR. However, it should be noted that Barbados made no such reservations when it ratified the ICCPR in 1973, which contains an identical provision restricting the age groups that are eligible to be sentenced to death. This coupled with the fact that the USA has signed but not ratified the ACHR, would seem to suggest that despite the compromises that were made during the drafting of the ACHR, so as to make it acceptable to those States still retaining the death penalty, the ACHR is still too drastic for them to accept. Therefore it is not surprising that there have been many cases brought before the Inter-American Commission of Human Rights and the Inter- American Court of Human Rights disputing that the terms of the ACHR have been clearly breached.¹⁷⁹

¹⁷⁶ Barbadian legislation permits the execution of those who are 16 years of age and above and sets no upper age limit. The domestic legislation of Trinidad and Tobago does not set an upper age limit on those eligible to receive the death penalty.

¹⁷⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

¹⁷⁸ - - Amnesty International Report, 'The Exclusion of Child Offenders From the Death Penalty Under General International Law' ACT 50/004/2003 (July 2003) 6 <

<http://www.amnesty.org/fr/library/asset/ACT50/004/2003/en/63f9a108-d712-11dd-b0cc-1f0860013475/act500042003en.pdf>> (Accessed on 03/03/2012)

¹⁷⁹ *Marcelino Marraquin et al v Guatemala* (Case No 8094 Resolution No 15/84) Inter_ American Court of Human Rights (3 October 1984) – Guatemala handed out four death sentences for politically motivated

Footnotes continued on next page

Similarly the UN International Law Commission has conducted a lengthy and in-depth study of the issues surrounding reservations not only to human rights treaties, but to all treaties, so as to clarify the stance that should be taken in the current legal climate and to clarify the Vienna Convention on the Law of Treaties (1969).¹⁸⁰ This study has culminated in the creation of the Guide to Practice on Reservations to Treaties,¹⁸¹ which closely follows the Vienna Convention (1969) and has sought to ‘...fill the gaps of the [Vienna Convention] and ...removing the ambiguities in the existing rules, but without embarking on their amendment.’¹⁸² As is evidenced by the fact that guideline 3.1¹⁸³ is a direct reproduction of Article 19 of the Vienna Convention (1969)¹⁸⁴ and like the Vienna Convention (1969), the ILC Guidelines of 2011¹⁸⁵ have chosen not to deal with human rights treaties separately, but have instead incorporated the special circumstances created by human rights treaties involving the rights or obligations of third parties are considered with the insertion of guideline 3.1.5.6.¹⁸⁶ Guideline 3.1.5.6 sets out how States or the bodies that oversee the adherence to the treaties should assess the permissibility of a reservation to a treaty containing interdependent, by providing the following guidance:

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.

crimes, which was directly in contravention of American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) Art 4 (4) Guatemala argued that it was entitled to do because they had made a reservation to Article 4 and so they believed that the convention only restricted Section 54 of the Guatemalan Constitution from applying the death penalty for directly political crimes and not common crimes that had a political link. The Inter- American Court of Human Rights found the reservation to be inadequate. However by the time this decision was given the four men had been executed and Guatemala had suspended the death penalty.

¹⁸⁰ Allain Pellet ‘ The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’ (2013) 24(4) EJIL 1061, 1072

¹⁸¹ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2

¹⁸² Allain Pellet ‘ The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’ (2013) 24(4) EJIL 1061, 1072

¹⁸³ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2, guideline 3.1

¹⁸⁴ Ineta Ziemala and Lasma Liede, ‘ Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6’ (2013) 24(4) EJIL 1135, 1149

¹⁸⁵ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2, guideline 3.1

¹⁸⁶ Ibid (Guide to Practice on Reservations to Treaties, 2011) guideline 3.1.5.6 entitled: Reservations to treaties containing numerous interdependent rights and obligations

This is a direct expansion of Article 19 (c) of the Vienna Convention, which provides guidance on what should be considered when determining whether a reservation to a multilateral treaty that also creates third party rights, is permissible or not. However, the most interesting point of the ILC Guide (2011)¹⁸⁷ is that of guideline 4.5.3, which has been described as creating a middle ground¹⁸⁸ between the stance taken by the UN Human Rights Commission (UN HRC) in General Comment No. 24¹⁸⁹ on how to deal with reservations that are deemed to be invalid and the extreme opposite view taken by the USA and the UK¹⁹⁰ to the view expressed by the UN HRC in General comment No. 24. The UN HRC in General Comment No. 24 took the view that should a reservation be found to be invalid, then the treaty would simply continue to apply to that State, but ‘...without benefit of the reservation.’¹⁹¹ Whilst is stark contrast the USA and the UK felt that a policy of ‘severability’¹⁹² should be undertaken whereby if the reservation is found to be invalid, then so is the ratification of the entire treaty.¹⁹³

However the ILC Guide (2011) has taken on board both extremes and found a middle ground, whereby in guideline 4.5.3 states that whether a State is bound by the treaty without the benefit of the reservation that had been deemed invalid, depends upon whether the State has expressed an intention as to ‘...whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by

¹⁸⁷ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2

¹⁸⁸ Ineta Ziemala and Lasma Liede, ‘Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6’ (2013) 24(4) EJIL 1135, 1152

¹⁸⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 24, ‘Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994)

¹⁹⁰ Glenn McGroarty, ‘Reservations of Virtue? Lessons from Trinidad and Tobago’s Reservation to the First Optional Protocol’ (2001) 23 Hum Rts Q 769, 808-810

¹⁹¹ UN Human Rights Committee (HRC), CCPR General Comment No. 24, ‘Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) 846

¹⁹² - - ‘Observations by the Governments of the United States and the United Kingdom on General Comment No. 24 (52) Relating to Reservations’ (1995) 16 Hum Rts L J 422, 197

¹⁹³ - - ‘Observations by the Governments of the United States and the United Kingdom on General Comment No. 24 (52) Relating to Reservations’ (1995) 16 Hum Rts L J 422, 202-203

the treaty.¹⁹⁴ And in guideline 4.5.3.2 the ILC states that when a State has made no expression at all, then they will be deemed to be bound by the treaty without the ‘...benefit of the reservation.’¹⁹⁵ This stance taken by the ILC is interesting, as it clearly aims to bind as many States as possible to the treaties to which they freely become a party to, but without the ability to hide behind reservations that undermine ‘... the object and purpose of the treaty.’¹⁹⁶ In the case of Barbados as mentioned above, it is likely that in relation to the execution of Martin Marsh, because the reservation¹⁹⁷ makes no expression that without the reservation to Article 4(5) of the ICCPR (1966) they do not wish to be bound to the ICCPR (1966), then it would likely be held that the ICCPR fully applied to Barbados and in the execution of Martin Marsh, they had breached their legal obligation.

As previously mentioned the Organisation of American States stance on the abolition of the death penalty, closely followed that of Europe and the UN, therefore it is unsurprising that by 1986 some of the more staunchly abolitionist States felt that the current ACHR with its many reservations was simply not enough to ensure that abolition would occur. In the 1986-1987 annual report of the Inter- American Commission, they suggested creating an additional protocol, similar to that of the ECHR or the ICCPR, whereby the death penalty would be abolished for all crimes except for certain military crimes during times of war; subsequently in 1987 the Inter-American commission was instructed to review a draft additional protocol and on the 8 June 1990, by Resolution 1042 of the twentieth regular session of the Organisation of American States, General Assembly, the additional protocol was adopted.¹⁹⁸ The protocol of the ACHR is far shorter than that of the ICCPR of the ECHR and is more similar to the SOP to the ICCPR than the Protocol No 6 to the ECHR, as it is intended to exclude the death penalty at all times, whilst providing for an exception to be

¹⁹⁴ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2, guideline 4.5.3.1

¹⁹⁵ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2, guideline 4.5.3.2

¹⁹⁶ Guide to Practice on Reservations to Treaties, UN Yrbk ILC (2011) II, Part 2, guideline 3.1 (c)

¹⁹⁷ Barbados Reservations to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Barbados> (Accessed on 16/04/2013)

¹⁹⁸ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990) OAS Treaty Series No 73 (1990) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 80 (1992)

made during times of war.¹⁹⁹ Whilst the ACHR Protocol is noticeably shorter than its European and UN counterparts, it seems to afford the same level of guidance and protection. The ACHR Protocol states that when the death penalty needs to be applied during times of war, it must be applied ‘... in accordance with international law, for extremely serious crimes of a military nature’,²⁰⁰ which clearly makes reference to the third²⁰¹ and fourth²⁰² Geneva Conventions and also their additional Protocols.²⁰³ Sadly to date only thirteen States out of a potential thirty two have ratified the ACHR Protocol and it is not surprising that the steadfast retentionist States such as the USA, Jamaica and Trinidad & Tobago have neither signed nor ratified the Protocol. However, only time will tell if the ACHR and its Protocol relating to abolition of the death penalty can be classed as being successful, because unlike Europe at the time of the creation of Protocols No 6 and No 13 to the ECHR, the Inter-American States have far more States retaining the death penalty and who are also applying it than Europe did, therefore making it a much larger challenge for the American States, than Europe.

2.5 Social and Political Factors

Having explored the various international pieces of legislation that can be attributed with having created what can only be described as a wave of abolition which peaked during the last twenty years, it is also vital to explore the question ‘Is the Death Penalty Dying?’²⁰⁴ This

¹⁹⁹ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 282

²⁰⁰ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990) OAS Treaty Series No 73 (1990) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 80 (1992) Art 4(2)

²⁰¹ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

²⁰² International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

²⁰³ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3, Arts 76(3) & 77(5); also International Committee of the Red Cross (ICRC), 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 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art 6 (4)

²⁰⁴ Austin Sarat & Jürgen Martschukat, *Is the Death Penalty Dying?: European and American Perspectives* (CUP 2011) 1

question favours historical and political explanations as to why the use of the death penalty is in decline and it has often been noted that as society has evolved, so too has our distaste for the 'Spectacle of Suffering';²⁰⁵ the most notable illustration of this being the removal of executions from public places, which began in the 1830's in New England.²⁰⁶ It should be noted that since this date, the vast majority of executions have taken place mostly behind prison walls, it would seem unlikely that any retentionist State could argue that they merely retain the death penalty for deterrent effect, as something which does not shock the conscience of those it is intended to deter is unlikely to have little or no effect. Furthermore, given that we are now living amongst a generation where the death penalty is fast becoming a '...barbaric relic of the past...' ²⁰⁷ is not unreasonable to expect that, '... the final destination is approaching when all countries will have agreed that the killing of captive criminals should be outlawed forever.'²⁰⁸

However for this to become a realisation, it has been implied by many such as Roger Hood,²⁰⁹ G Stephanie L Kent,²¹⁰ James Unnever and, Eric Neumayer²¹¹ as well as many more legal and political theorists that '... the continuation of the abolitionist trend is contingent on

²⁰⁵ Peter Spierenberg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial metropolis to the European Experience* (CUP 1984)

²⁰⁶ Austin Sarat & Jurgen Martschukat, *Is the Death Penalty Dying?: European and American Perspectives* (CUP 2011) 151

²⁰⁷ Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects' Lecture delivered at the Death Penalty Project Lecture (London 21 January 2010) 21

<http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (Accessed 01/10/2011)

²⁰⁸ Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects' Lecture delivered at the Death Penalty Project Lecture (London 21 January 2010) 21

<http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (Accessed 01/10/2011)

²⁰⁹ Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects' Lecture delivered at the Death Penalty Project Lecture (London 21 January 2010) 21

<http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (Accessed 01/10/2011)

²¹⁰ Stephanie L Kent, 'Predicting Abolition: A Cross-National Survival Analysis of the Social and Political Determinants of Death Penalty Statutes' (2010) 20(1) ICJR 56

²¹¹ Eric Neumayer, 'Death Penalty: The Political Foundations of the Global Trend Towards Abolition' (2008) 9 Human Rts Rev 241, 263

a further spread of democracy around the world ...'.²¹² The logic behind this argument assumes that in democratic States, there is a more balanced society and a lesser disparity of wealth and social standing, even amongst the minority groups.²¹³ Which in turn is supposed to create a society where there is no desire to suppress the minorities by means of force and violence, as they are given an equal voice due to the way in which democracy allows everyone to have their say,²¹⁴ but as always there is an exception to the above theory, which is the USA. However, as to why the USA despite being a staunch global advocate of human rights and a proud democratic nation it still continues to be one of the main global advocates of the death penalty,²¹⁵ as subject which this thesis neither has the time or the relevancy to explore in any depth. Nonetheless, it is argued that without the fear and need for suppression the desire for harsh and incapacitating punishments lessens and thus we find States more willing to abolish the death penalty.²¹⁶

Closely linked to the belief that democracy is linked with the willingness to relinquish the use of the death penalty, is the argument that States with a more prosperous and developed economy are more willing to use non - lethal incapacitating or rehabilitative forms of punishment;²¹⁷ such as imprisonment for life or at the very least long periods of time. This argument is based on the idea that States with struggling economies often choose capital punishment rather than lengthy prison sentences to protect society from the most dangerous of criminals because it is the cheaper option, due to incarceration being a costly

²¹² Eric Neumayer, 'Death Penalty: The Political Foundations of the Global Trend Towards Abolition'(2008) 9 Human Rts Rev 241, 242

²¹³ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Uni of Chicago Press 1993) 134

²¹⁴ Stephanie L Kent, 'Predicting Abolition: A Cross-National Survival Analysis of the Social and Political Determinants of Death Penalty Statutes' (2010) 20(1) ICJR 56, 67. Kent makes these assertions after conducting a 'history event analysis' of 29 states that abolished the death penalty over a 23 year period (1982-2005)

²¹⁵ Austin Sarat & Jurgen Martschukat (eds), *Is the Death Penalty Dying: European and American Perspectives* (CUP 2011) the entire book explores the complex situation with the USA, democracy, protection of human rights and why it still actively uses the death penalty for ordinary crimes,

²¹⁶ Stephanie L Kent, 'Predicting Abolition: A Cross-National Survival Analysis of the Social and Political Determinants of Death Penalty Statutes' (2010) 20(1) ICJR 56, 57

²¹⁷ Stephanie L Kent, 'Predicting Abolition: A Cross-National Survival Analysis of the Social and Political Determinants of Death Penalty Statutes' (2010) 20(1) ICJR 56,60

choice of punishment.²¹⁸ However in direct contradiction to the view that States which are democratic and economically well-developed tend not to retain the death penalty, sits the United States of America (USA); which sits alongside States such as China, Saudi Arabia and Iran, as the most prominent users of the death penalty globally. What is noticeable about this group of States who have been attributed with carrying out the majority of death sentences in recent years, the top five in 2012 of which were China, Iran, Iraq, Saudi Arabia and USA, with Yemen not too far behind,²¹⁹ is that the USA is the only State within this group that is a democratic nation and one that is also actively ‘...championing human rights in other countries...’²²⁰

However, it should be noted that whilst America is the ‘exception’ to the general trend of abolitionist States being democratic, economically sound and at the very least aware of the basic human rights of their citizens, there does seem to be some indication that the USA may be coming around to the abolitionist ideal. As indicated by the fact that by the 18 September 2014,²²¹ only thirty executions have been carried out in the USA which seems to indicate a marked decrease in the number of executions carried out, compared to a peak of ninety eight executions carried out during in 1998.²²² This trend towards a decline in the use of the death penalty as a form of punishment within the USA is also supported by the fact

²¹⁸ Stephanie L Kent, ‘Predicting Abolition: A Cross-National Survival Analysis of the Social and Political Determinants of Death Penalty Statutes’ (2010) 20(1) ICJR 56, 60 and Jonathan Simon, ‘Capital Punishment as Homeowner’s Insurance: The Rise of the Homeowner Citizen and the Fate of Ultimate Sanctions in Both Europe and the United States’ in Austin Sarat & Jurgen Martschukat (eds), *Is the Death Penalty Dying: European and American Perspectives* (CUP 2011) 91, here Simon shows a correlation between increased wealth and economic prosperity of European states and increasing length of prison sentences within those states. Suggesting economic factors heavily influence a state’s decision to use life sentences or at least very lengthy sentences.

²¹⁹ Amnesty International Report ‘Death Penalty 2012: Despite Setbacks, A Death Penalty-free World Came Closer’ (10 April 2013) < <http://www.amnesty.org/en/news/death-penalty-2012-despite-setbacks-death-penalty-free-world-came-closer-2013-04-10-0>> (Accessed on 01/06/2013)

²²⁰ Roger Hood, *Towards Global Abolition of the Death Penalty: Progress and Prospects*, Lecture delivered at the Death Penalty Project Lecture (London 21 January 2010) 20 <http://www.deathpenaltyproject.org/assets/12/original/Towards_Global_Abolition_of_the_Death_Penalty_by_Prof_Roger_Hood.pdf?1273573377> (Accessed 01/10/2011)20

²²¹ Death Penalty Information Centre, ‘Executions by Year Since 1976’ (18 September 2014) <http://www.deathpenaltyinfo.org/executions-year> (Accessed on 25/09/2014)

²²² Death Penalty Information Centre, ‘Executions by Year Since 1976’ (18 September 2014) <http://www.deathpenaltyinfo.org/executions-year> (Accessed on 25/09/2014)

that of the thirty²²³ executions carried out in the USA during 2014, they took place in only seven of the thirty four States within the USA that currently retain the death penalty and of these seven, only three²²⁴ have executed more than one person during 2014.²²⁵ There are many complex and varied explanations as to why this trend has occurred, such as the religious fervour of the southern States, the racial disparity that still remains between the white ruling classes and the ever increasing black minority. However this thesis is not the place to discuss these issues in any great depth, as the sole purpose of this chapter has been to merely provide a brief overview of the general global trend towards abolition of the death penalty, so as to provide background information and to place the key argument of the thesis in the correct context.

Moreover, all that remains to be said in relation to the death penalty and its role in both international and domestic law is that it is an ancient regime that is slowly being eradicated through the growing ‘... acceptance of international human rights principles ...’,²²⁶ which is being aided by the growing trend for democratic States where the minority in power no longer seek to suppress the masses, but where they aim to give them a voice and treat all with respect, dignity and what have become commonly accepted as our inalienable human rights. Finally in relation to the American ‘exception’ all that remains to be said, is that should they choose to join Europe and the majority of other democratic nations around the globe who have abolished the death penalty, then we could well see ‘... a whole new momentum [on] the global abolitionist campaign ...’,²²⁷ which could very well signal the start of the end for the death penalty. Subsequently this could potentially give the ICC the necessary confidence to apply pressure to States not to use the death penalty when

²²³ Death Penalty Information Centre, ‘US Execution List 2014’ < <http://www.deathpenaltyinfo.org/execution-list-2014>> (Accessed on 25/09/2014)

²²⁴ Death Penalty Information Centre, ‘US Execution List 2014’ < <http://www.deathpenaltyinfo.org/execution-list-2014>> (Accessed on 25/09/2014) The states which have carried out executions during 2014 are: Florida (7), Texas (9), Missouri (8), Oklahoma(3), Arizona (1), Ohio (1) & Georgia (1)

²²⁵ Death Penalty Information Centre, ‘US Execution List 2014’ < <http://www.deathpenaltyinfo.org/execution-list-2014>> (Accessed on 25/09/2014)

²²⁶ Roger Hood & Carolyn Hoyle, *The Death Penalty: Worldwide Perspective* (4th edn, OUP 2008) 18

²²⁷ Eric Neumayer, ‘Death Penalty: The Political Foundations of the Global Trend Towards Abolition’ (2008) 9 *Human Rts Rev* 241, 265

prosecuting crimes that potentially fall within the jurisdiction of the ICC, thus facilitating greater consistency between the national and international prosecutions. However, until the ICC has been in existence for a greater period of time and had subsequently completed many more successful prosecutions, this may be a little too ambitious an aim, but one nonetheless, that should be forgotten as the ICC has the potential to lead the way in illustrating that the death penalty no longer has a place in a world that fights to uphold respect for human rights.

Chapter 3: The Principle of Complementarity

The principle of complementarity is defined in the Oxford Dictionary as ‘A relationship or situation in which two or more different things improve or emphasize each other’s qualities.’²²⁸ Which if applied in a legal context simply means that two or more legal bodies work together by using their strengths to achieve a common goal. However in the context of the ICC it is a principle that allows the ICC and the domestic courts to work together to ensure that:

... [T]he most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.²²⁹

More specifically in relation to the ICC, it is a principle whereby the ICC given its limited resources and the vast numbers of cases it could potentially investigate and prosecute, it acts as a court of ‘last resort’²³⁰ to step in where the State is ‘... unwilling or unable genuinely to carry out the investigation or prosecution.’²³¹ Whilst the Rome Statute 1998 does not expressly make reference to the principle of complementarity it does define the ICC as being a body that shall be considered ‘... complementary to national criminal jurisdictions ...’;²³² it is Article 17 of the Rome Statute 1998 that sets out when the ICC is required to intervene and is thus the most important body of text when discussing the principle of complementarity in the context of the ICC. In order to ascertain why the ICC has chosen to pursue a principle of being complementary rather than opting for primacy as adopted by the ICTY and ICTR, an overview of the drafting of the Rome Statute 1998 will be necessary.

²²⁸ <<http://oxforddictionaries.com/definition/english/complementarity>> (Accessed on 24/02/2013)

²²⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble

²³⁰ Dalila V Hoover, ‘Universal Jurisdiction Not so Universal: Time to Delegate to the International Criminal Court?’(2011-2012) 73 *Eyes on the ICC* 73, 98

²³¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Article 17 (1)(a)

²³² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 , Preamble, Para 10 & Art 1

3.1 Drafting of the Rome Statute 1998

Whilst the notion of an International Criminal Court was first raised on the 9 December 1948 by the UN General Assembly;²³³ which subsequently set the International Law Commission (ILC)²³⁴ the task of drafting a resolution to create an international criminal court, that would conform to Article VI of the Genocide Convention,²³⁵ this section will skip to the post - Cold War efforts and drafts. Due to the fact that during the Cold War, efforts to draft a statute to create an international criminal court were put on hold, but following the fall of the threat of Communism, followed by the atrocities occurring in Iraq and the former Yugoslavia international attention was once again reminded that following the horrors of the Second World War, the UN and its member States had sworn to change the globe from one where there was a '... culture of impunity to a culture of accountability.'²³⁶ Momentum in support of international accountability for crimes against humanity grew throughout the 1990's with the creation of the ICTY in 1993 and the ICTR 1994. The perceived need for these ad-hoc tribunals and outside intervention to bring the perpetrators to justice, stemmed in part from the globalisation of media coverage and what could be perceived as a weakening of the age old doctrine of sovereignty.²³⁷ As the days where news travelled slowly and the earth had time to absorb spilt blood before the rest of the world could be made aware of it, were long gone²³⁸ and so too were the once sacred boundaries of State sovereignty and the legal protection this afforded the States from the intervention of others outside their sovereign boundaries.²³⁹

²³³ UN GA, 'Historical Survey of the Question of an International Criminal Jurisdiction' A/CN.4/7/Rev 1 (9 December 1948)

²³⁴ The International Law Commission is described as '... a body of experts named by the UN General Assembly and charged with the codification and progressive development of international law.' in William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 8

²³⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

²³⁶ Ramesh Thakur & Peter Malcontent, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press 2004) 15

²³⁷ Susan L Carruthers, *The Media at War* (St Martins Press Inc 2002) 198

²³⁸ Ramesh Thakur & Peter Malcontent, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press 2004) 15

²³⁹ Ramesh Thakur & Peter Malcontent, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press 2004) 19

More significantly the creation of the ICTY and the ICTR, which are currently in the final phases of their completion strategies, served to highlight the need for a truly supranational and permanent legal body that can intervene and bring to account those who commit the gravest crimes known to mankind, when the States in which they occur are 'unable or unwilling to ...'²⁴⁰ to do so themselves. Subsequently in 1994 the UN General Assembly decided to pick up where the ILC had left off and used their draft as a starting point. The ILC had envisaged an international court much like the ICTY and ICTR,²⁴¹ in that it had created its draft so as to give the ICC supremacy. However the Ad Hoc Committee of the UN noted concerns from States regarding this principle and as a compromise suggested a principle of 'complementarity' where the ICC could only exercise jurisdiction where '... domestic courts were unwilling or unable to prosecute ...'²⁴² and they were keen to strike a balance that ensured '... not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction ...',²⁴³ a somewhat tricky balance to attain. Following on from the work of the Ad - Hoc Committee, the UN General Assembly formed a Preparatory Committee, which was made up of member State delegates, non-governmental organisations (NGO's) and an assortment of other international organisations. This Preparatory Committee met on five occasions over the course of 1996 and 1997, they finally submitted what became known as the 'Zutphen draft',²⁴⁴ which with a few alterations became the basis of the final draft that was submitted to the Diplomatic Conference of Plenipotentiaries²⁴⁵ that meet on the 15 June 1998 in Rome.

²⁴⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17 (a)

²⁴¹ Antonio Cassese, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 265

²⁴² William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 18

²⁴³ Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) 23 *Mich J Int'l L* 869, 890

²⁴⁴ Owing its name to being affirmed at the intersessional meeting held Zutphen, the Netherlands in January 1997

²⁴⁵ Pursuant to UN GA Resolutions, 'For the Establishment of an International Criminal Court' UN Doc A/RES/51/207 (16 January 1997) & UN Doc A/RES/52/160 (15 December 1997)

The draft submitted in Rome, contained many variations and wording options, however the issue of complementarity had largely been resolved at the Preparatory Committee stage and remained uncontested at Rome.²⁴⁶ In contrast, the issues of definition of crimes and matters relating to jurisdiction when the offender was not a national of a member State, were a focal point of the discussions and debate that took place in Rome.²⁴⁷ Furthermore, due to time constraints at the Rome Conference and a general desire to avoid a Rome Conference Part II, the Drafting Committee in Rome were prohibited from making any alterations to Articles 5-21 of the Rome Statute 1998, so the issue of complementarity remained unchanged.²⁴⁸ This was not surprising, given that multilateral treaties are often approved in the final stages by diplomatic representatives of the various member States, who have little legal knowledge and are therefore ill equipped to create legislation of any level.²⁴⁹

Thus in summary, the reason the ICC was created as a court to complement rather than have primacy over the national courts can be explained in a few simple and brief points. Firstly, unlike the ICTY and ICTR, who were designed to prosecute those guilty of crimes against humanity in just one particular State, the ICC has been created to act as a court of 'last resort'²⁵⁰ on a global scale.²⁵¹ Therefore, the ICC follows a principle of being complementary rather than seeking to assert primacy over all crimes that potentially fall within its jurisdiction. Secondly State sovereignty, which despite significant advances in international law within the last fifty or so years where a '... state sovereignty orientated

²⁴⁶ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 17

²⁴⁷ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 18

²⁴⁸ M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', (1999) 32 *Cornell Int'l LJ* 443,453

²⁴⁹ M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', (1999) 32 *Cornell Int'l LJ* 443, 461

²⁵⁰ Dalila V Hoover, 'Universal Jurisdiction Not so Universal: Time to Delegate to the International Criminal Court?' (2011-2012) 73 *Eyes on the ICC* 73, 98

²⁵¹ 122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are [African States](#), 18 are [Asia-Pacific States](#), 18 are from [Eastern Europe](#), 27 are from [Latin American and Caribbean States](#), and 25 are from [Western European and other States](#). Information taken from:

<http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> (Accessed on 29/03/2013)

approach [having] been gradually supplanted by a human-being orientated approach ...²⁵² many States still show a strong desire to retain their sovereign rights. Therefore it is not surprising, that whilst many States are more than happy to be a member of the ICC, it is highly unlikely that they would ever have signed had they felt that their sovereign right to prosecute their own nationals or crimes that were committed within their territories; would be seriously impinged. Finally the most effective method of justice is not always achieved by an international body, which is both culturally and geographically far removed from where the crimes took place and where the victims and offenders reside.²⁵³ It is often the case, that domestic routes for justice provide a greater opportunity for healing and restorative justice,²⁵⁴ as well as the added bonus of it being far cheaper and providing easier access to evidence and witnesses.

3.2 How Does the Rome Statute Define Complementarity?

Having now established why the drafters of the Rome Statute 1998 chose to opt for a principle of complementarity for the ICC rather than one of primacy as advocated by its predecessors (the ICTY and ICTR), it is time to examine what exactly the statute says about complementarity and how it is to be applied in practice. Article 17²⁵⁵ sets out the 'issues of admissibility' and defines when the ICC can take action and it is here that we will begin our assessment of how the Rome Statute 1998 defines and applies the principle of complementarity. The essence of complementary and what this means to the ICC and the way in which it interacts with the national courts of its member States, is defined by Article 17 (1) (a) and (b), which state:

‘The Court shall determine that a case is inadmissible where:

²⁵² Frederica Goia, 'State Sovereignty, Jurisdiction & Modern International Law: The Principle of Complementarity in the ICC' (2006) 19 LJIL 1095, 1099

²⁵³ Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 JICJ 950, 953

²⁵⁴ Kingsley Chiedu Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions' in Ramesh Thakur & Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press 2004) 216

²⁵⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;'

From this, it can be understood that the ICC will only step in to intervene where an eligible State with jurisdiction over the matter is 'unwilling or unable' to carry out the investigation or prosecution. The insertion of the word 'genuinely' merely serves to emphasise the fact that the ICC will also be willing to step in and take action, when it feels that the investigation or prosecution is a sham designed to protect a person from genuine proceedings.

An example of where the ICC has stepped in due to feeling that the State is unwilling to take action themselves, can be seen in Kenya where under Article 15 of the Rome Statute 1998²⁵⁶ the Prosecutor initiated prosecutions based upon his own initiative and the grounds of their being a 'reasonable basis'.²⁵⁷ Initially six arrest warrants were issued for high ranking political figures within the Kenyan State Party,²⁵⁸ for example Uhuru Muigai Kenyatta who is the current President of Kenya and Mohammed Hussein Ali, the then Commissioner of the Kenyan police.²⁵⁹ Whilst six individuals were initially detained in 2011, on the 23 January 2012 the ICC subsequently declined to confirm charges against Henry Kiprono Kosgey and Mohammed Hussein Ali²⁶⁰ and then in March of 2013 charges were also withdrawn against Francis Kirimi Muthaura, as the Prosecutor felt that there was not a '... reasonable prospect

²⁵⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 15 (3) & (4)

²⁵⁷ ICC Pre-Trial Chamber Decision, 'Situation in the Republic of Kenya' (Pre-Trial Chamber II) ICC-01/09 (31 March 2010) 7

²⁵⁸ ICC Website, 'Situations and Cases' < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> Accessed on (20/02/2013)

²⁵⁹ Academic Research Profile, 'Mohammed Hussein Ali' (The Hague Justice Portal) < <http://www.haguejusticeportal.net/index.php?id=12472>> (Accessed on 28/08/2014)

²⁶⁰ ICC Website, 'Situations and Cases' < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> Accessed on (20/02/2013)

of conviction at trial.²⁶¹ However it should be noted that this is not a sign that the ICC is backing down from its commitment to hold people to account for the atrocities occurring in Kenya; as was illustrated by the fact that on the 2 October 2013 the Pre-Trial Chamber unsealed an arrest warrant against Walter Osapiri Barasa²⁶² a journalist who has been accused of ‘... corruptly influencing ...’²⁶³ witnesses, which is a first for the ICC going after a person for witness tampering. Furthermore, Kenya is technically capable of carrying out the prosecutions in the sense that it has a fairly comprehensive legal system in place,²⁶⁴ but given the level of violence and corruption within the State coupled with the high powered political status of those being prosecuted, it is easy to understand why a State could reasonably be expected to provide a genuine investigation and prosecution, nor would they have any desire to do so.

In contrast to the situation in Kenya, where the Office of the Prosecutor took the initiative to initiate proceedings, in Uganda the investigations came about following a self - referral to the ICC in 2003,²⁶⁵ from the Ugandan President Yoweri Museveni in a what has been described as bid to try and bring the Lord’s Resistance Army (LRA) to the negotiation table.²⁶⁶ This assertion that the self-referral was nothing more than a tactic by the Ugandan government to ‘... isolate the LRA from foreign backers and drive it to the negotiating table

²⁶¹ Fatou Bensouda ‘Statement by ICC Prosecutor on the Notice to Withdraw Charges Against Mr Muthaura’ (11 March 2013) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx> (Accessed on 28/08/2014)

²⁶² ICC Website, ‘Situations and Cases’ < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> Accessed on (20/02/2013)

²⁶³ - - ‘ICC Seeks Walter Barasa Arrest for Kenya “Witness Tampering”’ (BBC News Africa, 2 October 2013) < <http://www.bbc.com/news/world-africa-24364778>> (Accessed on 22/08/2014)

²⁶⁴ This is not to say that it does not have some deficiencies, as identified by the Waki Commission, which in turn led to the ICC Prosecutor in February 2008 to decide to invoke his power under Article 15 (Rome Statute 1998) to monitor the situation.

²⁶⁵ ICC Press Release, ‘President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC’ (ICC-20040129-44, 29 January 2004) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx> (Accessed on 22/08/2014)

²⁶⁶ Chris Tenove, ‘Uganda and the International Criminal Court: Debates and Developments’ (Africa Portal Backgrounder No 60, 18 July 2013) < <http://www.africaportal.org/articles/2013/07/18/uganda-and-international-criminal-court-debates-and-developments>> (Accessed on 22/08/2014)

...²⁶⁷ has been reinforced by the fact that whilst the Office of the Prosecutor conducted its investigations and attempted to detain Joseph Kony and his four key LRA members,²⁶⁸ the Ugandan Government began peace negotiations with the LRA, culminating in the 'Agreement on Accountability and Reconciliation',²⁶⁹ which was intended to ensure that LRA leaders would be prosecuted through 'national legal arrangements'.²⁷⁰ The peace agreement was envisaged to incorporate a mixture of formal justice and the more traditional Ugandan conflict resolution *Mato Oput* (to drink from a tree), which were believed to carry a greater potential for restorative justice²⁷¹ and had also controversially hoped to include immunity from arrest for Joseph Kony and his key figures, had President Museveni succeeded in convincing the ICC to make the arrest warrants disappear.²⁷² However, the ICC refused to drop the arrest warrants and despite Uganda's attempts to regain control and deal with the crimes and ongoing civil war at a national level, plus the fact Joseph Kony refused to sign the 'Agreement on Accountability and Reconciliation',²⁷³ which in turn meant that the ICC actively resumed its proceedings, so to date neither the ICC or Uganda have been able to detain any of the key LRA figures. It has been questioned whether the ICC's refusal to drop its own proceedings against the key figures of the LRA, so as to allow the Ugandan pursue their alternative methods of accountability via the

²⁶⁷ Patrick Wegner, 'Ambiguous Impacts: the effects of the International Criminal Court investigations in northern Uganda. Kampala, Uganda: Refugee Law Project' (Refugee Law Project Working Paper No 22, October 2012) 3 <http://www.refugeelawproject.org/files/working_papers/RLP.WP22.pdf> (Accessed on 22/08/2014)

²⁶⁸ *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (Pre-trial) ICC-02/04-01/05 (2005) There was also a warrant issued for Raska Lukwiya, but he has been confirmed dead, so his arrest warrant has been terminated.

²⁶⁹ Agreement on Accountability and Reconciliation Between the government of the Republic of Uganda and the Lord's Resistance Army/Movement juba , Sudan (29 June 2007) <http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf> (Accessed on 22/08/2014)

²⁷⁰ Alhagi Morong, 'Unlocking the Mysteriousness of Complementarity: In Search of a Forum Conveniens for Trial of the Leaders of the Lord's Resistance Army (2011) 40 GA J Int'l & Comp L 67,76

²⁷¹ Agreement on Accountability and Reconciliation Between the government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba , Sudan (29 June 2007) <

http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf> (Accessed on 22/08/2014) Preamble, Para 5 & Section 2

²⁷² William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 42

²⁷³ Agreement on Accountability and Reconciliation Between the government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba , Sudan (29 June 2007) <

http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf> (Accessed on 22/08/2014)

‘Agreement on Accountability and Reconciliation’²⁷⁴ in an attempt to facilitate reconciliation and restore peace, was contrary to the principle of complementarity?²⁷⁵ It was contrary in the sense that whilst Uganda were now showing willing and able²⁷⁶ to take action for themselves, given the unconventional nature of the method chosen it was not considered ‘...criminal proceedings as such for the purpose of assessing the admissibility of cases before the International Criminal Court, but they are an important part of the fabric of reconciliation...’.²⁷⁷ However, within Africa which happens to be where the all the current ICC investigations²⁷⁸ are situated, these types of unconventional proceedings that focus on truth and reconciliation are the preferred method,²⁷⁹ meaning that States who are taking action of the unconventional form, will be deemed as showing an ‘... unwillingness to prosecute.’²⁸⁰

The guidance given by the Rome Statute 1998 as to what constitutes ‘unwillingness’ or ‘inability’, is very brief and vague given that this is such a crucial part of the ICC’s decision making process, as to whether or not they should investigate and prosecute. Article 17(2) of the Rome Statute 1998 states that a State will be found ‘unwilling’ if the national proceedings are merely taking place in order to ‘... [shield] the person concerned from criminal responsibility for crimes within the jurisdiction of the Court ...’,²⁸¹ where there is a ‘... unjustified delay in proceedings which... is inconsistent with an intent to bring the person concerned to justice;’.²⁸² In addition to these two conditions dealing with instances where

²⁷⁴ Chris Tenove, ‘Uganda and the International Criminal Court: Debates and Developments’ (Africa Portal Backgrounder No 60, 18 July 2013) available at: <http://www.africaportal.org/articles/2013/07/18/uganda-and-international-criminal-court-debates-and-developments> (Accessed on 22/08/2014)

²⁷⁵ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 198

²⁷⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art17

²⁷⁷ UNSC Doc S/PV.5459 (14 June 2006) 3

²⁷⁸ ICC Website, ‘Situations and Cases’ < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx > Accessed on (20/02/2013)

²⁷⁹ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 199

²⁸⁰ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 198

²⁸¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art17(2)(a)

²⁸² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 17(2)(b)

States are strategically shielding the accused, the article also states that where ‘... proceedings were not or are not being conducted independently or impartially ...’²⁸³ and this too will constitute evidence of unwillingness. Similarly section 3 of Article 17, gives an equally broad definition of what the ICC will deem to be evidence of ‘inability’, by stating that this will be determined when the court considers that:

... due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.²⁸⁴

This is probably the most sensible of all the preconditions for admissibility to ICC investigation and prosecution because more often than not, in a country that has been host to any of the crimes within the jurisdiction of the ICC, it is highly likely that there will no longer be a functioning legal system in place, as was the case in Rwanda following the genocide.²⁸⁵ Furthermore, if there is still some form of functioning legal system in place, it is highly plausible that it will be somewhat diminished in resources and finances and quite likely to be politically corrupt and therefore in no position to carry out such complex, high profile and politically sensitive investigations and prosecutions, as was the case in the Democratic Republic of the Congo (DRC) when it made a self-referral to the ICC in March 2004.²⁸⁶ However this is not to suggest that primacy would necessarily be a better option, as very few States would have been likely to have become party to a treaty that created a court that would have primacy over such crimes, as to do so would be too great an impingement upon their sovereignty and would create an even more difficult situation than currently exists.²⁸⁷ Moreover, one small paragraph seems ill equipped to deal with such a complex matter and further examination of the Rome Statute 1998 provides no further explanation or guidance on the matter or ‘inability’ or ‘unwillingness’.

²⁸³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 17(2)(c)

²⁸⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 17(3)

²⁸⁵ Ariel Meyerstein, ‘Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality’ (June 2007) 32(2) L & Soc Inquiry 467, 468

²⁸⁶ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 194

²⁸⁷ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 190

Whilst no further expansion of the test of 'inability' or 'unwillingness' is provided within the statute, there are other sections that deal with the issues that may arise once the ICC has deemed a State unwilling or unable. For example Article 18 provides a '... further procedural filter to the benefit of States sovereignty ...'²⁸⁸ by setting out the conditions in which a State may take ownership of an investigation and prosecution, which it can do by notifying the ICC of their current or past investigations of the same persons, within a month of receiving notification from the ICC of their intention to launch an investigation.²⁸⁹ Furthermore, Section 5 of Article 18 of the Rome Statute 1998 puts in place a procedural safeguard, by stipulating that after a period of six months the Prosecutor has the right to investigate the State's proceedings in order to determine whether they are genuine and adequate. Similarly, Article 19 sets out the grounds upon which a State may make a challenge to an investigation or prosecution being undertaken by the ICC and provides some guidance as to how this is to be progressed from the Pre-Trial Chamber to the Trial Chamber and possibly the Appeals Chamber as a last resort. Whilst Article 19 does not expand upon what complementarity really is, it should be noted that it highlights the '... severe tension between the powers of the Prosecutor, and the priority of States in the complementarity regime.'²⁹⁰

To surmise what has so far been established about the principle of complementarity as it is enacted by the ICC, is that it is a principle whereby the ICC will only step in where the State is unable to do so, due to having an insufficient legal system or a corrupt legal system, alternatively the ICC will also seek to complement the national courts when a State is unwilling to take action themselves, despite having the mechanisms in place to facilitate justice. However, one issue that the Rome Statute 1998 fails to address, is how the ICC can

²⁸⁸ El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) 23 MJIL 869, 906

²⁸⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 18(2)

²⁹⁰ El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) 23 MJIL 869, 930

realistically complement a legal system that is intrinsically different from its own? As William Schabas highlighted:

... [A]s originally conceived, the term 'complementarity' may be somewhat of a misnomer, because what is established is a relationship between international justice and national justice that is far from 'complementary'. Rather, the two systems function in opposition and to some extent with hostility *vis-à-vis* each other.²⁹¹

Which is something that Schabas has described as potentially causing more friction than the policy of primacy established by the ad-hoc tribunals, because at least primacy does not enquire as to the '...failure or inadequacy of the domestic system.'²⁹² Whilst in contrast complementarity either assumes that a national legal system is capable but is failing to do its duty to seek justice, or as is more likely to be the case the situation will be that the national legal system will be in need of rebuilding or strengthening, which is something that Barbara Hola²⁹³ and Jane Stromseth²⁹⁴ have highlighted as being key to the ICC being able to continue its work. Stromseth puts forward a very convincing argument wherein she states that '... capacity-building is important because, in the long-term, domestic justice systems that are capable of delivering reasonably fair justice and that enjoy public confidence are crucial to preventing future atrocities and to building a stable rule of law.'²⁹⁵ And indeed this is especially relevant for the ICC which works on a principle of complementarity, because the more effort that is put into ensuring the rule of law and the legal systems are strengthened at the national level,²⁹⁶ then in the long-term the ICC will be ensuring that the level of cases able to be dealt with by the national courts will not spiral out of control to such a level that the ICC could not cope.

²⁹¹ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 190

²⁹² William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 190

²⁹³ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3

²⁹⁴ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *HJRL* 87

²⁹⁵ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *HJRL* 87, 89

²⁹⁶ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *HJRL* 87, 95

Whilst the principle of complementarity does lay the responsibility of investigation and prosecution with the national courts in the first instance, this is not always an ideal situation because as Schabas stated above, the national and the international legal systems are often in 'opposition'²⁹⁷ to one another, as has been highlighted by the death penalty debate. For example nineteen²⁹⁸ of the one hundred and twenty two member States of the ICC still retain the death penalty, so how can a court that views life imprisonment as an extreme penalty realistically complement legal systems that may give the death penalty? It is not surprising that given the ICC is established by a multilateral treaty, it excludes the death penalty because there are many States that would not become have signed the treaty had the Rome Statute 1998 not reflected the current trend in international human rights law; as was explored in great depth during chapter two of this thesis, so as to provide a grounding for issues such as this. However, if the ICC were to aim to help strengthen the rule of law at the national level as proposed by Barbara Hola, then through education and leading by example, a relationship could potentially be established wherein a consistent approach to sentencing may develop between the national and the ICC's prosecutions²⁹⁹ as a by-product of the outreach work that is essential to maintaining the ICC as a complementary court.

In addition to the issue of national courts often requiring capacity building being an obstacle to the principle of complementarity as discussed above, El Zeidy³⁰⁰ has noted that the statute of limitations poses another obstacle to the principle of complementarity in that it serves to highlight yet another area where the ICC and the national legal systems may differ. A statute of limitations is an act '... which proscribes the periods within which proceedings to enforce a right must be taken or the action is barred.'³⁰¹ The Rome Statute

²⁹⁷ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 190-191

²⁹⁸ The ICC member states, that currently retain the death penalty are: Afghanistan, Belize, Botswana, Chad, Congo (Democratic Republic), Comoros, Dominica, Guatemala, Guinea, Guyana, Japan, Jordan, Lesotho, Mongolia, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad & Tobago and Uganda.

²⁹⁹ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3, 4

³⁰⁰ Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) 23 *MJIL* 869

³⁰¹ Leslie Rutherford & Sheila Bone (eds), *Osborn's Concise Law Dictionary* (8th edn, Sweet & Maxwell 1998) 203

1998 bars all statutes of limitation upon the crimes within its jurisdiction,³⁰² which can potentially become an obstacle when a member State does have a statute of limitations within its domestic legislation for that same offence as ‘...how can the International Criminal Court be ‘complementary’ when the State has a statute of limitations on an offence that the International Criminal Court does not?’³⁰³ Because this would mean that whilst a State would no longer be able to prosecute the crimes due to the passing of the ascribed period of time in which action can be brought, the ICC will have no such restrictions and may well find their workload increased substantially, as this now provides another circumstance under which the national courts may be ‘unable’ to carry out their own investigation or prosecution.³⁰⁴

The issues or discrepancies between the national and the international legal systems at odds with one another as highlighted above, are simply a few of the many questions which the Rome Statute 1998 remains silent upon. However the Office of the Prosecutor has over recent years come to acknowledge, them to be obstacles standing in the way of the ICC attaining its ultimate goal of bringing an end to impunity, through facilitating the member States to help themselves bring an end to the culture of impunity.³⁰⁵ Having now looked at the rather scant and vague provision given to the issue of complementarity provided within the Rome Statute 1998, it is to the real life implications of the implementation of the principle that we must now look, in attempt to understand why complementarity has evolved into what is now more commonly known as positive complementarity.

³⁰² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 29

³⁰³ El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2001-2002) 23 MJIL 869, 955

³⁰⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17

³⁰⁵ Luis Moreno-Ocampo, Chief Prosecutor, **ICC**, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16th June 2003) [hereinafter Prosecutor's Initial Statement]. < <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf> > (Accessed on 14/12/2012)

3.3 A New and Evolving Kind of Complementarity

This terminology was confirmed at the ICC Review Conference at Kampala in 2010;³⁰⁶ whilst the conference focussed mainly on setting out the definition for the new crime of aggression as covered by the amended Article 8 of the Rome Statute 1998, there was also much discussion about the need for complementarity to move away from the two dimensional black and white text form of the principle as stipulated in Article 17. It was identified at Kampala that complementarity needed to evolve in order to be a more realistic principle which acknowledged whilst there are many instances where a State's judiciary may be willing to take legal action; they sadly are unable to do so due to a multitude of factors. This was succinctly summarised by William Schabas, who wrote that the new concept of 'positive complementarity' which has emerged is one where:

... a more benign relationship with national justice systems is encouraged [whereby] The Court, and other States Parties not involved in the prosecution itself, are to cooperate with the State concerned in provision of technical assistance.³⁰⁷

This new drive to get other States to help put the State concerned into a position whereby it can possibly carry out its own investigations and prosecutions, stems from the realisation that the ICC has neither the financial resources or the manpower to keep up with the growing number of ICC eligible crimes that are coming to light. Which has led the ICC and the Office of the Prosecutor to realise, that they have to help improve the States within which these crimes occur, so as to educate against the reoccurrence of the cultures of impunity and strengthen the rule of law³⁰⁸ if they realistically want to bring an end to it as is stated as one of the ICC's goals in the Preamble to the Rome Statute 1998. It has been suggested that:

In the eyes of some the ICC should also provide technical assistance and capacity building

³⁰⁶ ICC Review Conference Resolution, 'Complementarity' RC/Res.1 (Kampala, 8 June 2010)

³⁰⁷ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 191

³⁰⁸ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 88

support to national criminal justice systems in their pursuit of investigations and prosecutions for international crimes.³⁰⁹

This is a sentiment which once the ICC came into full effect and began to embark upon investigations and prosecutions, became very apparent to the Office of the Prosecutor³¹⁰ and was strongly reaffirmed at the Kampala Review Conference, where it was stated:

... that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation ...³¹¹

This is something that became evident whilst undertaking investigations in the DRC, following a self-referral by President Joseph Kabila in 2004, which was vague in that it neither stated whether the DRC was unwilling or unable to proceed.³¹² Whilst some have argued that the act of self-referral was merely an underhanded way of getting the ICC to carry out the Congolese government's 'dirty work',³¹³ it is also fairly plain to see that the DRC is not really equipped to deal such high profile and politically complex cases. As was affirmed by William Burke-White, who remarked on there not being anything in the DRC for the ICC to complement, due to the fact that in 2004 the judiciary of the DRC were neither politically or financially impartial, there were few functioning courts (for example in the entire oriental province and there was only one fully functioning court) and those courts which did exist were ill equipped and lacked basic amenities such as typewriters and copies of their own legislation.³¹⁴

³⁰⁹ M Cherif Bassiouni, 'The International Criminal Court – Quo Vadis?' (2006) 4 JICJ 421, 421-422

³¹⁰ Office of the Prosecutor (ICC), 'Paper on Some Policy Issues Before the Office of the Prosecutor' (2003) [hereinafter Policy Issues] < http://www.icccpi.int/NR/rdonlyres/1FA7C4C6-DE5F42B7-8B25-60AA962ED8B6/143594/030905_PolicyPaper.pdf >, 5 (Accessed on 10/08/2012)

³¹¹ ICC Review Conference Resolution, 'Complementarity' RC/Res.1 (Kampala, 8 June 2010) Para 3

³¹² William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 44

³¹³ William Burke-White, 'Complementarity in Practise: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' (2005) 18 LJIL 557, 559

³¹⁴ William Burke-White, 'Complementarity in Practise: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' (2005) 18 LJIL 557, 578-581

As has already been made clear, the ICC does not have the resources to bring an end to the culture of impunity alone, it is merely there to act as a ‘... court of last resort ...’³¹⁵ when States either fail to take action or are unable to do so for themselves. Therefore it is not surprising that as early as 2003 the prosecutor of the ICC, Luis Moreno- Ocampo³¹⁶ acknowledged that in order for the ICC to succeed it needed to be more than just a court, that it needed to ‘... also shape national processes through normative and legal influence, as well as advice or technical assistance.’³¹⁷ This evolved form of complementarity will see the ICC step slightly outside its remit and help the failing States to strengthen and in some cases rebuild their domestic legal infrastructures or in the very least encourage assistance from other State parties or NGO’s, because by helping these failing States to help themselves,³¹⁸ the ICC would be giving itself a fighting chance of stretching its somewhat limited resources to impact upon the majority of human rights abuses across the globe and bring an end to the culture of impunity.³¹⁹

3.4 The Implications of Positive Complementarity

This new approach to complementarity was first formally named as ‘positive complementarity’ by the Prosecutor in his 2006 Report on Prosecutorial Strategy (14 September 2006),³²⁰ where it was stated:

³¹⁵ Coalition for the International Criminal Court, ‘Delivering on the Promise of a Fair, Effective and Independent Court: Review Conference of the Rome Statute> Stocktaking>Complementarity’ Para 1 <<http://www.iccnw.org/?mod=complementarity>> (Accessed on 20/08/2014)

³¹⁶ Office of the Prosecutor (ICC), ‘Paper on Some Policy Issues Before the Office of the Prosecutor’ (2003) [hereinafter Policy Issues]< http://www.icccpi.int/NR/rdonlyres/1FA7C4C6-DE5F42B7-8B25-60AA962ED8B6/143594/030905_PolicyPaper.pdf> , 5 (Accessed on 10/08/2012)

³¹⁷ Chris Tenove , ‘Uganda and the International Criminal Court: Debates and Developments’ (Africa Portal Backgrounder No 60, 18 July 2013) <<http://www.africaportal.org/articles/2013/07/18/uganda-and-international-criminal-court-debates-and-developments> > (Accessed on 22/08/2014)

³¹⁸ Office of the Prosecutor (ICC), ‘Paper on Some Policy Issues Before the Office of the Prosecutor’ (2003) [hereinafter Policy Issues]< http://www.icccpi.int/NR/rdonlyres/1FA7C4C6-DE5F42B7-8B25-60AA962ED8B6/143594/030905_PolicyPaper.pdf> , 5 (Accessed on 10/08/2012)

³¹⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble

³²⁰ Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) < http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf > (Accessed on 28/03/2013)

... [T]he Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.³²¹

The focus of this progressive form of complementarity was to ‘... empower the national legal systems ...’³²² however, the extent to which the ICC should play a part in this was not clearly defined until the Review Conference in Kampala in June 2010; where in addition to establishing the new crime of aggression (as detailed in the new Article 8 of the Rome Statute 1998) the issue of positive complementarity was also discussed at great length also.³²³ At Kampala it was noted that States incapable of undertaking their own prosecutions would create an ‘impunity gap’³²⁴ that the ICC could ill afford and concluded that the most effective way to ensure that this impunity gap would be slowly closed, was by encouraging ‘... States to assist each other to fight impunity where it began, i.e. at the national level... [because] the role that the Court could play in positive complementarity was limited by the nature of the institution and its resources.’³²⁵ A sentiment which was affirmed at the Assembly of State Parties where in a conference review paper created following Kampala,³²⁶ it was stated that positive complementarity in the form of ‘... capacity building ...’³²⁷ was required to facilitate complementarity from the domestic courts if the impunity gap were to be bridged.³²⁸ It is worth noting that fairly recently the ICC has been criticised for being too costly in light of the number of convictions it has achieved, as was illustrated in a Forbes article that questioned was the ICC worth it in light of having spent \$1billion (US dollars) over a duration of 12 years, resulting in only two convictions.³²⁹ Similarly a BBC News article in

³²¹ Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) 5 < http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf > (Accessed on 28/03/2013)

³²² Morten Bergsmo, Olympia Bekou & Annika Jones, ‘Complementarity after Kampala: Capacity Building and the International Criminal Court’s Legal Tools’ (2010) 2 GoJIL 791,795

³²³ ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010)

³²⁴ Review Conference of the Rome Statute (ICC), ‘Focal Points’ Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes’ RC/ST/CM/INF.2 (30 May 2010)110 < http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf > (Accessed on 28/01/2013)

³²⁵ ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010) 110

³²⁶ ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010)

³²⁷ ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010)110

³²⁸ ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010)5

³²⁹ David Davenport, ‘International Criminal Court: 12 Years, \$1 Billion , 2 Convictions’ (Forbes 400 Online, 12 March 2014) < <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/> > (Accessed on 24/08/2014)

2012³³⁰ made a direct comparison between the ICC and the ICTR, reporting that the ICTR which had an annual budget of \$257 million (US dollars) in 2012 and had completed a total of fifty trials since its establishment in 1994,³³¹ whilst in contrast the ICC had a budget of \$140 million (US dollars) and had only reached one verdict in a period of ten years.³³² This does pose the question as to whether the ICC is cost effective, given that the figures would seem to suggest that the ICC is too far stretched and caught up in ‘...complex political, diplomatic and military matters that should not be reduced to criminal prosecutions.’³³³ Which is an issue that ties into this thesis, because of the States the ICC has to date investigated or sought to initiate prosecutions, few have been capable or in a position either practically or politically to take on their ‘... duty to exercise [their] criminal jurisdiction ...’.³³⁴ Therefore, it is easy to understand why at the Review Conference in Kampala, it was made explicitly clear that the all capacity building, technical assistance and financial aid should come from fellow States³³⁵ or NGO’s as is more often the reality, as the ICC was openly acknowledging that it cannot achieve its objectives alone, making complementarity superfluous unless the States involved are able to progress to such a level with their national jurisdictions following assistance from NGO’s or other States, so that they are able to help themselves. Nonetheless, there have been some examples where the ICC can be described as being directly involved in positive complementarity.

³³⁰ Jon Silverman, ‘Ten Years, \$900m, One Verdict: Does the ICC Cost too Much?’ (BBC News, 14 March 2012) < <http://www.bbc.com/news/magazine-17351946>> (Accessed on 24/ 08/2014)

³³¹ Jon Silverman, ‘Ten Years, \$900m, One Verdict: Does the ICC Cost too Much?’ (BBC News, 14 March 2012) Para 13 < <http://www.bbc.com/news/magazine-17351946>> (Accessed on 24/ 08/2014)

³³² Jon Silverman, ‘Ten Years, \$900m, One Verdict: Does the ICC Cost too Much?’ (BBC News, 14 March 2012) Paras 1-3 < <http://www.bbc.com/news/magazine-17351946>> (Accessed on 24/ 08/2014)

³³³ David Davenport, ‘ International Criminal Court: 12 Years, \$1 Billion , 2 Convictions’ (Forbes 400 Online, 12 March 2014) Para 6 < <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/>> (Accessed on 24/08/2014)

³³⁴ Office of the Prosecutor (ICC), ‘Paper on Some Policy Issues Before the Office of the Prosecutor’ (September 2003) [hereinafter Policy Issues] 5, 1(2) <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Accessed on 10/08/2012)

³³⁵ ICC Review Conference Resolution ICC-ASP/8/Res.9 (adopted at the 10th plenary meeting 25 March 2010) 16, Para 16 <http://www.icccpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf>

An example of where the ICC has been described³³⁶ as being directly involved in positive complementarity through its preliminary examinations, which are hoped to either trigger the State in which the crimes took place to take action at the national level, or highlights the inability of that State and its need for assistance with capacity building, so as to eventually facilitate the State to be able carry out its own prosecutions.³³⁷ Some promising examples of this can be seen in the situation between Libya and the ICC, where the Libyan government was the first State to submit an admissibility challenge under Article 19 of the Rome Statute 1998,³³⁸ seeking to retain the right to prosecute Abdullah Al-Senussi and Saif Al-Islam Gaddafi³³⁹ at the national level. The Libyan government was successful in its challenge of admissibility against Abdullah Al-Senussi and on the 24 July 2014 the ICC Appeals Chamber unanimously decided that he was currently subject to national proceedings ‘...by the Libyan competent authorities and that Libya is willing and able genuinely to carry out such investigation.’³⁴⁰ However in the case of Saif Al-Islam Gaddafi, the ICC has declined Libya’s challenge of admissibility and on the 21 May 2014 the Appeals Chamber upheld the earlier decision of Pre-Trial Chamber I of the ICC, where it was stated that the ICC and domestic investigations did not cover the same case against the defendant.³⁴¹ Therefore, this serves as an example that signals ‘...the creation of a culture of justice, not a dominant court that imposes justice. Libya may be the first step towards this culture’³⁴² a culture that is essential to the success of the principle of positive complementarity, as the ICC simply cannot do it all on its own.

³³⁶ Christine Bjork & Juanika Goerbertus, ‘Complementarity in Action: The Role of Civil Society and the International Criminal Court in the Rule of Law Strengthening in Kenya’ (2011) 14 YHRDLJ 205

³³⁷ Ibid (Christine Bjork & Juanika Goerbertus, 2011) 205, 208

³³⁸ Stephen Krug, ‘Testing the ICC: The Politics of Complementarity’ (Jurist, 1 June 2012) Para 4 < <http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php>> (Accessed on 24/08/2014)

³³⁹ ICC Website, ‘Situations and Cases’ available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx Accessed on (20/02/2013)

³⁴⁰ ICC Information Sheet, ‘Situation in Libya: The *Prosecutor v Saif Al-Islam Gaddafi* Case No. ICC- 01/11-01/11’ (ICC Website, 7 August 2014) < <http://www.icc-cpi.int/iccdocs/PIDS/publications/GaddafiEng.pdf>> (Accessed on 28/08/2014)

³⁴¹ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Appeals Chamber – Pre-Trial) ICC-01/11-01/11 (24 June 2014) 4-6

³⁴² Stephen Krug, ‘Testing the ICC: The Politics of Complementarity’ (Jurist, 1 June 2012) Para 9 < <http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php>> (Accessed on 24/08/2014)

Another excellent example of this wider reaching principle of complementarity, can be seen in the work that the Office of the Prosecutor has been carrying out in Kenya, where following the decision to investigate on 31 March 2010³⁴³ the investigations have been considered to not only signal that justice will be served fairly and in accordance with the 'Rule of Law', but it has also acted as a 'catalyst'³⁴⁴ for wider social, legal, political and economic reforms. This in part, is due to the fact that once a case becomes the responsibility of the ICC, it simultaneously is brought the situation to the attention of the world at large, which not only places a stigma upon a State that is viewed in the eyes of its peers not to be able or willing to bring the perpetrators which can spur them into taking action, where previously they would have stood by and let an external body (the ICC in the current context) carry the burden. Alternatively as occurred in Kenya, the global media attention the ICC intervention resulted in, brought assistance from NGO's which provided the impetus and the resources to kick-start reform in Kenya, so as to avoid the global stigma of being branded a 'failing state'.³⁴⁵

3.5 The ICC Outreach and Beyond

Whilst the ICC has limited capacity and resources to assist with capacity building, the Legal Tools Project which is free and easily accessible, via the ICC website,³⁴⁶ is significant in that they '... [are] freely available in the public commons, the Tools democratize access to international criminal law information, thus empowering practitioners and levelling preconditions for criminal justice in both richer and materially less resourceful countries.'³⁴⁷

³⁴³ ICC Pre-trial Document 'Situation in the Republic of Kenya' (31 March 2010) ICC-01/09-19 31-03-2010 1/163 CB PT < <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> > (Accessed on 01/04/2013)

³⁴⁴ Christine Bjork & Juanika Goerbertus, 'Complementarity in Action: The Role of Civil Society and the International Criminal Court in the Rule of Law Strengthening in Kenya' (2011) 14 YHRDLJ 205, 226

³⁴⁵ Christine Bjork & Juanika Goerbertus, 'Complementarity in Action: The Role of Civil Society and the International Criminal Court in the Rule of Law Strengthening in Kenya' (2011) 14 YHRDLJ 205, 221-222

³⁴⁶ ICC Legal Tools

<http://www.legaltools.org/fileadmin/user_upload/Legal_Tools_Brochure_ENG_FRA_V.2010.pdf> (Accessed on 27/03/2013)

³⁴⁷ ICC Factsheet, 'What are the ICC Legal Tools?' (ICC Website) < <http://www.legal-tools.org/en/what-are-the-icc-legal-tools/>> (Accessed on 22/08/2014)

These readily available resources³⁴⁸ go some way to providing the basic tools and relative information for States to be able to help them, to be able carry out their own investigations, as ‘... access to legal information is the bread and butter of lawyers.’³⁴⁹ The Legal Tools which are a work in progress and were first initiated in 2002 and continue to be added to, comprise of:

- **Elements Commentary** – ‘... a commentary on each element of the crimes and legal requirement of the modes of liability in the ICC Statute ...’³⁵⁰
- **Means of proof Documentation** – ‘... a detailed digest of international criminal jurisprudence showing the type or category of facts which could potentially constitute evidence...’
- **The Case Matrix** – Is ‘... a unique law-driven case management application that provides an explanation of the elements of crimes and legal modes of liability for all crimes in the ICC statute ...’³⁵¹ In basic terms, this means that it is a ‘how to guide’, which can be used to teach others how to successfully prosecute the crimes that fall within the jurisdiction of the ICC, in a manner that is similar to the way in which the ICC would conduct a prosecution.
- **Legal Tools Database** – This contains over 40,000 documents and consist of ICC documents and preparatory documentation, primary legislation, indictments, judgements and decisions from a variety of international and national bodies/courts (which includes Nuremberg, Tokyo, ICTY, ICTR and many of the other contemporary

³⁴⁸ Note: The Case Matrix does require an email requesting permission for access to it to be sent to the Case Matrix Network, so that they can gain an understanding of what it will be used for and create a Case Matrix Understanding

³⁴⁹ Morten Bergsmo, Olympia Bekou & Annika Jones, ‘Complementarity After Kampala: Capacity Building and the International Criminal Court’s Legal Tools’ (2010) 2 GoJIL 791, 807

³⁵⁰ ICC Legal Tools Brochure ‘Legal Tools Project: Bringing New Technologies into the Investigation, Prosecution and Defence of International Crimes’ 1 < http://www.legal-tools.org/fileadmin/user_upload/Legal_Tools_Brochure_ENG_FRA_V.2010.pdf > (Accessed on 27/03/2013)

³⁵¹ ICC Legal Tools Brochure ‘Legal Tools Project: Bringing New Technologies into the Investigation, Prosecution and Defence of International Crimes’ 1 < http://www.legal-tools.org/fileadmin/user_upload/Legal_Tools_Brochure_ENG_FRA_V.2010.pdf > (Accessed on 27/03/2013)

international tribunals/courts) and finally relevant research and papers published by academics and various other websites.³⁵²

In summary the Legal Tools Project is fairly comprehensive and is an easily accessible repository of information that can be used to help rebuild and re-educate even the most decimated of legal systems, so long as the right economic support and political reformation coincides, however these are factors which are beyond the control of the ICC and are reliant upon goodwill of the various NGO's and States currently involved continuing to do so.³⁵³

One notable difference between the ICC Case Matrix and the ICTR's is that it is a software platform, rather than an online repository of information, meaning it is a free resource that can be made available to legal professionals who do not have access to the internet but simply have access to some form of computer, which is invaluable given that access to the internet is not common in developing or post-conflict States. However, access to the internet is not always the main obstacle to accessing and utilising this kind of invaluable information, other factors such as lack of regular electricity, access to computers and lack of legal training so as to be able to understand and apply the legislation and case law provided,³⁵⁴ are obstacles worth noting. However, the success of this for now at least lies in the hands of State parties and NGO's, as it is highly unlikely that in the foreseeable future that the ICC will have either the money or the manpower to take on more of a capacity building role, rather than its current stance as a court of last resort and a provider of information and educational tools. However if positive complementarity continues to be actively pursued with the same zeal as it has until now,³⁵⁵ then Louis Moreno-Ocampo may

³⁵² ICC Legal Tools Brochure 'Legal Tools Project: Bringing New Technologies into the Investigation, Prosecution and Defence of International Crimes' 1 < http://www.legal-tools.org/fileadmin/user_upload/Legal_Tools_Brochure_ENG_FRA_V.2010.pdf > (Accessed on 27/03/2013)

³⁵³ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010)

³⁵⁴ Eric Mose , ' Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 921; see also Ariel Meyerstein , 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Inquiry 467, 468

³⁵⁵ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010)

see his dream come to fruition, whereby:

[T]he success of the ICC [is] judged not by its number of prosecutions, but by the number of international prosecutions avoided because of the increased functioning of domestic legal systems.³⁵⁶

Furthermore, should the ICC achieve Louis Moreno-Ocampo's dream, whereby the national courts of the States currently under investigation are in a position where they have increased functioning, then we would find ourselves in a world full of '... state[s] with strong judicial institutions and respect for the rule of law ... [which are] arguably less likely to reach the level of societal upheaval in which international crimes are most often committed.'³⁵⁷

As illustrated by the Strategic Plan for Outreach of 2006,³⁵⁸ the ICC certainly has been far more organised and dedicated to ensuring the dissemination of information about the ICC's work to the people within the affected States and the ICC evidently seems to have learnt the importance of outreach from the mistakes made by the ICTY and ICTR, which did not make outreach and capacity building a priority until a few years into their mandate.³⁵⁹

In addition to the ICC's dedication to dissemination of information to the affected communities, a report drafted by Denmark and South Africa³⁶⁰ in preparation for the Kampala conference illustrated, there were already many European and NGO's initiatives in place that were seeking to educate or rebuild the legal systems of the affected states.³⁶¹ Some of the most notable projects detailed in this report, include the Avocats Sans

³⁵⁶ Christine Bjork & Juanika Goerbertus, 'Complementarity in Action: The Role of Civil Society and the International Criminal Court in the Rule of Law Strengthening in Kenya' (2011) 14 YHRDLJ 205, 212.

³⁵⁷ Katharine A Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) 17 (2) HR Brief 21, 24

³⁵⁸ International Criminal Court, Assembly of States Parties, 'Strategic Plan for Outreach of the International Criminal Court' ICC-ASP/5/12 (29 September 2006) 1

³⁵⁹ Adama Dieng, 'Capacity Building Efforts of the ICTR: A Different Kind of Legacy' (2011) 9(3) Northwest J Int'l Hum Rts 403, 406

³⁶⁰ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010)

³⁶¹ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010)

Frontieres 'Integrated Project on Fighting Impunity and the Reconstruction of the Legal System in the DRC',³⁶² which has received funding from the EU, The Belgian Government and The MacArthur Foundation. This project has been running training sessions in the DRC for the Congolese judiciary and legal professionals; the success of the project became evident in 2007, when the new skills acquired through the training enabled some Congolese magistrates to undertake approximately a dozen prosecutions, by applying the Rome Statute directly.³⁶³ Another remarkable effort at capacity building has come from the State of Denmark, which has taken at least 165 Ugandan magistrates³⁶⁴ to Denmark, to provide them with proper legal training, they have also physically built court houses in Kampala and other areas of Uganda, they have continued to have a presence within the country since they opened a Danish embassy in Kampala in 1994 and with the assistance of NGO's have provided legal aid.³⁶⁵ All of these are the necessary precursors and groundwork that is required in these conflict torn states, before the ICC can begin to conceive of undertaking any complementary investigations of prosecutions. However if the ICC takes an active role in supervising and monitoring these programmes as well as possibly providing the materials, then they may be able to influence the way in which the various legal professionals undergoing training, apply the law when they return to their respective States to apply it in their own trials at the national level.

An excellent example of where the national courts, have been ill equipped to provide legal investigations and prosecutions complementary to the ICC, has been in the DRC. Despite the many instances of aid and assistance from NGO's, such as Avocats Sans Frontieres,³⁶⁶ the DRC has been struggling with internal conflict, right up until 2012 and is still far from settled

³⁶² Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) 8-11

³⁶³ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) 9

³⁶⁴ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) 24

³⁶⁵ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) 24-25

³⁶⁶ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30 May 2010) 8-11

now. One of the most notable obstacles to justice in the DRC has been the lack of any national legislation equipped to deal with the prosecution of the crimes covered by the Rome Statute. The current situation is a piecemeal one, where the State has failed to enact a new piece of legislation that encompasses all of the Rome Statute offences, and at present crimes against humanity, genocide and war crimes are dealt with by the Military Criminal Code³⁶⁷ and Military Judicial Codes of 2002.³⁶⁸ Not only is this very peculiar in the sense that military and not national legislation has been left to deal with crimes of such magnitude that are clearly criminal and not military in nature, but is also illustrative of the fact that not many courts in the DRC can at present undertake the prosecutions that are necessary to be complementary to the ICC. A further paradox is created by the fact that all crimes which took place prior to 2003 are to be dealt with by the 1972 DRC Military Justice Code,³⁶⁹ which unfortunately has very limited definitions of the crimes of genocide, crimes against humanity and war crimes.³⁷⁰ Thankfully the 2002 Military codes³⁷¹ have a virtually identical provision for the crime of genocide, as the Rome Statute and whilst they have slightly more restrictive definitions of war crimes and crimes against humanity, the military judges who have received training from NGO's like Avocats Sans Frontieres have chosen to directly apply the Rome Statute.³⁷² This is possible due to the DRC being a monist legal system,

³⁶⁷ Democratic Republic of Congo Military Criminal Code (Code Penal Militaire) Law No 024/2002 (18 November) 2002 <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf>> (Accessed on 02/08/2013)

³⁶⁸ Democratic Republic of Congo Military Criminal Code (Code Penal Militaire) Law No 023/2002 (18 November 2002) <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>> (Accessed on 02/08/2013) and Democratic Republic of Congo Military Criminal Code (Code Penal Militaire) Law No 024/2002 (18 November 2002) <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf>> (Accessed on 02/08/2013)

³⁶⁹ Congolese 1972 Military Justice Code Law No 72/060 of 25 September 1972, Arts 435 & 436

³⁷⁰ Antoinetta Trapani, DOMAC Report, 'Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC' (12 November 2011) 24 <<http://www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf>> (Accessed on 02/08/2013)

³⁷¹ Democratic Republic of Congo Military Criminal Code (Code Penal Militaire) Law No 023/2002 (18 November 2002) <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>> (Accessed on 02/08/2013) and Democratic Republic of Congo Military Criminal Code (Code Penal Militaire) Law No 024/2002 (18 November 2002) <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf>> (Accessed on 02/08/2013)

³⁷² Mirna Adjami & Guy Mushiata, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court' (ICTJ Briefing: DRC Case Study, May 2010) 3 <<https://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>> (Accessed on 13/03/2013)

meaning that international law can be directly applied³⁷³ and also because Article 215 of the 2006 Congolese Constitution states that, 'Duly concluded international treaties and agreements shall have, following publication, higher authority than laws, provided each treaty or agreement is applied by the other party.'³⁷⁴

This ad-hoc approach to legislating for these crimes is less than ideal and certainly will not be conducive to ensuring consistency, as some judges may decide to apply the Rome Statute definition, where others will use the Military Code definition, but it does serve to illustrate that when they receive training from NGO's or the ICC, then they will be more inclined to follow the ICC's approach.

³⁷³ Mirna Adjami & Guy Mushiata, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court' (ICTJ Briefing: DRC Case Study, May 2010) 3 <
<https://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>> (Accessed on 13/03/2013)

³⁷⁴ Constitution of the Democratic Republic of Congo as amended by Law No 11/002 of January 20, 2011 Amending Some Articles of the Constitution of the Democratic Republic of Congo of February (adopted and entered into force on 18 February 2006) Art 215.

Chapter 4: Proportionality, Penalties and the ICC

William Schabas has stated that the judges of the ICC ‘...have been given a very free hand ...’³⁷⁵ when it comes to the sentencing of those brought before its judges. This comment from Schabas stems from the fact that the Rome Statute 1998 is silent upon the purpose of the ICC’s sentencing and apart from a brief mention in the Preamble, where it is stated that the aim is to ‘... put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’³⁷⁶ The statement suggests deterrence as being an objective of the ICC penalty regime, but it is certainly not to be interpreted as meaning deterrence is central to the punishment aims of the ICC or that it will play any significant factor in sentencing determination.³⁷⁷ The lack of any clarification as to what is the true aim of ICC sentencing jurisprudence is can be attributed to several factors. Firstly, as the ICC is intended to act as a court of last resort to one hundred and twenty two legally and socially diverse member States, it is highly likely that the Rome Statute 1998 has remained silent on this topic, so as not to cause offence to any State or to deter other States from future ratification³⁷⁸ simply because the ICC does not share in its punishment objectives. And secondly it could in part be due to the fact that international law is always evolving and the drafters of the Rome Statute 1998 may have intended the ICC’s positive law to remain silent upon issues such as sentencing determination, so as to allow the judges of the ICC the flexibility to follow what becomes the accepted norms for the sentencing of these relatively new types of crimes.³⁷⁹

4.1 Why is the ICC’s Sentencing Jurisprudence Vague?

³⁷⁵William A Schabas *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 331

³⁷⁶Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble

³⁷⁷William A Schabas *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 333

³⁷⁸William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 335-336

³⁷⁹Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 52

‘Because the law seeks justice ... it is natural to ask which ... legal doctrines ...’,³⁸⁰ are most likely to advance the pursuit of justice, which is why this chapter will explore the theories of justice in order to establish why the ICC and the national courts are unlikely to have similar penalty policies when pursuing justice. The ICTY and ICTR, which have often been viewed as precursors to the ICC, have stressed the need for consistency and a clear penalty objective both in relation to their own sentencing and particularly in relation to the ICTR; there has also been a desire for there to be some level of proportion and consistency between the sentences of the ICTR and the Rwandan National courts.³⁸¹ An excellent example of this is illustrated in the *Prosecutor v Tadic* (Sentencing Judgement) IT-94-1-S (14 July 1997) ILR 286 (1999) where ICTY Judge McDonald held retribution and deterrence to be at the heart of their penalty policy;³⁸² similarly in the *Prosecutor v Rutaganda* (Judgement and Sentence) ICTR-96-3 (6 December 1999) before the ICTR, it was stated that deterrence and retribution were central themes of their sentencing policy,³⁸³ thus illustrating that the same objectives were driving the sentencing determinations of both the ICTR and the ICTY. Whilst it is neither desirable nor realistic to have rigid penalty scales for crimes, given the scope for variations from crime to crime, at least when the factors driving the sentencing decisions of courts are similar then it is possible that there will be some symmetry and proportionality.

However these tribunals are only concerned with bringing to justice those who committed crimes in one single State, namely the former Yugoslavia and Rwanda and are therefore able to more easily ‘... have recourse to the general practice regarding prison sentences in the courts ...’³⁸⁴ as they only had to consider the sentencing practice of one State when making

³⁸⁰ Mark J Osiel, ‘Modes of Participation in Mass Atrocity’ (2005) 38(3) Cornell Int’l LJ 793,804

³⁸¹ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 23(1) states that ‘in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.’

³⁸² *Prosecutor v Tadic* (Sentencing Judgement) IT-94-1-S (14 July 1997) ILR 286 (1999) 286

³⁸³ *Prosecutor v Rutaganda* (Judgement and Sentence) ICTR-96-3 (6 December 1999)

³⁸⁴ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 23 (1) Similarly UNSC Res Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) UN Doc S/Res/827 (last amended September 2009) Art 24(1) states that the ICTY should ‘...have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.’

their own sentencing determinations. In contrast the ICC must aim to at least to some degree appease the penalty goals of a wide range of States because if the sentences handed out by the ICC intend to have a positive effect at the local level where the crimes took place, then '...close attention must be paid to factors such as local historical experience, local customs and sensibilities, and sometimes even existing loyalties.'³⁸⁵ This can become problematic when the State involved does not view deterrence and retribution as the key aims of justice, but instead focus on truth, reconciliation or simple incapacitation as the end result may be that tensions arise between the victims who may merely want the violence to cease, whilst the ICC may be viewed as only being concerned with bringing the leaders of that violence to justice.³⁸⁶

Increasingly truth and reconciliation have become central themes of justice within the African States, as they have often been viewed this as the only way to rebuild their war torn States, where corruption and violence is still rife.³⁸⁷ For example, Sierra Leone,³⁸⁸ Uganda³⁸⁹ and the Democratic Republic of Congo,³⁹⁰ have all chosen truth and reconciliation over retribution and deterrence in their search for justice to the human rights abuses that have taken place within their boundaries and have often granted pardons and amnesties to those offenders who may still be in positions of power. This decision to forgive and learn from lessons of the past is driven by a desire to move forward in which it is believed that:

³⁸⁵ Mirjan R Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 Chi-Kent L Rev 329, 335

³⁸⁶ Mirjan R Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 Chi-Kent L Rev 329, 332

³⁸⁷ Mark J Osiel, 'Modes of Participation in Mass Atrocity' (2005) 38(3) Cornell Int'l LJ 793, 810

³⁸⁸ The Sierra Leone Truth and Reconciliation Commission as created by the Truth and Reconciliation Act of 2000 Sierra Leone Gazette Vol CXXI No 9 (10 February 2000)

³⁸⁹ Agreement on Accountability and Reconciliation Between the government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba , Sudan (29 June 2007)

<http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf> (Accessed on 22/08/2014)

³⁹⁰ 23 March 2003 the National Congress for the Defence of the People (CNDP) signed a peace agreement that incorporated them into the DRC national army (FARDC) and therefore provided amnesty against prosecution for their previous crimes. As cited at: International Justice Resource Center, 'DR Congo Parliament Approves New Amnesty Law for Insurgency and Other Crimes, as Part of Agreement with M23 Rebel Group' (10 February 2014) <<http://www.ijrcenter.org/2014/02/10/dr-congo-parliament-approves-new-amnesty-law-for-insurgency-and-other-crimes-as-part-of-agreement-with-m23-rebel-group/>> (Accessed on 29/08/2014)

It is only through generating such understanding that the horrors of the past can be prevented from occurring again. Knowledge and understanding are the most powerful deterrents against conflict and war.³⁹¹

Furthermore, the culpability of the lower level offenders in human rights abuses often is not black and white, as is more commonplace with case of the vast majority of ordinary crimes, in the sense that the culpability of the perpetrators is often clouded by the circumstances that led to them committing the crimes. More specifically, in these States where internal conflict has been rife for many years and genocide and war crimes have become the norm, many of those who are perpetrators of the crimes are often also victims, as they have had little option but to act in that manner to save their own life, or that of a loved one. However, truth and reconciliation are not a viable aim for the ICC as its job is to ensure that the key perpetrators of these extraordinary crimes as seen to pay for the harm they have done, and a forgiveness, truth and reconciliation committee just would not be seen to be doing that job, especially in the eyes of the Westernised world. Nonetheless the existence of these alternate methods for dealing with the crimes that are often advocated at the national level and '... operate in tension with retribution.'³⁹² And therefore also operate in tension with the ICC, in the sense that a State may be left feeling that the ICC has unjustly intervened or interfered because truth and reconciliation are not viewed as justice under the current international legal system, once again highlighting problems that can arise when objectives of the national systems and the ICC are not aligned.

The penalty policy of the ICC is dealt with in Part 7 of the Rome Statute 1998, mainly in Article 77, which states that the two main penalties handed out by the ICC will be:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years;
- (b) Or

³⁹¹ Sierra Leone Truth and Reconciliation Commission Website (Home page) < <http://www.sierraleonetr.com/>> (Accessed on 20/08/2014)

³⁹² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 15

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.³⁹³

Whilst the two maximum sentence durations available to the ICC seem to contradict one another when viewed in isolation, because one would seem to suggest an aversion to lengthy sentences, whilst the other offers the longest available sentence. However, when viewed in the context of the discussions between the member States at Rome in 1998 and discussions prior to the Rome conference, then the life imprisonment penalty option can be seen as a halfway measure that has been placed within the statute to appease the member States that still advocate the death penalty, such as the Arabic, Islamic and Caribbean States.³⁹⁴ Nonetheless, whilst a life sentence can be said to have the same incapacitating effect as a death sentence and has been argued by advocates of human rights to be equal to the death penalty,³⁹⁵ in the sense of it being cruel and unusual and depriving the person of their liberty for the duration of their life, the Rome Statute does provide a sentencing review once 25 years of the sentence has been served. This is provided for in Article 110, where it is stated that only the ICC has the right to make a decision to reduce any sentence³⁹⁶ and that ‘When a person has served ... 25 years in the case of life imprisonment, the ICC shall review the sentence to determine whether it should be reduced.’³⁹⁷ As to whether Article 110 of the Rome Statute will result in very few life sentences actually meaning life imprisonment, remains to be seen, as to date only two convictions have been secured and neither of which exceeds a sentence of more than 14 years.³⁹⁸

³⁹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 77 (1)

³⁹⁴ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 336

³⁹⁵ Marie Gottschalk, ‘The Long Shadow of the Death Penalty: Mass Incarceration, Capital Punishment and Penal Policy in the United States’ in Austin Sarat & Jurgen Martschukat (eds), *Is the Death Penalty Dying: European and American Perspectives* (CUP 2011) 317

³⁹⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 110 (2)

³⁹⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 110 (3)

³⁹⁸ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) received a sentence of 14 years for being a co-perpetrator of War Crimes & *Prosecutor v Germain Katanga* (Trial Chamber II - Sentencing) ICC-01/04-01/07 (23 May 2014) received a sentence of 12 years for being an accessory to one count of crimes against humanity and four counts of war crimes.

In addition to this already ambiguous sentencing policy, Article 80 of the Rome Statute 1998 states that, 'Nothing in this Part effects the application by States of penalties prescribed by neither their national law, nor the law of States which do not provide for penalties prescribed in this part.' Once again we see a direct compromise to the abolitionist direction of the ICC's penalty stance, so as to not discourage those States that retain the death penalty from ratifying the Rome Statute 1998 and aiding the ICC in its global fight to 'bring an end to impunity'.³⁹⁹ This flexibility permits member States to apply their own domestic penalty policy, meaning there is certainly going to be a wide and diverse range of penalties handed out to those tried both by the ICC and the national courts. A fact that has been pointed out by my academics⁴⁰⁰ and most aptly put by Dragana Radosavljevic, who wrote that:

The omission [of the death penalty] significantly destabilizes the impact of the ICC sentencing law and inevitably leads to inconsistencies within the court's jurisprudence as well as among the ICC states parties ...⁴⁰¹

The destabilisation referred to above by Dragana Radosavljevic makes reference to the fact that the ICC, who will generally only prosecute those held to be most culpable whilst in general the national courts will try the lower ranking perpetrators and may well give harsher sentences than the given by the ICC to the more culpable. And this inconsistency not only highlights that there may well be doubts as to whether the ICC's sentences are proportionate to the crime, but it also as Barbara Hola has noted potentially undermines the whole concept of justice as Hola purports that 'One of the fundamental principles of justice is consistency - like cases should be treated alike ...',⁴⁰² which is the view this thesis also takes. So what does this diverse and uncertain range of penalties mean for the quality and proportionality of the justice metered out by the ICC and the member States? One thing is for certain, whilst the current penalty arrangement between the ICC and its member States remains in place, there will be a lack of consistency of sentences and as a result of that, it is

³⁹⁹ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 336

⁴⁰⁰ See Mark Drumbl, Barbara Hola, Jane Stromseth and Dragana Radosavljevic

⁴⁰¹ Dragana Radosavljevic, 'Restorative Justice Under the ICC Penalty Regime' (2008) 7(2) LPICT 235, 236

⁴⁰² Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 3

not likely that there will be any 'proportionality' between the penalty and the gravity of the crime.⁴⁰³

4.2 What is Proportionality and Why is it Important?

That a punishment should 'fit the crime' and be proportionate to the wrong or harm committed is a key factor of retributive justice and this is a criminal principle that can be traced back as far as Ancient Greece and Anglo Saxon times;⁴⁰⁴ but is most commonly known to many through the ancient biblical legal principle of *Lex Talionis*, which in its most basic definition means '...an eye for an eye, a tooth for a tooth.'⁴⁰⁵ Whilst this is often viewed by modern society to be a harsh, barbaric and a primitive stance,⁴⁰⁶ many neglect to realise that far from being cruel and extreme, this ancient principle in reality signified a crucial 'turning point'⁴⁰⁷ in the constantly evolving field of lawful punishment signalling a move towards '... a policy of restraint and it sanctified proportionality as a moral principle of punishment ...',⁴⁰⁸ where the level of punishment is commensurate with the gravity of the crime.

Indeed the principle of *Lex Talionis*, is one that formed an integral part of the Kantian retributive model, where Kant purported that *Lex Talionis* was the only principle by which it was possible to '... assign both quality and quantity of a just penalty.'⁴⁰⁹ What he meant by this is that not only should the punishment be proportionate to the 'blameworthiness' of the offender, but there should also be a proportionate correlation between the level of

⁴⁰³ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 4

⁴⁰⁴ John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 5

⁴⁰⁵ Exodus 21:24 ESV

⁴⁰⁶ Dr Leo Zaibert, *Punishment and Retribution* (Ashgate Pub Ltd 2013) 106

⁴⁰⁷ Morris J Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) OJLS 57,57

⁴⁰⁸ Morris J Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) OJLS 57,57

⁴⁰⁹ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, (Trans) by W Hastie (Edinburgh): T & T Clark (1887) reprinted by Clifton, NJ: Augustus M. Kelly Publishers 1974) 196-197

harm caused and the punishment.⁴¹⁰ The retributive model, often referred to as ‘just deserts theory’ is quite possibly the leading penalty theory and the most commonly used by judges across the globe,⁴¹¹ as was asserted in the *Tadic* sentencing judgement⁴¹² before the ICTY, where the tribunal affirmed that ‘...the modern philosophy of penology [states] that the punishment should fit the offender and not merely the crime...’.⁴¹³ This definition provided by the ICTY sentencing judges, is merely a modern take on the more traditional retributivist theory, which also serves to affirm that this is the preferred penology for the international courts and tribunals, including the ICC, who is likely to look to its predecessors the ICTY and ICTR for jurisprudence and sentencing guidance, given that the Rome Statute provides very little guidance.⁴¹⁴ Therefore it would seem logical to expand upon the theory, in order to explain, why proportionality, clarity and consistency in due process in the sentencing determination of the ICC is imperative.

4.3 Just Deserts Theory and Retribution

It must be noted that whilst there are a multitude of retributivist theories, such as R A Duff’s theory of ‘communication and reconciliation’,⁴¹⁵ the ‘unfair advantage theory’ as advocated by Sher⁴¹⁶ and the original ideal of retributivism as envisioned by Kant and H L A Hart’s ‘modern retributivism’,⁴¹⁷ this chapter will focus on the ‘just deserts’ retributivist theory in an attempt to assess why proportionality, is so fundamental to the ICC and its penalty

⁴¹⁰ Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (3rd edn, Thomson Reuter 2010) 20

⁴¹¹ Whitley R P Kaufman, *Honor and Revenge: A Theory of Punishment* (Springer 2012) 6 and Hola B, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 6

⁴¹² *Prosecutor v Tadic* (Sentencing Judgement) IT-94-1-S (14 July 1997) ILR 286 (1999) Para61

⁴¹³ *Prosecutor v Tadic* (Sentencing Judgement) IT-94-1-S (14 July 1997) ILR 286 (1999) Para61

⁴¹⁴ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 332 & Marisa R. Bassett ‘Defending International Sentencing: Post Criticism to the Promise of the ICC’, (2009) 16(2) HR Brief 22, 22

⁴¹⁵ R A Duff, *Trials and Punishment* (CUP 1986) Also R A Duff ‘Punishment, Citizenship and Responsibility’, in H Tam (ed), *Punishment, Excuses and Moral Development* (Avebury Press 1996)

⁴¹⁶ G Sher, *Desert* (Princeton Uni 1987) Also G.Sher, *Approximate Justice, Studies in Non-Ideal Theory* (Rowman & Littlefield 1997)

⁴¹⁷ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 231

praxis. Especially given that, ‘Punishing human rights violations with penalties proportionate to the gravity of their crime has become a norm of international law.’⁴¹⁸

The reason for this being that the ICTY and ICTR have sought to ensure that the perpetrators received their ‘just deserts’ and that the punishment as previously stated in the *Tadic* sentencing judgement,⁴¹⁹ would ensure that the penalty not only sought to fit the crime, but also that it was befitting of the circumstances in which the crime occurred. However, there is no penalty in existence that could be deemed truly proportionate to the gravity of the crimes committed by those that will stand trial before the ICC or any other similar court or tribunal.⁴²⁰ And this is a form of ‘just deserts’ theory that has been described by Andrew Von Hirsch as ‘just deserts in an unjust society’⁴²¹ where the offender is punished not based on their moral deserving, but the based on what is considered to be deserving when considered in the context of the actual circumstances surrounding their crime. This indeed would be an exemplary basis for establishing the blameworthiness of the types of offender that are likely to be brought before the ICC,⁴²² as the crimes over which the ICC has jurisdiction are complex in nature, meaning that moral gravity of the offence will often be cloudy at the best of times because crimes of this nature are crimes of mass participation and ‘...Individual perpetrators are often risk-averse and would not act without a context of authorization from authority figures, peer co-action, and victim vulnerability.’⁴²³

⁴¹⁸ Marisa R Bassett ‘Defending International Sentencing: Post Criticism to the Promise of the ICC’, (2009) 16(2) HR Brief 22, 22

⁴¹⁹ *Prosecutor v Tadic* (Sentencing Judgement) IT-94-1-S (14 July 1997) ILR 286 (1999) Para61

⁴²⁰ John G Heidenrich, *How to Prevent Genocide: A Guide for Policymakers, Scholars, and the Concerned Citizen* (Greenwood Pub 2001) 64

⁴²¹ Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (NE Uni Press 1976)

⁴²² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 78 (1) states that the ICC must consider the ‘... gravity of the crime ...’ and also the ‘... individual circumstances of the convicted person ...’ Similarly in the Rules of Procedure and Evidence of the International Criminal Court (adopted 9 September 2002) ICC-ASP/1/3 Rule 145(1)(b) also states that the ICC must ensure that they ‘Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.’

⁴²³ Kjell Anderson, ‘Hegemony and Entrepreneurship in Collective Violence’ (Hague Institute for Global Justice, 28 June 2013)

Para 3 < http://thehagueinstituteforglobaljustice.org/index.php?page=Commentary-Commentary_Articles-Commentary_archives-Hegemony_and_Entrepreneurship_in_Collective_Violence&pid=177&id=103&jaar=2013 >

Furthermore, given that the ICC is still very much in its infancy, it is highly likely that it will follow its more localised counterparts, the ICTY and ICTR when developing its own penalty praxis and opt for the modern form of ‘just deserts’ theory as its sentencing rationale.

However, before embarking upon a more in-depth discussion of the ‘just deserts’ school of retributivism, which is one of the central, if not the primary punishment objective of the ICC as was established in the sentencing determination of the two cases that the ICC has to date completed and convicted the perpetrator,⁴²⁴ a brief examination of the ICC’s sentencing determinations will be undertaken. The ICC, in the *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) appeared to take an almost scientific approach to ensuring that the sentence handed out was fitting, consistent and proportionate by looking to establish a ‘... consistent baseline’⁴²⁵ which they held to be 80% of the statutory minimum⁴²⁶ sentence available, which was then to be adjusted in accordance with Rule 145 (mitigating and aggravating circumstances of the individual).⁴²⁷ Whilst in contrast, the ICC in the more recent *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) appeared to take a more traditional retributivist stance when they stated that the punishment needed to be inevitable so as to express society’s disapproval and to ‘...satisfy thirst for vengeance ...’;⁴²⁸ in addition to this, they felt that by the sentence being proportionate to the crime it ‘... helps to encourage the convicted person’s return to society.’ It should also be noted that in addition to the retributivist sentencing rationales given in the *Germain Katanga*⁴²⁹ sentencing hearing, it should also be noted that Trial Chamber II of the ICC also made reference to deterrence⁴³⁰ and

⁴²⁴ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) & *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

⁴²⁵ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) 9, Para 33

⁴²⁶ *Ibid* (*Prosecutor v Thomas Lubanga Dyilo* – Sentencing) 9, Para 33

⁴²⁷ International Criminal Court Rules of Procedure and Evidence ICC-ASP/1/3 (Part II-A) (adopted and entered into force 9 September 2002) Rule 145

⁴²⁸ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴²⁹ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴³⁰ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3 ‘...the sentence serves to deter others from committing similar crimes.’

reconciliation⁴³¹ in their sentencing rationale.

Having now established that the two sentencing determinations of the ICC were both concerned in some way the crime be proportionate to the crime, it is essential to establish, why proportionality is central to the retributivist school of thought. One of the key proponents of the retributive belief that the penalty needs to be in some way proportionate to the crime is H L A Hart; who succinctly summed it up when he stated that, 'Disproportionate sanctions pose the risk... of either confusing common morality or flouting it and bringing the law into contempt.'⁴³² Here Hart talks about disproportionate penalties having one of two effects, the first being that it would confuse the 'common morality' in the sense that to give a disproportionate penalty, would only confuse the general public as to the moral culpability of the offence. Whilst in contrast the second reason he gives is more concerned with State authority, procedural fairness and consistency, because without this Hart argues that the citizens of a State, may lose respect for the legal system and view those who administer justice disproportionately with contempt.⁴³³ Furthermore, Hart argues that the judiciary often feel that it is their duty to award a punishment that reflects the public abhorrence of the act, an idea that he supports with a quote from Lord Denning, who stated that, '... the punishment for grave crimes should adequately reflect the great revulsion felt by the great majority of citizens ...'.⁴³⁴

Similarly ICC Trial Chamber II in the *Germain Katanga* sentencing hearing⁴³⁵ cited expression of '... society's disapproval of the crimes committed and their perpetrator ...'⁴³⁶ as being one of the two main functions of their sentencing. However, the ICC in the *Germain*

⁴³¹ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3 'The sentence must also serve to bring once again to the affected populations and help them achieve reconciliation ...'

⁴³² H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 25

⁴³³ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 25

⁴³⁴ Lord Denning Address to the Royal Commission on Capital Punishment, Cmd 8932 (1953) Para 53

⁴³⁵ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

⁴³⁶ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

*Katanga*⁴³⁷ sentencing hearing make reference to the need for the punishment to be inevitable rather than harsh to a level commensurate with the harm done by the perpetrator,⁴³⁸ but it should be noted that proportionality does also factor into their sentencing determination, as is illustrated by the statement that, 'The punishment must thus reflect the gravity of the offence itself.'⁴³⁹ Whilst it is not possible to issue a sentence that is truly proportionate to the gravity of such crimes as those that are brought to justice before the ICC, it does appear from the sentencing decisions of the two cases that the ICC has to date completed, that they are trying to scale the sentences according to the gravity of the crimes.⁴⁴⁰

Like Jeremy Bentham, Hart believed that people act voluntarily and that when they commit a wrong that is morally culpable, they should receive a punishment that '... must in some way match, or be the equivalent of the wickedness of his offense ...'.⁴⁴¹ Moreover, Hart believed that the state of mind '*mens rea*' was a key element in determining the moral culpability of the offender or something that should be taken into consideration, when deciding what punishment befits the crime. Hart's view of proportionality in punishment, was an advancement of the ancient principle of *Lex Talionis*, whereby rather than doing to the offender what he has done to others, the aim is to find a punishment '... that should in some sense be equal to or proportionate to the wickedness of the crime.'⁴⁴² For Hart the very essence of what he terms the 'modern form' of retributive thinking, is a philosophy that holds that proportionality is achieved when the '...relative gravity of punishments is [able] to reflect the moral gravity of offences.'⁴⁴³ This simplistic view of retributivism as described by Hart, carries many of the traits that are central to the 'just deserts' theory of punishment, as illustrated by the quote below:

⁴³⁷ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

⁴³⁸ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴³⁹ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 4-5

⁴⁴⁰ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 4-5 and *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) 9

⁴⁴¹ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 231

⁴⁴² H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 161

⁴⁴³ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 234

The 'just deserts' theory of sentencing advocates that punishment should be proportionate to the seriousness of the offense committed. Advocates of the just deserts philosophy emphasize the importance of due process, determinate sentences, and the removal of judicial discretion in sentencing practice⁴⁴⁴

The above statement encapsulates the very essence of what 'just deserts' theory is, or what is otherwise known as retributivist penal theory; in summary, it is a penal policy that is not dictated by judicial discretion, but by fairness, morality and proportionality. The term 'just deserts' is self-explanatory, in the sense that in purest terms it seeks to give the offender, the punishment of which they are 'deserving' and by deserving it means 'morally deserving',⁴⁴⁵ as there is a common desire in human nature to '... to inflict punitive measures on wrongdoers, which is motivated by just deserts ...'.⁴⁴⁶

Retributivism can be traced back to the Enlightenment period⁴⁴⁷ and the scholarly writings of Cesare Beccaria⁴⁴⁸ and subsequently Immanuel Kant.⁴⁴⁹ Both of which held great belief in social contract theory, where it was purported that punishment merely existed to '... restrain men from encroaching upon the freedom of one another ...'.⁴⁵⁰ This was very innovative for its time, as prior to this all men were not held equal before the law and often the punishment would not fit the crime, but would more likely vary dependent upon the social status of both the offender and the victim,⁴⁵¹ especially where the offender was of a higher social standing than the victim. Similarly 'just deserts' theory is a logical progression of the original retribution theory of punishment, whereby we now see that in accordance

⁴⁴⁴ Mary Bosworth, *Encyclopedia of Prisons & Correctional Facilities* (Sage Publications 2005) <<http://knowledge.sagepub.com/view/prisons/n189.xml>> (Accessed on 22/05/2013)

⁴⁴⁵ C W K Mundle, 'Punishment and Desert' in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 65

⁴⁴⁶ Dena M Gromet & John M Darley, 'Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals' (2009) 43(1) L & Soc'y Rev 1, 3

⁴⁴⁷ The Enlightenment period spanned between 1650- 1800.

⁴⁴⁸ Cesare Beccaria, 'On Crimes and Punishment', in Grupp SE (eds), *Theories of Punishment* (Indiana Uni Press 1971)

⁴⁴⁹ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (trans) by Hastie W, Edinburgh T & Clark T (Augustus M Kelly Pub 1974)

⁴⁵⁰ E Monachesi 'Cesare Beccaria (1738 – 1794)' in H Manheim (eds), *Pioneers in Criminology* (2nd edn, Montclair 1972) 40

⁴⁵¹ E Monachesi 'Cesare Beccaria (1738 – 1794)' in H Manheim (eds), *Pioneers in Criminology* (2nd edn, Montclair 1972) 40

with social conscience there is also a concern with not only addressing the physical and or actual harm done, but also with the moral reprehensibility of that wrongful behaviour.

It has been suggested that, 'In criminal law circles, the accepted wisdom is that there are two and only two true justifications of punishment-retributivism and utilitarianism.'⁴⁵² Whilst this statement may seem a narrow stance to take, it generally does form the basis of conventional ideals of justice, although it should be noted that reconciliation also can be found in the sentencing rationale of the modern courts and was expressly stated to be a secondary aim of the ICC in the *Germain Katanga* sentencing judgement.⁴⁵³ Moreover, justice always seeks to either punish an offender to a level commensurate with the harm that they have caused and that which they are deserving of (this being the retributivist stance) or alternatively because the punishment or incapacitation is for the greater good of society as a whole (utilitarianism). The theory of utilitarianism is one that will be discussed at greater length later on the chapter. However, this section will focus on retributivism as it is one of the most commonly used penal theories advocated by the ad-hoc international tribunals, which the ICC is likely to follow in the footsteps of when forming its own penal policy and praxis.

To surmise, 'just deserts' theory is a modern advancement of the original Kantian retributive theory in which punishment merely served to attempt to '... restore the wrong that has been committed.'⁴⁵⁴ Whereas 'just deserts' takes this a step further and also seeks to ensure that the reprehensive moral nature of the wrong committed is acknowledged and is a factor that is attributed when weighing up the form of punishment deemed appropriate and proportionate. This has been described by Andrew Von Hirsch as 'censure', which is '... [an] expression of judgement, plus its accompanying sentiment of disapproval.'⁴⁵⁵ Therefore by

⁴⁵² Aya Gruber, 'A Distributive Theory of Criminal Law' (2010) 52 (1) Wm & Mary L Rev 1, 1

⁴⁵³ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴⁵⁴ David Schicor, *The Meaning and Nature of Punishment* (Waveland Press Inc 2006) 28

⁴⁵⁵ Andrew Von Hirsch, 'Censure and Proportionality' in Anthony Duff & David Garland (eds) *A Reader on Punishment* (OUP 1994) 119

placing a degree of moral deserving into the proportionality methodology it makes the proportionality element of the penalty also about recognising the victim in the proceedings. Furthermore, 'just deserts' is also concerned with clarity and codification:

The aim of distinguished and codification of crime and punishment is to make sure that a defendant is sentenced to neither more nor less than what he deserves ... [furthermore] the sentence accorded to a crime should reflect the serious of the offences.⁴⁵⁶

The idea that the penalty regime for crimes, be clearly codified so that the offenders or potential offenders can unequivocally know what punishment they will receive should they carry out the illegal act, coupled with the ideology that punishment should be in some way proportionate to the crime or harm done, is an age old principle that is central to the ideal of justice and one that '... has proved so alluring that, in many parts of the Western World, it is one of the main goals of sentencing.'⁴⁵⁷

Having now established what proportionality is and how it is intended to function in order to facilitate retributivism, it is worth mentioning that there are two sub-divisions of proportionality. The first of which is known as 'ordinal' proportionality and is best explained by Andrew Ashworth and Matt Matravers, as a form of proportionality where the '... penalties be scaled to the comparative seriousness.'⁴⁵⁸ This form of proportionality can be broken down into three subsections, the first of which requires that there be 'parity', so as to ensure that people who are convicted of similar offences are also found to '...deserve penalties of comparable severity'⁴⁵⁹ thus ensuring consistency. Secondly, there needs to be a form of 'rank ordering'⁴⁶⁰ in which the punishments are placed on a scale that serves to illustrate a ranking of the crimes in accordance with the perceived seriousness of that crime.

⁴⁵⁶ Venus Gareh Baghi & TR Maruthi, 'The Principle of Proportionality in international Criminal Law' (2011) 70 (3) AUDJ 5, 6 < journals.univ-danubius.ro/index.php/juridica/article/download/.../885> (Accessed on 12/12/2012)

⁴⁵⁷ Mirko Bagaric, *Punishment & Sentencing: A Rational Approach* (Cavendish Pub 2001) 164

⁴⁵⁸ Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Just* 55, 79

⁴⁵⁹ Matt Matravers, *Justice and Punishment: the rationale of Coercion* (OUP 2008) 260

⁴⁶⁰ Andrew Von Hirsch, 'Censure and Proportionality' in Anthony Duff & David Garland (eds) *A Reader on Punishment* (OUP 1994) 129

Finally in order for ordinal proportionality to be fully attained, there must also be spacing or a scaling of the penalties, that is not only proportionate to the gravity of the crimes, but also the moral censure of the wrong committed and harm done.⁴⁶¹ In summary ordinal proportionality exists when there is a ‘... scale or tariff of punishments and offences ...’⁴⁶² and the punishment that is deemed fitting is ‘... proportionate to the relative wickedness or seriousness of the crime.’⁴⁶³ And the sentencing hearing in the *Germain Katanga* case would seem to be an excellent illustration of ordinal proportionality in practice, as the ICC often made reference to attempting to ensure that the sentence is not only proportionate to the gravity of the crime,⁴⁶⁴ but that it also reflects society’s moral censure⁴⁶⁵ of the crimes committed. Whilst In contrast to ordinal proportionality ‘cardinal’ proportionality is a more complex form of proportionality that is not so much concerned with matching the crime to the moral wickedness of the offence, but with creating a starting point from which other crimes can be scaled and awarded a proportionate sentence. With this form of proportionality it is not so easy to distinguish parity or to set a scale for the proportionate punishment in relation to the level of harm done, because cardinal principles of proportionality are applied in order to create an ‘anchor’ or base level, that is then used to help determine the severity of punishment that is deemed appropriate. From this ‘anchor’ point scales can then be set, with consideration to the individual circumstances of the crime and the ‘... gravity of the criminal conduct ...’⁴⁶⁶ factored in, so as to attempt to determine a punishment that is proportionate to the unique and complex circumstances of that particular offence. Put simply, this means that this form of proportionality is concerned with ensuring that the more severe crimes receive the more severe the sentence is, so as to ensure consistency and an example of this kind of proportionality was illustrated by the ICC in the sentencing hearing of the *Lubanga* case, where the court made reference to establishing a ‘baseline’ of approximately 80%⁴⁶⁷ of the statutory minimum sentence, that

⁴⁶¹ Matt Matravers, *Justice and Punishment: the rationale of Coercion* (OUP 2008) 260 and Andrew Von Hirsch, ‘Censure and Proportionality’ in Anthony Duff & David Garland (eds) *A Reader on Punishment* (OUP 1994)129

⁴⁶² H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 162

⁴⁶³ H L A Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 162

⁴⁶⁴ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 4-5

⁴⁶⁵ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴⁶⁶ Andrew Von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime & Just* 55, 83

⁴⁶⁷ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

could then be adjusted in accordance with the individual circumstances of a particular case, so as to create ‘... consistent baseline for sentences, which should not be adjusted on the basis that some crimes are less serious than others.’⁴⁶⁸

Whilst this sub-division of the principle of proportionality, may appear to over complicate an already complex principle of penalty theory and practice, it is highly relevant when viewed in light of the complex task before the ICC and the other ad-hoc international courts and tribunals. Because the job they have before them requires both ordinal and cardinal proportionality, especially in terms of the ICC sentencing rationale, because not only is the ICC required to punish crimes in many socially and culturally diverse States across the globe, it is also tasked with ensuring accountability for crimes that are likely to be equally as diverse. In addition to this the ICC must also manage to ensure that some level of proportionate justice is carried out in line with the retributivist theory of justice, therefore it remains to be seen what effect the fact that one trial chamber of the ICC has opted for a cardinal approach to proportionality, whilst the other trial chamber has taken the ordinal approach. Moreover I believe this complex task is best surmised in the words of Dragana Radosavljevic:

Whilst pursuing accountability goals, a balance should be reached between proportionality and culpability which means that consistency demands similar crimes be dealt with in equal measure and furthermore that the penalty imposed be proportionate to the wrongdoing.⁴⁶⁹

4.4 Utilitarianism – An Overview

Whilst utilitarianism has not really been put forward as one of the punishment objectives of the ICC or the ad-hoc tribunals (mainly the ICTY& ICTR) from whom the ICC is most likely to develop its own penalty praxis. It is necessary to undertake an exploration of utilitarianism in order to fully understand what proportionality is and why it is the most favoured legal principle in relation to punishment. As a starting point it seems appropriate to highlight the

⁴⁶⁸ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) 9, Para 33

⁴⁶⁹ Dragana Radosavljevic, ‘Restorative Justice Under the ICC Penalty Regime’ (2008)7(2) LPICT 235, 235

biggest distinction between utilitarianism and retributivism, which is that that retributivism is 'deontological' in its nature, meaning that it has morality as its central focus. Whilst In contrast utilitarianism is 'consequentialist', in simplistic terms this means that it is concerned with the supposed effects of punishment rather than addressing the issues of morality in relation to harm or wrong done, whereas utilitarianism is more concerned with preventing further harm occurring.

The two most notable utilitarian theorists are John Stuart Mill⁴⁷⁰ and Jeremy Bentham,⁴⁷¹ who developed the theory during the eighteenth and early nineteenth century. Whilst there is a distinguishable difference between Bentham's 'hedonistic' theory of utilitarianism and Mill's 'rule' version of utilitarianism, they also share a common feature, which is that they both have as their overriding objective of the use of punishment to attain '... the achievement of the greatest happiness for the greatest number.'⁴⁷² Thus in summary utilitarianism, is an acceptance that harm to a few is necessary and acceptable, when it brings benefits to the greater good of society.

Rule utilitarianism as advocated by Mills, acknowledges that adherence to a rule is necessary so long as it is '... likely to maximize happiness ...'⁴⁷³ and presupposes that justice is merely a tool to ensure happiness for the greater number of a society's members. However, to go into much greater depth of this somewhat antiquated theory of utilitarianism (in the sense that it is rarely cited as a sentencing objective by the international courts or ad-hoc tribunals), would be to diverge to far from the topic being discussed here, so it is to the more commonly accepted form of utilitarianism as

⁴⁷⁰ Bryan Greetham, *Philosophy* (Palgrave Macmillan 2006) 322

⁴⁷¹ Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in Burns JH and Hart HLA (eds), *An Introduction to the Principles of Morals and Legislation: Jeremy Bentham* (Methuen Pub 1982) (Originally pub 1780)

⁴⁷² Stanley E Grupp, *Theories of Punishment* (Indiana Uni Press 1971) 7

⁴⁷³ Bryan Greetham, *Philosophy* (Palgrave Macmillan 2006) 324

conceptualised by Jeremy Bentham, who is often described as the 'father' of the utilitarian school of thought.⁴⁷⁴

Bentham's theory of utilitarianism, which is commonly referred to as 'hedonistic act utilitarianism', has been described as forward looking in that the punishment has the sole aim '... to induce others to desist from crime.'⁴⁷⁵ The key of Bentham's theory of utility is that he believed that, 'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do...'⁴⁷⁶ Bentham founded this principle on the assumption that all people are free thinking individuals, who will ultimately choose the more preferable course of action or behaviour, but that when the preferable course of conduct is not chosen, then a pain or harm must be done to them.⁴⁷⁷ The justification for the infliction of pain is the greater good of society or at least the greater number of people, so as to deter that individual from that unfavourable course of action in future, as well as to deter others from choosing the same course of harmful action.⁴⁷⁸ However, it is worth noting that within Bentham's theory of utility, traces of the principle of proportionality can be found; in the sense that Bentham who believed that '... [w]here two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.'⁴⁷⁹ Furthermore Bentham believed that if too severe a punishment was used, this would lead to an injustice and injustice was something that Bentham was keen to avoid, despite been a keen supporter of deterrence. Once more reinforcing the view that proportionality to some degree, must be present for justice to be fairly administered; even if only to provide a scale upon which the seriousness of harm done can be matched to a commensurate level of pain that may be administered by the States, or in the more modern scenario setting the scale

⁴⁷⁴ David Schicor, *The Meaning and Nature of Punishment* (Waveland Press Inc 2006) 30

⁴⁷⁵ Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Just* 55, 59

⁴⁷⁶ Jeremy Bentham, *Principles of Morals and Legislation* (1781) Chapter I(I)
<http://www.constitution.org/jb/pml_01.htm> (Accessed on 12/07/2013)

⁴⁷⁷ Jeremy Bentham, *Principles of Morals and Legislation* (1781) Chapter I(I)
<http://www.constitution.org/jb/pml_01.htm> (Accessed on 12/07/2013)

⁴⁷⁸ Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Just* 55, 56-59

⁴⁷⁹ J H Burns & H L A Hart, *Jeremy Bentham :An Introduction to the Principles of Morals and Legislation* (Methuen 1982) 168

for an international court or tribunal and the national courts that will ideally follow by example.⁴⁸⁰ However it is worth noting that modern utilitarian theorists, such as Richard Posner, who view utility in economic terms, believe that it is acceptable for disproportionate punishments to be handed out if the ‘... severe punishment of a few [means] it is more cost efficient.’⁴⁸¹ One key element that is common to all theories of utility is the justification of punishment by means of it being a tool to deter not only the current offender, but to also deter others from committing the same wrong or harm in future; which brings us to the type of utilitarianism, commonly known as deterrence.

4.5 Deterrence a Sub-division of Utilitarianism

Deterrence theory justifies punishment not because it is deserved, but rather because punishment consequentially builds a safer world⁴⁸² as has been apparent over the previous few paragraphs, in which a brief overview of the theory of utilitarianism was explored. Deterrence is an integral part of utilitarian justifications for punishment and is a principle in which it is assumed that, ‘... the actual or perceived risk of punishment must outweigh the potential benefits that may be derived from the offense to make certain that individuals will refrain from committing a criminal act.’⁴⁸³

Therefore, whilst it may in theory seem like a viable argument for giving harsh sentences to a few in the hope that it will set an example and potentially deter others in the future (secondary deterrence). It is also flawed in the sense that it assumes that all humans share the same moral rationality and fear of punishment and would therefore choose to act within the law, for fear that they may risk the harsh consequences of acting outside the law. However if this were truly the case, then there would be no need for the ICC to exist, because with the age of globalisation and instant media access, there is no hiding the punishments that have been handed out by the ad hoc tribunals or the few sentencing

⁴⁸⁰ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6

⁴⁸¹ Richard A Posner, *Economic Analysis of Law* (Little Brown 1977) 170

⁴⁸² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 169

⁴⁸³ David Schicor, *The Meaning and Nature of Punishment* (Waveland Press Inc 2006) 31

decisions of the ICC. Nonetheless, this does not seem to have deterred others from committing the same human rights atrocities both in those same States and in various other States across the globe as was evidenced in the former Yugoslavia when the Srebrenica massacre (1995) and the Kosovo ethnic cleansing (1998), took place whilst the ICTY was in the thick of its investigations and prosecutions.⁴⁸⁴ Nonetheless, it would be ignorant to assume that there is not some deterrent value to these investigations and prosecutions as there is no way to quantify how many additional atrocities would take place if no form of judicial action were taken at all.⁴⁸⁵

Therefore, whilst deterrence cannot be said to anywhere near as effective as envisioned by the likes of Bentham, Beccaria and Mill, it must have some believed effect given that the Preamble to the Rome Statute 1998 makes reference to not only bringing an end to 'impunity' but also to '... contribute to the prevention of such crime ...'.⁴⁸⁶ Whilst the words 'deter' or 'deterrence' are not directly used, the use of the word 'prevention' implies deterrence, as the only way in which to prevent future crimes is to deter future offenders, by means of bringing about swift and certain justice. The ICC through its principle of complementarity as detailed under Article 17 of the Rome Statute 1998 could be described as seeking to ensure that no offences of the grave nature covered by the court's jurisdiction go unprosecuted. As Article 17 states that the court will only seek to prosecute when a member State is unable or unwilling to prosecute, subsequently sending out the message to offenders or potential offenders that if you are not prosecuted at the domestic level, then the ICC will step in to ensure that justice is carried out. Whilst in theory this may seem to have a deterrent effect, in reality due to the financial and man power constraints that the ICC has to deal with, they are not able to prosecute every offender that goes unpunished by the State. However it is quite possible that the ICC believes that by 'being seen' to prosecute even a few of the higher level offenders, it may deter others from committing similar atrocities in future.

⁴⁸⁴ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 169

⁴⁸⁵ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 169

⁴⁸⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble

The classical conception of deterrence is no longer acceptable to modern society, as it relied upon harsh punishments, that are nowadays ‘... associated in people’s minds with inhumane kinds of penalty, and especially capital punishment.’⁴⁸⁷ However, when classical deterrence was first born, capital punishment was commonplace,⁴⁸⁸ but as the chapter which explored the trend for abolition of the death penalty illustrated, there are many international treaties that prohibit these forms of punishment in modern justice. However some of the older deterrence theorists were aware that penalties should not be too harsh or greatly disproportionate to the harm caused to society,⁴⁸⁹ because it was feared that if the penalties were too severe, it might drive men to ‘... commit additional crimes to avoid the punishment for a single crime.’⁴⁹⁰ This would seem logical, as Beccaria pointed out that:

The countries and times most notorious for severity of penalties have always been those in which the bloodiest and most inhumane deeds were committed, for the same spirit of ferocity that guided the hand of the legislators also ruled that of the parricide and assassin.⁴⁹¹

Indeed this is a logical statement, because it is often in States that have become desensitised to the violence and inhumane treatment from those in power, that then become the States in which the human rights atrocities take place, as was illustrated in Nazi Germany during World War II and also in Rwanda, where violence becomes commonplace and pre-requisite for survival.⁴⁹² Therefore perhaps some form of milder deterrence theory is what is intended by the courts and ad hoc tribunals of today, where perhaps global shaming and an increased certainty that these crimes will not go unnoticed or

⁴⁸⁷ N Walker, ‘Reductivism and Deterrence’, in Duff and Garland (eds) *A Reader on Punishment* (OUP 1994) 213

⁴⁸⁸ Stephen E Brown, Finn-Aage Esbensen & Gilbert L Geis, *Criminology: Explaining Crime and Its Context* (7th edn, Anderson 2010) 140

⁴⁸⁹ Cesare Beccaria, ‘On Crimes and Punishment’, in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 127

⁴⁹⁰ Cesare Beccaria, ‘On Crimes and Punishment’, in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 127

⁴⁹¹ Cesare Beccaria, ‘On Crimes and Punishment’, in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 127

⁴⁹² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 171

unpunished⁴⁹³ is hoped to be enough to ensure that the potential criminal is prevented from ‘... inflicting new injuries ... and to deter others from similar acts.’⁴⁹⁴

Therefore in conclusion whilst the ICC and the ad hoc tribunals may not have deterrence at the heart of their punishment objectives, it certainly is possible that through their transparency of proceedings combined with the impetus that their existence places upon States to take charge of the proceedings themselves, that future offences may already be being deterred (general deterrence). In addition to this by catching the key perpetrators of these crimes and sentencing them to lengthy if not life sentences, then through incapacitation, they are being prevented from committing any future crimes. Furthermore this brief overview of utilitarianism and more specifically deterrence theory, has served to illustrate that the principle of proportionality is at the heart of all modern and westernised conceptions of justice, as to sum up in the words of Cesare Beccaria ‘There must, therefore, be a proper proportion between crimes and punishment’⁴⁹⁵ in order for justice to be attained.

4.6 Proportionality and Consistency at the ICC

Having now established the importance of proportionality and its foundation in punishment theory, via an assessment of retributivist theory and utilitarianism, it is now necessary to turn to the direct correlation between consistent sentencing jurisprudence (or lack of) in the case of the ICC and what this means for the legal principle of proportionality, which has undoubtedly been established as a prerequisite to the attainment of justice.⁴⁹⁶ One of the

⁴⁹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble, Para 4 & also as affirmed in *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁴⁹⁴ Cesare Beccaria, ‘On Crimes and Punishment’, in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 126

⁴⁹⁵ Cesare Beccaria, ‘On Crimes and Punishment’, in Stanley E Grupp (eds), *Theories of Punishment* (Indiana Uni Press 1971) 132

⁴⁹⁶ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) *Amsterdam Law Forum* 3, 3

key problems that instantly becomes apparent when looking at the prosecution of extraordinary crimes, such as those within the jurisdiction of the ICC is because ‘... there is no punishment under human law sufficiently grave enough to match [their] guilt.’⁴⁹⁷ In the case of Adolf Eichmann’s trial,⁴⁹⁸ it was held that even the death penalty was inadequate compared to the crimes he perpetrated and the millions he committed to death. However human rights legislation and international treaties prohibit the use of ‘cruel and unusual punishment’⁴⁹⁹ and given that the death penalty is expressly prohibited and not provided for in any of the statutory bodies that give power to the ICC and the other international ad hoc courts and tribunals, custodial sentences are all that remain at the disposal of the courts to try and apportion to the level of harm caused to society by these reprehensible offenders.

Following on from this Mark Drumbl a leading scholar in the subject area of punishment for abuses of human rights and atrocities, such as those within the jurisdiction of the ICC,⁵⁰⁰ has noted several key issues that could prove to be obstacles to the attainment of justice:

1. Sentences for ordinary crimes such as murder are generally equal to if not longer in some States, than those attributed to extraordinary crimes, such as war crimes or genocide.
2. There does not appear to be a general trend that the international courts and tribunals will be the ones to give out the harsher sentences.

⁴⁹⁷ *The State of Israel v Adolf Eichmann* (S Ct Israel, May 26 1962) 36 ILR 277 (1968) 348

⁴⁹⁸ *The State of Israel v Adolf Eichmann* (S Ct Israel, May 26 1962) 36 ILR 277 (1968)

⁴⁹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 7, • Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) (Rome, adopted 4 November 1950, entered into force 3 September 1953) TS 71 (1953) Cmd 8969 Art 3 and the American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 (entered into force July 18 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) Art 2

⁵⁰⁰ Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007)

3. That there is a ‘... significant disparity within and among institutions when it comes to the severity of sentence, and this disparity is not consistently explainable on the basis of the gravity of the offense.’⁵⁰¹

If we take the first issue as our starting point, there is no way of disputing that sentencing for ordinary crimes within national legislation is often harsher than those for extraordinary crimes; as illustrated by the fact that none of the statutory instruments that create these courts and ad hoc tribunals permit the use of the death penalty, simply because the death penalty is contrary to international human rights norms (as established in chapter 2). However, whilst these statutory instruments do prohibit the international courts and tribunals from issuing a sentence of death, they do not prohibit the national courts from doing so. Thus, given that the national courts especially in relation to the ICC are presumed to carry out the vast majority of the prosecutions⁵⁰² and as it has been established that States will generally apply the sentencing rationales which they apply to ordinary crimes,⁵⁰³ meaning that the national courts have an increased likelihood of giving out harsher sentences than the international courts,⁵⁰⁴ does this paradox not create a situation where the sentencing constraints placed upon the ICC by Article 77 of the Rome Statute 1998 may undermine those of the national legislative instruments? Nonetheless until there is a global consensus that the death penalty no longer has a place in the process of justice, then this disparity of penalties between ordinary and extraordinary crimes will continue to exist.

Leading on from this point, the second issue raised by Drumbl highlights that there does not appear to be a trend whereby the international courts or tribunals give harsher sentences than the national courts, which are prosecuting offenders for similar crimes. This does seem highly surprising given that the international courts are more likely to be only prosecuting the higher ranking and therefore more culpable offenders due to being able to only

⁵⁰¹ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 154

⁵⁰² ICC Review Conference Resolution, ‘Complementarity’ RC/Res.1 (Kampala, 8 June 2010) 1

⁵⁰³ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) *Amsterdam Law Forum* 3, 6

⁵⁰⁴ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6-7

undertake a small percentage of the cases and as has been illustrated by the level of perpetrator that they have to date investigated or commenced trial proceedings against.⁵⁰⁵ Whilst the national courts who are expected to take on the bulk of the investigations and prosecutions either because the crime took place within their State or through universal jurisdiction, will hopefully prosecute not only the higher ranking and therefore most culpable perpetrators but also the lower level perpetrators that the ICC would not deem of high enough rank and therefore not be deemed to be of ‘... sufficient gravity to justify further action ...’⁵⁰⁶ and will potentially be applying harsher sentences than the ICC.

When this inconsistency of sentencing practice between the national and international jurisdictions is considered in the context of the ICC, which will need to take into consideration the often conflicting views about justice held by its member States when making sentencing determinations, so as to ensure reconciliation will follow and that they satisfy the victims ‘... thirst for vengeance ...’.⁵⁰⁷ It is easy to see why drafters of the Rome Statute 1998 have chosen to take a moderate and exemplary human rights stance towards punishment, as they will never be able to appease everyone, especially whilst there is still a divide on the death penalty debate and one that seems unlikely to reach a unanimous consensus culminating in global abolition of the death penalty at any point in the near future. However, perhaps as Drumbl has stated, by taking the exemplary human rights stance in accordance with the accepted customary norms of what is deemed humane punishment at the international level, perhaps the ICC can use its elevated status as an international institution and become a ‘... trendsetter for [its] national and local counterparts.’⁵⁰⁸

⁵⁰⁵ ICC Website, ‘Situations and Cases’ <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> Accessed on (20/02/2013)

⁵⁰⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17(1)(d)

⁵⁰⁷ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁵⁰⁸ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6

If we briefly look to the examples of the ICTY and ICTR as an illustration for the potential sentencing disparity that may lie ahead for the ICC, we see a 'sentencing paradox' in which the higher level offenders who are tried before international courts or tribunals receive milder sentences than those lesser ranking offenders who have been tried before the national courts.⁵⁰⁹ For example, many of the former Yugoslavian States have sentences of forty years upwards on their statute books for extraordinary crimes,⁵¹⁰ whilst the ICTY has an average final sentence for convictions brought about under Article 7(1) of the ICTY statute⁵¹¹ of eighteen years.⁵¹² Furthermore, greater disparity is found when a direct comparison is made with the ICTR, which has a final sentence average for the same crimes under Article 6(1) of the ICTR statute⁵¹³ as does Article 7(1) of the ICTY statute, only the ICTR has an average sentence length of 46.9 years⁵¹⁴ of imprisonment. This disparity, Mark Drumbl has suggested will only serve to undermine the '... supposedly enhanced retributive value of punishment at the ICTY.'⁵¹⁵

Similarly in relation to the ICTR and the disparities with Rwandan domestic prosecutions, the figures suggest that the ICTR has handed out more life sentences on average than the Rwandan courts. However, when we factor in that prior to the abolition of the death penalty in 2007 in Rwanda, 10% of genocide convictions in the national courts received the death penalty (this is not to say that all of the executions were carried out, only 22 are known of),⁵¹⁶ this severely distorts the figures and means that the national courts appear to have a harsher sentencing jurisprudence than the ICTR. Furthermore, in the case of the

⁵⁰⁹ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3, 10

⁵¹⁰ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 101

⁵¹¹ UNSC Res Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) UN Doc S/Res/827 (last amended September 2009) Art 7(1)

⁵¹² Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Bloomsbury Pub 2011) 227

⁵¹³ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 6(1)

⁵¹⁴ Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Bloomsbury Pub 2011) 227

⁵¹⁵ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 158

⁵¹⁶ Amnesty International Report, 'Major step back for human rights as Rwanda stages 22 public executions' AFR 47/14/98 (24 April 1998)

Prosecutor v. Bisengimana [2006] *Prosecutor v Bisengimana* (Judgement and Sentence) ICTR-00-60-T (13 April 2006),⁵¹⁷ the ICTR duly noted that had the offender been tried by a domestic *Gacaca* court, due to his social status, he would have received a sentence upwards of twenty five years to life. However, the ICTR despite acknowledging this, the ICTR ignored the domestic sentencing policy of Rwanda and opted to give a lesser sentence of fifteen years, in accordance with its own sentencing guidelines.⁵¹⁸ The reason this often happens is due to the fact that, mitigating circumstances and plea bargains are often factored into the sentencing and when an offender admits guilt and therefore shows remorse, as occurred in the Case of *Prosecutor v. Bisengimana*⁵¹⁹ the court will be more lenient in its sentencing. Nonetheless, this is not to say that mitigating factors are not considered by the national courts, but as Drumbl⁵²⁰ and Schabas⁵²¹ have noted the national courts are often ‘fettered’ in sentencing determination due to being bound by constraints within their legislation that ascribes sentence length⁵²² or ‘... set out a precise and detailed range of sentencing options.’⁵²³ An example of this can be seen in Rwanda where Articles 14-18 of Organic Law No 08/96 of 30 August 1996⁵²⁴ seriously curtail the discretion of the judges, by stipulating what the punishment should be for category 1 and 2 offences⁵²⁵ and where a confession or guilty plea is entered a minimum and maximum sentence is given,⁵²⁶ once again fettering the discretion given to the judges when trying to incorporate mitigating circumstances into the sentencing rational.

⁵¹⁷ *Prosecutor v Bisengimana* (Judgement and Sentence) ICTR-00-60-T (13 April 2006) 194

⁵¹⁸ *Prosecutor v Bisengimana* (Judgement and Sentence) ICTR-00-60-T (13 April 2006) 194

⁵¹⁹ *Prosecutor v Bisengimana* (Judgement and Sentence) ICTR-00-60-T (13 April 2006)

⁵²⁰ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 158

⁵²¹ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 331

⁵²² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 73

⁵²³ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 331

⁵²⁴ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990

⁵²⁵ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990 Art 14 (a) & (b)

⁵²⁶ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1995 Arts 15-17

4.7 Plea Bargains, Mitigating and Aggravating Circumstances

Plea bargains and the acceptance of mitigating or aggravating circumstances as grounds for a reduced or increased length of sentence during trials before the ICC, are provided for in Articles 65 (1)(c) and 78 of the Rome Statute 1998 and also Rule 145 of the ICC Rules of Procedure and Evidence 2002,⁵²⁷ and these various provisions provide scope for a great deal of judicial discretion over the sentence determination.⁵²⁸ A plea bargain is an ‘... agreement between the prosecution and the defence by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution (for example to drop a more serious charge against the accused) or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty.’⁵²⁹ Plea bargains, therefore often allow those being prosecuted to avoid prosecution for the more serious of the offences that they stand accused of and subsequently to avoid the lengthier sentences. However, Plea bargains have also been cited as being positive in light of the fact that the apology and recognition that often goes hand in hand with such confessions, is deemed to conducive to reconciliation⁵³⁰ and allowing the victims the opportunity to receive an apology and possibly provide forgiveness in return;⁵³¹ all of which are helpful in rebuilding a post-conflict nation.

However, Drumbl has also noted that at the national level judges have often ‘... award[ed] huge discounts for guilty pleas in the name of administrative economy ...’,⁵³² because to not have to take case to trial not only saves time and staff resources, but also money and creates what appears to be efficiency within the judicial system. In addition to plea bargains, the ICC under Article 78 (1) of the Rome Statute 1998 as will many national courts, take into consideration mitigating circumstances (factors that encourage the court to be more lenient

⁵²⁷ Rules of Procedure and Evidence of the International Criminal Court (adopted 9 September 2002) ICC-ASP/1/3

⁵²⁸ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007)

⁵²⁹ Elizabeth A Martin (eds), *Oxford Dictionary of Law* (5th edn, OUP 2003) 368

⁵³⁰ Drumbl MA, *Atrocity, Punishment and International Law* (CUP 2007) 165

⁵³¹ *Prosecutor v Bisengimana* (Judgement and Sentence) ICTR-00-60-T (13 April 2006) 136-137

⁵³² Drumbl MA, *Atrocity, Punishment and International Law* (CUP 2007) 167

with sentencing)⁵³³ and also aggravating circumstances (factors that are deemed to heighten the gravity of the crime),⁵³⁴ when determining the appropriate sentence for the crimes being prosecuted. Rule 145 of the ICC Rules of Procedure and Evidence 2002⁵³⁵ sets out some of the factors that the ICC can consider to be mitigating or aggravating circumstances when making their sentencing determination.

These three general grounds upon which the court is given discretion to potentially reduce or increase the sentence, are all variants which only serve to undermine the principle of proportionality and consistency because it ‘... vitally creates uncertainty concerning benchmark sentences.’⁵³⁶ And without certainty and consistency, how will the ICC be able to lead the way and set an example for the national courts⁵³⁷ by illustrating in a consistent⁵³⁸ and transparent⁵³⁹ manner what is deemed at the international level to be a proportionate penalty for these extraordinary crimes. Without benchmark sentences and a more structured and consistent penalty praxis, which as we have already seen not only makes deterrence very unlikely because potential offenders have no way of knowing what type of punishment they might expect to receive should they commit a certain type of crime. Furthermore, this flexibility in sentencing ‘... does not promote consistency and therefore could confuse public perception as to the gravity of the crime.’⁵⁴⁰ This is concerning, as it would be counter to the retributive function of the ICC seeking to bring an end to crimes of this nature through punishment. Therefore, whilst I do not propose a rigid system of fixed sentences, it would be helpful to possibly look to set some benchmarks within the Rules of Procedure and Evidence of the ICC, which would set minimum sentences for the various

⁵³³ Elizabeth A Martin(eds), *Oxford Dictionary of Law* (5th edn, OUP 2003) 318

⁵³⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 78(1)

⁵³⁵ International Criminal Court Rules of Procedure and Evidence ICC-ASP/1/3 (Part II-A) (adopted and entered into force 9 September 2002) Rule 145(2)(a)(i)

⁵³⁶ Dragana Radosavljevic, ‘Restorative Justice Under the ICC Penalty Regime’ (2008)7(2) LPICT 235, 255

⁵³⁷ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6

⁵³⁸ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 3

⁵³⁹ Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 89

⁵⁴⁰ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 162

crimes that fall under the jurisdiction of the ICC. In setting a minimum sentence for each category of crimes, the aim would be to still provide a generous level of judicial discretion in sentencing determination facilitated through plea bargains and mitigating or aggravating circumstances; but would provide a starting point from which the ICC judges and then hopefully the national courts would look to for guidance as a starting point to achieve consistent and proportionate sentences for these extraordinary crimes. Nonetheless, whilst this would be a very interesting topic to discuss in greater depth, this is a topic that could be a thesis in its own right and will therefore not be explored in greater depth within this thesis, but merely serves to illustrate how the current sentencing practice could be improved upon, without placing rigid constraints upon the judges of the ICC.

4.8 The Plasvic Paradox

A famous example, where the offender received a sentence that was gravely disproportionate to their crimes and was also sent to serve their sentence in Western prison, was the case of *Prosecutor v Biljana Plasvic* (Sentencing Judgement) IT-00-39 & 40/1-S (27 February 2003), who was a former Bosnian Serb leader. Biljana Plasvic a much respected biologist from Bosnia who had many academic accolades, went on to become the co-founder of the Serbian Democratic Party in 1990 in conjunction with Radovan Karadzic, where she swapped her communist values for those of ‘... ethnic nationalism’s.⁵⁴¹ She was charged with eight counts of violating Articles 7 (1) and Article 7 (3) of the ICTY Statute,⁵⁴² which included crimes against humanity and genocide, but was eventually convicted of only one of the eight counts initially brought against her, despite her actions or some cases inactions resulting in the death of thousands.⁵⁴³ This is because Plasvic entered into a plea agreement with the ICTY Prosecutor,⁵⁴⁴ which meant all charges were dropped against her, except for the one count, which was count three ‘... persecutions, a crime against humanity

⁵⁴¹ Elena Subotica, ‘The Cruelty of False Remorse: Biljana Plasvic at the Hague’ (2012) 36 SE Europe (Brill) 39, 41

⁵⁴² *The Prosecutor of the Tribunal Against Biljana Plasvic* (Indictment) IT-00-40-I (3 April 2000)

⁵⁴³ Statement made by Biljana Plasvic at her sentencing hearing: *Prosecutor v Biljana Plasvic* (Sentencing hearing) IT-00-39 & 40/1-S (17 December 2002) 609-610

⁵⁴⁴ *Prosecutor v Biljana Plasvic* (Plea Agreement) IT-00-40 PT (30 September 2002)

...⁵⁴⁵; subsequently her trial was separated from that of Momcilo Krajisnik.⁵⁴⁶ At her sentencing hearing, she was portrayed as ‘... neatly coifed with color-coordinated purses and dresses ... a civilized contrast to the male hard-liners in the wartime government.’⁵⁴⁷ Plasvic had voluntarily surrendered herself to the ICTY on the 7 January 2001, and subsequently received a controversially short sentence of eleven years⁵⁴⁸ for her crimes. The justification for this short sentence was described as being due to:

... having acknowledged the mitigating factors, in particular the acknowledgement of crimes, acceptance of responsibility and expression of remorse from a former leader, points out, correctly, that these factors must be appropriately balanced against the gravity of the crime and the factors in aggravation ...⁵⁴⁹

The mitigating factors that were listed at the sentencing hearing consisted of the entry of a guilty plea showing remorse and a desire for reconciliation, voluntary surrender, post-conflict conduct and her age.⁵⁵⁰ The reference to post-conflict conduct relates to her work with a Mr Hollingsworth from the UNHCR, who sought to provide humanitarian aid to Bosnian Muslim villages.⁵⁵¹ Her guilty plea was described by the sentencing hearing as being evidence of remorse and illustrating a desire for reconciliation, has since been described as ‘... strangely superficial ...’⁵⁵² in that it seemed almost detached and rehearsed; furthermore the ICTY Prosecutor Del Ponte, has since admitted ‘... I listened to her admissions in horror, knowing she was saying nothing.’⁵⁵³ Furthermore, Plasvic’s refusal to testify against others was not held to be an aggravating factor, whilst in the case of *Prosecutor v Goran Jelusic* (Judgement) IT-95-10-T (14 December 1999), Jelusic received a forty year sentence for the crimes of violating the laws or customs of war and of crimes against humanity⁵⁵⁴ and in

⁵⁴⁵ *Prosecutor v Biljana Plasvic*, Sentencing Judgement, IT-00-39 & 40/1-S (27 February 2003) 1, Para 5

⁵⁴⁶ *Prosecutor v Momcile Krajisnik & Biljana Plasvic* (Decision on Motion from Biljana Plasvic for Separate Trial) IT-00-39 & IT-00-40/1 (27 April 2001)

⁵⁴⁷ J Hammer, ‘The Empress Deposed’ (Newsweek, 22 January 2001)

<http://www.thedailybeast.com/newsweek/2001/01/21/the-empress-deposed.html> (Accessed 05/08/2013)

⁵⁴⁸ *Prosecutor v Biljana Plasvic* (Sentencing Judgement) IT-00-39 & 40/1-S (27 February 2003) 41, Para 132

⁵⁴⁹ *Prosecutor v. Biljana Plasvic*, Sentencing Judgement, IT-00-39 & 40/1-S (27 February 2003) 40, Para 128

⁵⁵⁰ *Prosecutor v. Biljana Plasvic*, Sentencing Judgement, IT-00-39 & 40/1-S (27 February 2003) 20-30

⁵⁵¹ *Prosecutor v. Biljana Plasvic*, Sentencing Judgement, IT-00-39 & 40/1-S (27 February 2003) 39, Para 123

⁵⁵² Jelena Subotic, ‘The Cruelty of False Remorse: Biljana Plasvic at the Hague’ (2012) 36 SE Europe (Brill) 39, 46

⁵⁵³ Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (Otherpress 2009) 161

⁵⁵⁴ *Prosecutor v Goran Jelusic* (Judgement) IT-95-10-T (14 December 1999) 2

paragraph 133 of his trial hearing, it was stated that without the aid of testimony from people like Jelusic, the ICTY would not be '... able to achieve their ends ...'⁵⁵⁵ and his failure to testify against others was held to be an aggravating factor.⁵⁵⁶ This disparity between the two cases is inexplicable, but serves to illustrate that even with the same court, there can be vast inconsistencies, that serve to undermine justice.

Whilst the relatively short sentence undermines the gravity of the crimes that Biljana Plasic was convicted of, more controversial is the fact that she was sentenced to serve this in a Swedish prison which is reported to have a sauna, steam rooms and even a horse riding arena.⁵⁵⁷ Further undermining the already lenient sentence is the fact that on the 27 October 2009, Biljana Plasic was released early, after having only served two thirds of her sentence, but the early release was in accordance with the law of the State in which she was serving her sentence (Sweden); she was now eligible for parole.⁵⁵⁸ The provision for the sentence to be served in accordance with the legislation of the country in which the sentence was carried out, undermines the gravity and seriousness of the offence, given that there are many people who have been found guilty of the ordinary crime of murder across the globe; and who are currently or who have served sentences that actually meant life. However the most remarkable part of the whole Biljana Plasic case is that the ICTY granted her early release, even after she retracted her confession in an interview to Banjaluka TV and published a two volume memoir called 'I Testify'.⁵⁵⁹ Even more alarming, was that in an interview in January 2009 with Vi magazine (the same year that she was granted early release), she unequivocally stated that the only reason she entered the guilty plea, was to have the genocide charges dropped and to reduce the length of the trial.⁵⁶⁰ What is most concerning, is that despite all of this evidence including a direct retraction of her guilty plea

⁵⁵⁵ *Prosecutor v Goran Jelusic* (Judgement) IT-95-10-T (14 December 1999) 40, Para 133

⁵⁵⁶ *Prosecutor v Goran Jelusic* (Judgement) IT-95-10-T (14 December 1999) 40, Para 133

⁵⁵⁷ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 160

⁵⁵⁸ UNSC Res 1329 'Amending the Statute of the International Criminal Tribunal for the Former Yugoslavia' (30 November 2000) UN Doc S/RES/1329 Art 27

⁵⁵⁹ Jelena Subotic, ' The Cruelty of False Remorse: Biljana Plasic at the Hague' (2012) 36 SE Europe (Brill) 39, 48-49

⁵⁶⁰ Jelena Subotic, ' The Cruelty of False Remorse: Biljana Plasic at the Hague' (2012) 36 SE Europe (Brill) 39, 48

and statements of remorse, the then ICTY Prosecutor Patrick Robinson, in the September of 2009 stated that he thought Plasvic ‘... appears to have demonstrated substantial evidence of rehabilitation and had accepted responsibility for her crimes.’⁵⁶¹ It has been suggested by Jelena Subotic that the biggest failing of this whole case, was that it allowed a ‘... high-ranking official to perpetrate fraud on the international community ...’.⁵⁶² However, what this failure of justice serves to illustrate is that, plea bargains have no place in trials for crimes of this magnitude and only serves to illustrate that the need for a level of punishment that is equal to, at least on some scale comparable to the gravity of the offence is the only way to ensure justice is achieved. Whilst remorse does play a part in reconciliation and possibly provide some comfort to the victims or their families, it is not necessarily a factor that should be attributed such weight in sentencing determination, as there is no way to ensure that the remorse is genuine nor that it will not be retracted after the trial, as occurred with Biljana Plasvic.⁵⁶³ Moreover, whilst the ICTY has handed down some heavy sentences, such as the forty year sentence given to Goran Jelusic, the lack of consistency and the tendency to be lenient where the defendant has been cooperative or remorseful, will certainly do little to deter future offenders, as they will be willing to take the risk, given that there is a chance they could receive a fairly lenient sentence. And whilst the ICC has yet to clearly illustrate how much weight it will attribute to statements of remorse either made in plea bargains or non-negotiated admissions of guilt when determining the appropriate level of sentence, the fact remains that these admission of guilt or remorse can easily be given falsely or retracted at a later date, which can undermine the retributive value of the sentence. Especially when it is known that some States have continental systems, whereby admissions of guilt are viewed with ‘... deep suspicion and courts are expected to rule on guilt and innocence based on the evidence, irrespective of such a plea.’⁵⁶⁴ Whilst in contrast, States that have common law systems allow guilty pleas, whether given freely or as part of plea bargain, to be given in exchange for ‘commitments

⁵⁶¹ ICTY President Patrick Robinson, as cited in Jelena Subotic, ‘The Cruelty of False Remorse: Biljana Plasvic at the Hague’ (2012) 36 SE Europe (Brill) 39, 49

⁵⁶² Jelena Subotic, ‘The Cruelty of False Remorse: Biljana Plasvic at the Hague’ (2012) 36 SE Europe (Brill) 39, 57

⁵⁶³ Jelena Subotic, ‘The Cruelty of False Remorse: Biljana Plasvic at the Hague’ (2012) 36 SE Europe (Brill) 39, 48

⁵⁶⁴ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 310

from the prosecutor as to the severity of the sentence⁵⁶⁵ as has been the stance taken by the ICTY and ICTR. Nonetheless, the ICC does strike a ‘... healthy balance ...’⁵⁶⁶ between the continental and common law approaches to guilty pleas and allows the judges the discretion to decide whether they feel the admission of guilt is appropriate based upon the prerequisites set out in Article 65(1) of the Rome Statute 1998 and can therefore proceed to the sentencing or where they do not feel the prerequisites have been met, they can request ordinary trial proceedings be undertaken.⁵⁶⁷ However, the prerequisites of Article 65(1) of the Rome Statute make no reference to whether the ICC must feel the confession of guilt is remorseful or genuine, just that it should be freely given and that it be supported by the facts, so the Plasvic paradox may occur in cases before the ICC as well as in national common law prosecutions, which further adds uncertainty to the sentencing rationales of the courts prosecuting these ‘... most serious crimes.’⁵⁶⁸

4.9 What Can the ICC Learn from This?

Having now clearly established that there is indeed too much scope for disparity of penalties at the international level, it is to the ICC and its guiding provisions as detailed in the Rome Statute 1998 that we turn in order to see whether the same issues that have arisen for the ICTR and ICTY may potentially exist for the ICC. Furthermore, given that, ‘... the ICC is dealing with the “most serious crimes known to man” it really should be a leading example of justice’.⁵⁶⁹ However, how well the ICC can be said to achieve this can only be theorised at this point, because to date there are not enough completed prosecutions, in order to facilitate a quantitative assessment.

⁵⁶⁵ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 309

⁵⁶⁶ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 310

⁵⁶⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 65(3) & (4)

⁵⁶⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble, Para

⁵⁶⁹ Ralph Henham, ‘Some Issue for Sentencing in the International Criminal Court’ (Jan 2003) 52(1) *Int'l & Comp L Q* 81, 101

The concept of international criminal law is a relatively new one and it has often been suggested and assumed that the key principles of national criminal law have transcended to the international level, in an attempt to help establish and legitimise this new legal order.⁵⁷⁰ One of these key principles is that the penalty be proportionate to the wrong or harm done, which has been directly transferred into the international criminal legal context; is construed to mean that the 'Punishing of human rights violations [is carried out] with penalties proportionate to the gravity of the crime.'⁵⁷¹ The only noticeable difference from the national legal interpretation of this principle, is the insertion of the word 'gravity' which in simplest terms is due to the fact that there is no punishment imaginable or available, that could be directly proportionate to any of the crimes for which the ICC or any other international court or tribunal, will be called upon to prosecute.

However given that the ICC is very much in its infancy, it is imperative that it establishes itself as a stable and authoritative criminal legal body as soon as is possible so as to assert its credibility and legitimacy. Furthermore it has been suggested by many that in order for the ICC to do this, it must follow the national criminal law practice, whereby:

Whilst pursuing accountability goals, a balance should be reached between proportionality and culpability which means that consistency demands similar crimes be dealt with in equal measure and furthermore that the penalty imposed be proportionate to the wrongdoing.⁵⁷²

But so long as the ICC continues to have such a vague penalty policy, as briefly outlined in Article 77 coupled with Article 80 of the Rome Statute 1998, which permits member States to apply their wide and varying penalty regimes including the death penalty when prosecuting domestically, then sadly there is little hope that uniformity or consistency of penalties will be achieved and with it the likelihood of the penalty being proportionate to the crime is lessened. This is problematic for a multitude of reasons and these will become

⁵⁷⁰ Fabian O Raimondo, 'General Principles of Law as Applied by International Criminal Courts'(2007) 6 LPICT 393, 403

⁵⁷¹ Marisa R Bassett, 'Defending International Sentencing: Post Criticism to the Promise of the International Criminal Court' (2008-2009) 16(2) HR Brief 22, 22

⁵⁷² Dragana Radosavljevic, 'Restorative Justice Under the ICC Penalty Regime' (2008) 7(2) LPICT 235, 235

apparent when explored in greater detail in the next chapter, which is a case study of the disparity of penalty regime between the ICTR and the Rwandan national courts and the problems this caused. The outcome of which, was that eventually the Rwandan domestic legislation was amended to bring it roughly in line with that of the ICTR, so as to facilitate more proportionate and consistent sentencing, as well as to allow for greater interdependence between the ICTR and the Rwandan national courts. But for now as has clearly been established in this chapter, proportionality is a principle that undeniably needs to play a central role in the sentencing practice of the ICC and without it the ‘... potential for systematic dysfunction of sentencing practice is significantly enhanced by the absence of mechanisms designed to secure consistency.’⁵⁷³

Furthermore, without consistency in sentencing practice the ICC will lose legitimacy and without legitimacy, the ICC is likely to encounter many obstacles and objections from its member States, which could make its current hybrid role in the international legal system untenable. Thus, whilst proportionality and consistency are not the same thing they do go hand in hand with one another as illustrated by the fact that national and international courts often talk about seeking to apply both in their sentencing determinations, as has recently been illustrated by the ICC in the *Thomas Lubanga* case.⁵⁷⁴ Furthermore, if a consistent approach to sentencing is maintained by the ICC, then it may well help the unstable or diminished legal systems of the States in which the crimes occur to rebuild their legal systems and enforce their rule of law on the ground, because they will have a transparent and consistent role model to follow.⁵⁷⁵

⁵⁷³ Dragana Radosavljevic, ‘Restorative Justice Under the ICC Penalty Regime’ (2008) 7(2) LPICT 235, 236

⁵⁷⁴ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012)9, Paras 33-34

⁵⁷⁵ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 3

Chapter 5: The Rwanda Case Study

Until now the thesis has explored the theoretical problems that potentially face the International Criminal Court (ICC), such as being a complementary and not a court with primacy over the national courts, which is problematic in the sense that whilst the ICC aims to step in and prosecute where the State is ‘... unable or unwilling ...’⁵⁷⁶ to do so themselves, the reality is that those States which will require the assistance of the ICC, are unlikely to be in a position to undertake the prosecutions themselves. This is primarily due to the fact that these States will be in the midst of or suffering the aftermath of some form of internal conflict, genocide or humanitarian crisis and are therefore unlikely able to help themselves or to take responsibility for ensuring justice is achieved.⁵⁷⁷

Another key theoretical issue that has been highlighted, is the lack of proportionality and consistency of sentences that is likely to occur in the current situation, where the ICC will be following one set of sentencing practices; whilst in contrast the national courts will be following their own widely varying domestic legislation and sentencing practices (as facilitated by article 80 of the Rome Statute 1998). Some of which may provide for more lenient sentences than provided for by the ICC applicable sentences as outlined in Article 77 of the Rome Statute 1998, whilst others will potentially be going to the other end of the spectrum and handing out the death penalty. Given that these two highlighted issues could potentially undermine the serious nature of the offences being dealt with and also damage the status of the ICC due to it being in its formative years subsequently causing it to lose the respect of its member States, it is essential to take a look at how one of the predecessors to the ICC dealt with vast differences in sentencing and punishment between the national and international courts.

⁵⁷⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17 (1)(a)

⁵⁷⁷ Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 88-89

Whilst the ad-hoc courts and tribunals that existed prior to creation of the ICC, differed in the sense that they had primacy rather relying upon the more complex principle of complementarity, they do nonetheless illustrate why consistency and proportionality of justice at both the national and international level is important. Whilst the ICC is not intended to dictate to the national courts how they should determine their own sentencing rationales or dictate the types of sentence the national courts should be looking to apply, as Mark Drumbl has suggested, the ICC should be looking to act as a role model and attempt to be a 'trendsetter'⁵⁷⁸ especially to those States that are in their newly formative years following a change of regime of leadership in the aftermath of atrocities. Because only then, will there begin to be some consistency and subsequently a level of proportionality in the sentencing for the majority of prosecutions for these extraordinary crimes at both the national and international level.

5.1 Why Rwanda?: Background and Context

The case study that has been selected is that of the International Criminal Tribunal for Rwanda (ICTR) and the Rwandan national courts in the years following the genocide of 1994. The reason for choosing this example as a working case study is because it is well documented, with the ICTR case law and UN resolutions that govern it being readily available and also because the Organic laws of Rwanda are easily accessible and available in English. Furthermore, it serves to highlight the obstacles the ICC may potentially encounter, so long as it permits its member States to retain and continue to use the death penalty, because the ICTR along with the ICTY is one of the most similar legal bodies to the ICC. In the sense that their objectives and powers are very similar, with the biggest exception being that the ICC has been formed by means of a multilateral treaty which States may freely opt to sign meaning that they '... chose to accept the jurisdiction ...',⁵⁷⁹ whilst in contrast the ICTR was created by a UN Security Council resolution which granted the ICTR primacy over the Rwandan national courts, unlike the ICC which only has a complementary one.

⁵⁷⁸ Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 6

⁵⁷⁹ - - 'Understanding the International Criminal Court' < <http://www.icc-cpi.int/jccdocs/PIDS/publications/UICCEng.pdf> > (Accessed on 20/02/2013)

Nonetheless, what makes the ICTR and Rwandan case so relevant is the fact that in 2007, the Rwandan government abolished the death penalty in its entirety, with the enactment of Organic Law 31/2007 of 25/07/2007.⁵⁸⁰ There are many theories as to why this occurred and they will be explored at some length in this chapter, however the most commonly accepted theory is that the Rwandan senate enacted this legislation for fear that if they did not bring their own sentencing policy in-line with that of the ICTR, then as the ICTR began to wind up its business, it would pass any outstanding cases to other legal bodies or national jurisdictions and this was something that the Rwandan government could not tolerate.

As the Registrar to the ICTR stated in address to the delegates of the XXXVIIth International Council stated in 2003:

The tragic events of 1994 in Rwanda have been well documented by the media and academics. Suffice to say that since that time the ICTR has been working closely with the Rwandan authorities to ensure not only justice for the victims but also reconciliation of the nation. Our core function is to provide a forum for all the parties to adjudicate on the issue of guilt or otherwise of individuals. As a result of this work the ICTR has set many precedents in its judicial decisions and judgments. As you all may be aware, precedents are of vital interest to lawyers. Even to this day reference is made in the ICTR deliberations to the jurisprudence of the Nuremberg and Tokyo war crimes trials of the 1940's. It will also be the case that future international criminal justice organisations will refer to the work of the ICTR. Hence, it is vital to permanently retain a complete record of our judicial work.⁵⁸¹

Invaluable lessons can be learnt from the actions of the courts and international tribunals that have gone before us, and I strongly believe that the ICC can learn a great deal from interaction between the ICTR and the Rwandan government and its national and *Gacaca* courts, as there is a distinct similarity to the present situation between the ICC and Uganda, with their traditional *Acholi* justice. In addition to this, lessons regarding the issue of complementarity or as more recently identified, positive complementarity, can be drawn

⁵⁸⁰ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law)

⁵⁸¹ Videotaped address of the Registrar of ICTR, Assistant Secretary-General Mr Adama Dieng to delegates of the XXXVIIth International Council on Archives (ICA) CITRA meeting 2003, Cape Town, South Africa cited in Tom A Adami & Martha Hunt 'Genocidal Archives: The African Context—Genocide in Rwanda' (2005) 26(1) J Soch Arch 105, 106

from the work of the ICTR and its outreach programmes. These programmes in which the ICTR along with non-governmental organisations (NGO's) sought to help Rwanda rebuild its legal system, so as to facilitate them to help themselves, will be explored at greater length in this chapter. However, before embarking upon the actual case study it is important to put the gravity of the role of the ICTR and the immense changes the Rwandan legal system has undertaken in such a relatively small period of time, into the correct context by providing a very brief background to the genocide, which is in essence the sole reason for the existence of the ICTR.

In simplest term that events of 1994 in Rwanda were sparked off by President Habyarimana's (the then president of Rwanda) plane being shot down on the night of the 6 April 1994⁵⁸² in which he was instantly killed. What ensued as a direct result of this was one hundred days of systematic killing in which it is estimated that between 500,000 to 800,000 men women and children were killed;⁵⁸³ in essence it has been described as the most organised and systematic mass killing since the Nazi Holocaust.⁵⁸⁴ However it must be acknowledged that this systematic killing that was so efficiently orchestrated using the medium of radio,⁵⁸⁵ which did not simply occur because the President of the country was assassinated. Indeed the genocide occurred as the result of years of political design compounded with other social and economic factors⁵⁸⁶ such as the pre-existing class divide between the Hutus and the previously ruling elite Tutsis, that was further exacerbated by Belgian colonisation and their program of eugenics,⁵⁸⁷ coupled with economic factors⁵⁸⁸ and

⁵⁸² Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 213

⁵⁸³ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 71

⁵⁸⁴ UNGA Press Release, 'General Assembly Marks 60th Anniversary of Liberation of Nazi Death Camps' UN Doc GA/10330 (24 January 2005) < <http://www.un.org/press/en/2005/ga10330.doc.htm> > (Accessed on 23/02/2013)

⁵⁸⁵ Habyarimana's inner circle set about creating Radio Rwanda and Radio Television Libre Mille Collines (RTLMC) that went on to be the most crucial tool in directing and orchestrating the one hundred days of violence. Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 212

⁵⁸⁶ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 209 and Catharine Newbury, 'Background to Genocide: Rwanda' (1995) 23 (2) *A Jour of Op* 12, 12

⁵⁸⁷ Phillip Gourevitch, *We Wish to Inform you that Tomorrow we will be Killed with our Families: Stories from Rwanda* (Picador Press 1998) 57

naturally occurring event such as famine.⁵⁸⁹ In addition to this, the Arusha Peace Accords (1993)⁵⁹⁰ which sought to reintegrate hundreds of thousands of Tutsi refugees who had fled to neighbouring countries following the Hutu uprising of 1959,⁵⁹¹ angered Hutus to the extent that the anti-Tutsi *Coalition pour la Defense de la Republique* (CDR) secretly began to work on a Nazi style ‘... final solution ...’⁵⁹² to the Tutsi problem.⁵⁹³ However, the background to the genocide need not be explored in any greater depth as to do so would add nothing to the discussions of this thesis, but the figures and information outlined briefly above serve to illustrate that crimes of this magnitude do not occur in isolation or due to one single event⁵⁹⁴ and may therefore be avoided if a country is stabilised and has a strong rule of law.⁵⁹⁵ It also serves to highlight the level of destruction that can often go hand in hand with crimes of this magnitude, especially in terms of infrastructure making it unlikely for the State involved to be able to take control of the prosecutions and investigations themselves in the immediate aftermath, as well as illustrating the enormity of the task before the ICC which will be called upon to intervene in more than one single State to facilitate justice.

5.2 The World Finally Takes Action and Creates the ICTR

Following the systematic killing within Rwanda where ‘... [the] dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient

⁵⁸⁸ Paul J Magnarella, ‘How Could it Happen?: The Background and Causes of the Genocide in Rwanda’ (2005) 3(4) JICJ 801, 803 and Alan J Kuperman, ‘Provoking Genocide: A Revised History of the Rwandan Patriotic Front’ (2004) 6(1) JGR 61

⁵⁸⁹ Catharine Newbury, ‘Background to Genocide: Rwanda’ (1995) 23 (2) A Jour of Op 12, 14

⁵⁹⁰ Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front (Arusha Peace Accords) RWA-020 (4 August 1993)

⁵⁹¹ Paul J Magnarella, ‘How Could it Happen?: The Background and Causes of the Genocide in Rwanda’ (2005) 3(4) JICJ 801, 803 The Hutus feared that the returning Tutsis would reclaim their land and leave many Hutus destitute.

⁵⁹² Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 212

⁵⁹³ Paul J Magnarella, ‘How Could it Happen?: The Background and Causes of the Genocide in Rwanda’ (2005) 3(4) JICJ 801, 812

⁵⁹⁴ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 207

⁵⁹⁵ Stromseth J, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 88-89

mass killing since the atomic bombings of Hiroshima and Nagasaki.⁵⁹⁶ Yet despite this the rest of the world stood back and did nothing other than to provide minimal intervention towards the end of the genocide, which took the form of Operation Turquoise, as mandated by UN Security Council resolution 929.⁵⁹⁷ This has been described by Nicholas J Wheeler to be a predominantly French-led multinational humanitarian⁵⁹⁸ force that supposedly acted out of guilt due to their previous support of the Habyarimana government,⁵⁹⁹ which had ultimately orchestrated the genocide. It has also been suggested that the French chose to instigate an operation to intervene because they wanted to preserve some semblance of the old Francophone influence,⁶⁰⁰ which would be lost if the RPF forces succeeded in driving all of the Hutu's, especially the Hutu political figures out of Rwanda.

In the aftermath of such a shocking event, the world could no longer stand by and do nothing to assist the people of Rwanda, therefore the UN Security Council at the beginning of July 1994, instructed a Commission of Experts⁶⁰¹ to investigate the situation, as they had done previously with the situation in the former Yugoslavia. The decision of the Commission was that in accordance with the UN's powers under Chapter VII of the UN charter, the UN should establish an International Criminal Tribunal for the Prosecution of Persons Responsible 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 1994 and 31 December 1994.⁶⁰² Almost parallel to the conclusion by the Commission of

⁵⁹⁶ Phillip Gourevitch, *We Wish to Inform you that Tomorrow we will be Killed with our Families: Stories from Rwanda* (Picador Press 1998) 4

⁵⁹⁷ UNSC Res 929 'Establishment of a Temporary Multinational Operation for Humanitarian Purposes in Rwanda Until the Deployment of the Expanded UN Assistance Mission for Rwanda' (22 June 1994) UN Doc S/RES/929

⁵⁹⁸ UN UNAMIR Background Information, 'June – September 1994: Operation Turquoise, RPF Establishes Control, Signs of Stabilization, Conclusion of UNOMUR' <

<http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm#JUNE>> (Accessed on 22/03/2013)

⁵⁹⁹ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000)231

⁶⁰⁰ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000)233

⁶⁰¹ UNSC Resolution 935 'Requesting the Secretary-General to Establish a Commission of Experts to Examine Violations of International Humanitarian Law Committed in Rwanda' (1 July 1994) UN Doc S/RES/935

⁶⁰² Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

Experts, was a request from the Rwandan government via a letter from Manzi Bakuramusta, the permanent representative, for Rwanda to the President of the Security Council, dated 28 September 1994.⁶⁰³ In the letter the Rwandan government noted that they were fully aware of the lack of assistance from the rest of the world and asked the UN for the following:

We request the international community to reinforce government efforts by:

(a) Ensuring that all aid earmarked for Rwanda is directed inside the country. The resulting improvement in welfare will encourage refugees to return and help those who have already returned to get settled. The majority of Rwandese are inside the country and they need assistance;

(b) Committing funds to the Government to improve its efficiency and capacity to implement programmes, for instance, in areas of security, especially the police. It would be very important to assist in training, investigation procedures and in any other fields;

(c) Setting up as soon as possible an international tribunal to try the criminals;

(d) Giving factual and objective information on Rwanda;⁶⁰⁴

Earlier on in the letter, the Rwandan representative stated that the Rwandan government was aware that there seemed to be a distinct reluctance to create an international tribunal, to bring to justice the perpetrators of the genocide. However the creation of such a tribunal was something that they felt was ‘... tantamount to diluting the question of genocide that was committed in Rwanda.’⁶⁰⁵ Given that transitional justice is commonly accepted as being essential to reconciliation⁶⁰⁶ and in this instance crucial to aiding the rebuilding of a nation, it is not surprising, that the newly formed Tutsi government of Rwanda felt the need for this outside help, particularly with the prosecution of those responsible, so as to make those

⁶⁰³ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994) 4

⁶⁰⁴ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994) 4

⁶⁰⁵ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994) 2

⁶⁰⁶ Eirin Mobekk, ‘Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation’ in Anja H Ebnöther, Philipp H Fluri (eds), *After Intervention: Public Security Management in Post-Conflict Societies* (DCAF 2005) 261

who had fled the country feel safe enough to return to their home nation,⁶⁰⁷ and to assist with rebuilding its infrastructures and diffuse any accusations of victors justice that could encourage ‘... divisive mentalities...’⁶⁰⁸ The necessity of justice to aid reconciliation was also affirmed by Dr Kingsley Chiedu Moghalu, who stated that, ‘When justice is done, and seen to be done, it provides catharsis for those who physically or psychologically scarred by violations of international humanitarian law.’⁶⁰⁹

5.3 Rwanda Objects to the Creation of the ICTR

However when the UN Security Council put resolution 955⁶¹⁰ to the vote on the 8 November 1994, thirteen States voted in favour, one State abstained (China) and surprisingly one voted against, this State was Rwanda.⁶¹¹ It has been reported, that the Rwandan delegate voted against the resolution for several reasons, which will be briefly detailed below:

1. Rwanda was unable to accept the very limited *ratione temporis* granted to the tribunal, because the jurisdiction of the tribunal was restricted to acts which occurred between the 1 January 199 and 31 December 1994. It has been stated⁶¹² that the reason for this, is believed to be because the Security Council considered the shooting down of President Habyarimana’s plane on the 6 April 1994, to be the trigger to the genocide and thus feel that four months prior to this is more than enough to encapsulate the planning stages.⁶¹³ Whilst it is undisputable that the

⁶⁰⁷ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994) 2

⁶⁰⁸ Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council (UNSCOR 49th Sess) UN Doc S/1994/1115 (1994) 3

⁶⁰⁹ Kingsley Chiedu Moghalu ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’ in Ramesh Thakur & Peter Malcontent (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN Uni Press 2004) 216

⁶¹⁰ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

⁶¹¹ UNSC Meeting, ‘The International Tribunal – Rwanda’ (8 November 1994) UN Doc S/PV.3453, 2

⁶¹² Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Press 2002)

⁶¹³ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Press 2002) 228

events that led up to the genocide of 1994, started long before the early months of 1994, it is quite plausible that the UN Security Council felt the need to restrict the scope of the court's jurisdiction as they had neither the resources or desire to create a permanent court. Similarly when the ICTY was created, the French representative suggested temporal jurisdiction for crimes committed should be restricted to only those crimes that did not '[predate] the dissolution of the former Yugoslavia and the outbreak of the current conflicts.'⁶¹⁴The reason given for the ICTY's restricted temporal jurisdiction was that under Chapter VII⁶¹⁵ '...the establishment of a tribunal would be authorized only for the purpose of maintaining or restoring peace, not in order to punish earlier crimes.'⁶¹⁶ Similarly the UN Security Council felt that in the case of Rwanda, under Chapter VII⁶¹⁷ they were only obliged to prosecute in order to restore peace and was construed as being only the events that immediately led up to the genocide of 1995⁶¹⁸ and not the years of internal conflict that had plagued Rwanda.

2. Secondly '... Rwanda stressed that the Tribunal's structure was inadequate for the task facing it.'⁶¹⁹ It was deemed inadequate in the sense that it was only to have two trial chambers of its own, which would consist of a total of six judges, whilst it would have to share an appeals chamber and prosecutor with the already established ICTY. Furthermore these were both situated back in the Netherlands at the Hague, which would make the justice process even further removed from the country in which the crime occurred.

⁶¹⁴ UNSC 'Report of the Committee of French Jurists' UN Doc S/25266 (10 February 1993)22, Para 76

⁶¹⁵ Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chap VII
<<http://www.un.org/en/documents/charter/>> (Accessed at various dates)

⁶¹⁶ Ibid (UN Doc S/25266, 3 May 1993) 22, Para 76

⁶¹⁷ Charter of the United Nations, 24 October 1945, 1 UNTS XV, Chap VII
<<http://www.un.org/en/documents/charter/>> (Accessed at various dates)

⁶¹⁸ Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (July 1996) 90(3) AJIL 501, 505

⁶¹⁹ Olivier Dubois, 'Rwanda's National Criminal Courts and the International Tribunal' (31/12/1997) 321 Int Rev of the Red Cross <<http://www.icrc.org/eng/resources/documents/misc/57jnza.htm>> (Accessed on 12/07/2013)
Also UNSC Meeting, 'The International Tribunal – Rwanda' (8 November 1994) UN Doc S/PV.3453, 15

3. There was concern over the way in which the other crimes, that the ICTR had jurisdiction over were not ranked by priority, it was feared that the tribunal may for instance deal more with the lower level offences, such as pillaging,⁶²⁰ rather than dealing primarily with the instigators of the genocide, which was the crime '...that brought about its establishment.'⁶²¹

4. The fourth issue that Rwanda raised in opposition to UN resolution 955, was that Rwanda objected to countries that '...had supported the genocidal regime [being able to] participate in the process of nominating judges.'⁶²² A Prime example of this was France, who had provided training and arms to the army of Habyarimana's regime, which formed the basis of the militias that led the genocide.⁶²³ Whether this was done in ignorance of the true purpose of the Rwandan desire to increase the size of its armed forces, is something that is not of concern to this discussion, but merely serves as an illustrative example of how States who now wanted to participate in prosecution of those responsible for the genocide, had been either deliberately or inadvertently involved in aiding those they now sought to hold accountable.

5. Rwanda was not happy that third party countries would host those convicted and sentenced, as it has often been felt that western countries, especially those in Europe have 'holiday camp'⁶²⁴ style prisons and there has also been criticism of what has been viewed some as the '...lavish lifestyles enjoyed by Genocide convicts

⁶²⁰ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Press 2002) 229

⁶²¹ UNSC Meeting, 'The International Tribunal – Rwanda' (8 November 1994) UN Doc S/PV.3453, 15

⁶²² ⁶²² Olivier Dubois 'Rwanda's national criminal courts and the International Tribunal' (31/12/1997) 321 Int Rev of the Red Cross <<http://www.icrc.org/eng/resources/documents/misc/57inza.htm>> (Accessed on 12/07/2013)

⁶²³ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 232-233

⁶²⁴ An example of this is Bastoy prison on Norway. Erwin James, 'The Norwegian Prison Where Inmates are Treated like People' The Guardian (London, 25 February 2013)

<<http://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>>. (Accessed on 26/03/2013)

incarcerated in Mali...⁶²⁵ Because this situation has been described as creating an ‘...obscene situation...in which those primarily responsible for the killing were living in relative comfort; while most of their surviving victims continued to live in poverty.’⁶²⁶

6. The sixth objection raised, was in relation to the issue of capital punishment and the disparity of penalties that this creates,⁶²⁷ with the death penalty being absent from the penalties available to the ICTR⁶²⁸ whilst the Rwandan domestic legislation still applied it.⁶²⁹ This was problematic because:

... Rwanda regarded this disparity in sentences as not being conducive to national reconciliation, as this would amount to a situation in which the leaders, planners, and organizers of the genocide would escape capital punishment, in contrast to those individuals who ‘simply carried out their plans’⁶³⁰

This is an issue that has also been highlighted by others, such as the US Institute of Peace⁶³¹ and Jens David Ohlin⁶³² who have concluded that the disparity of penalties between the ICTR and the Rwandan national courts would ‘... severely undermine any sense of justice or fairness ...’⁶³³ in any of the trials, because ‘...the death penalty remained in force for regular crimes under Rwandan Law, victims of genocide considered capital punishment an essential element of the judicial program.’⁶³⁴

⁶²⁵ Edwin Musoni, ‘Rwanda Complains to UN Over Convicts’ Lavish Life’ The New Times (All Africa, 10 December 2012) <<http://allafrica.com/stories/201212100131.html>> (Accessed on 26/03/2013)

⁶²⁶ Tim Allen, *Trial Justice: The ICC and the Lords Resistance Army* (1st edn, Zed Books Ltd 2006) 11

⁶²⁷ UNSC Meeting, ‘The International Tribunal – Rwanda’ (8 November 1994) UN Doc S/PV.3453, 16

⁶²⁸ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 23

⁶²⁹ Rwandan Penal Code, Decree Law No 27/77 of 18 August 1977, Art 26

⁶³⁰ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Press 2002) 229

⁶³¹ US Institute of Peace, ‘Rwanda: Accountability for War Crimes and Genocide’ Special Report No 13 (1 January 1995) <<http://www.usip.org/sites/default/files/SR13.pdf>> (Accessed on 04/06/2013)

⁶³² Jens David Ohlin, ‘Applying the Death Penalty to the Crime of Genocide’ (2005) 99(4) AJIL 747

⁶³³ US Institute of Peace, ‘Rwanda: Accountability for War Crimes and Genocide’ Special Report No 13 (1 January 1995) <<http://www.usip.org/sites/default/files/SR13.pdf>> (Accessed on 04/06/2013)

⁶³⁴ Jens David Ohlin, ‘Applying the Death Penalty to the Crime of Genocide’ (2005) 99(4) AJIL 747, 764

7. The seventh and final ground for objection raised by the Rwandan delegate was that the ICTR was to be situated outside of Rwanda.⁶³⁵ At this point the location of the ICTR had not been finalised, but the Rwandan government felt that if the ICTR were to sit within Rwanda then not only would it help stamp out the culture of impunity that had become inherent within Rwanda since 1959⁶³⁶ but it would also ‘...promote the harmonization of international and national jurisprudence.’⁶³⁷ This final statement made by the Rwandan delegate serves to illustrate how some member States of the ICC may feel that they are unable to prosecute in a complementary manner, when there is no harmonisation of jurisprudence between the national and international courts.

Having now established the reasons why Rwanda, the one State who stood to benefit the most from the creation of the ICTR, yet objected so strongly when the time came to create the tribunal, it is now to the actual function and work carried out by the ICTR, that we now turn to see, whether those concerns raised by the Rwandan delegate became a reality. Thus the wording of the ICTR statute that will provide a starting point, before moving on to a brief overview of what the ICTR has achieved to date.

5.4 UN Security Council Resolution 955

UN Security Council resolution 955 states the following objectives as being central to the purpose of the ICTR:

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace⁶³⁸

⁶³⁵ UNSC Meeting, ‘The International Tribunal – Rwanda’ (8 November 1994) UN Doc S/PV.3453, 16

⁶³⁶ UNSC Meeting, ‘The International Tribunal – Rwanda’ (8 November 1994) UN Doc S/PV.3453, 16

⁶³⁷ UNSC Meeting, ‘The International Tribunal – Rwanda’ (8 November 1994) UN Doc S/PV.3453, 16

⁶³⁸ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Preamble

Whilst this is very similar to the preamble of the ICC's Rome Statute 1998, one notable difference is that Resolution 955 talks of ensuring 'national reconciliation and restoration of peace',⁶³⁹ which could be interpreted as suggesting that the UN Security Council envisaged that the ICTR may need to play a role in nation building. This could possibly be because like the ICC, the ICTR did not have the capacity to prosecute the majority of those accused of participation in the genocide of 1994 and it may possibly have been felt that the UN needed to help the Rwandan people to seek their own justice in order to further reconciliation and so as to stabilise the country that was in a volatile transitional period.⁶⁴⁰ However, how far the ICTR went in achieving this will be discussed in greater depth in the section dealing with the outreach programmes of the ICTR. Nonetheless, Resolution 955 provides a very good place to start our brief overview of the ICTR as it clearly puts justice, reconciliation and restoration as the key objectives of the ICTR, so we now turn to the actual practice of the ICTR in order to see if any or all of these objectives have been achieved.

Despite the ICTR having theoretically been created in the November of 1994, the tribunal has often been criticised for being very slow to act,⁶⁴¹ as it was not until January of 1997 that the first trial actually took place.⁶⁴² At first glance this may seem exceptionally slow and this inaction could have been misconstrued by some, as implying that the prosecution of the key perpetrators of the Rwandan genocide was not considered a high priority. However when viewed in light of the obstacles that the tribunal had to overcome whilst establishing the basics, such as offices and courtrooms,⁶⁴³ it does not seem so unreasonable. The first dilemma that faced the UN Security Council was where to physically situate the tribunal? Kigali (Rwanda) was ruled out, because not only was it lacking in facilities and suitable

⁶³⁹ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Preamble

⁶⁴⁰ UN UNAMIR Background Information, 'June – September 1994: Operation Turquoise, RPF Establishes Control, Signs of Stabilization, Conclusion of UNOMUR' available at <http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm#JUNE> (Accessed on 22/03/2013)

⁶⁴¹ Peter Uvin and Charles Mironko, 'Western and Local Approaches to Justice in Rwanda' (2003) 9 Global Gov 219, 220

⁶⁴² Eric Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 920

⁶⁴³ Erik Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 922

premises, but also because the UN Secretary General feared that the unsettled and highly volatile situation in Rwanda at the time, would prove to be too great of a security risk to bring prisoners into Kigali for their trials⁶⁴⁴ and that in the interest of 'justice' and 'equity' the trials should take place on neutral territory.⁶⁴⁵ The other two proposed locations were Nairobi in Kenya and Arusha in Tanzania, unfortunately the Kenyan government were unable to provide a location that could accommodate such a tribunal,⁶⁴⁶ but Tanzania offered the use of the Arusha International Conference Centre and in February of 1995 Resolution 977 was passed,⁶⁴⁷ making Arusha the home of the ICTR. However it should be noted that things in Arusha were far from straightforward, Erik Mose⁶⁴⁸ has described the conditions which met the tribunal staff in Arusha, as being very 'primitive',⁶⁴⁹ as there were few working phone lines, tarmacked roads were scarce and electricity was far from consistent. Add to this, the fact that the Arusha Conference Centre was set up for office space and conference rooms, it is easy to understand why it took until January of 1997 to transform what was previously office space into what is now recognised as courtroom one and courtroom two of the ICTR; as the location must have made it a logistic nightmare. However by the time the tribunal was ready to hear its first case, there was also a detention centre, in place which the UN states as being '... constructed in accordance with international prison standards and includes 89 individual cells, a kitchen, medical facilities, library, a classroom and a gymnasium ...'⁶⁵⁰ and is located within the grounds of the Tanzanian detention centre only 10km from the ICTR.

⁶⁴⁴ Erik Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 921

⁶⁴⁵ UNSC 'Report of 13 February 1995 by the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134 9, Para 40
<<http://www.francerwandagenocide.org/documents/sg-1995-134.pdf>> (Accessed on 22/06/2013) and UNSC Res 977 'On the Decision to Designate Arusha as the Seat of the International Tribunal for Rwanda' (22 February 1995) UN Doc S/RES/977

⁶⁴⁶ UNSC 'Report of 13 February 1995 by the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134 9, Para 39

⁶⁴⁷ UNSC 'Report of 13 February 1995 by the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134
<<http://www.francerwandagenocide.org/documents/sg-1995-134.pdf>> (Accessed on 22/06/2013) and UNSC Res 977 'On the Decision to Designate Arusha as the Seat of the International Tribunal for Rwanda' (22 February 1995) UN Doc S/RES/977

⁶⁴⁸ Erik Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920

⁶⁴⁹ Erik Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 922

⁶⁵⁰ ICTR Factsheet: 'Detention of Suspects and Imprisonment of Convicted Persons The Detention Facility.'
<<http://www.unict.org/AboutICTR/FactSheets/DetentionofSuspectsandConvictedPersons/tabid/114/Default.a/spx>> (Accessed on 17/03/2013).

5.5 How is the ICTR Structured: How Well has this Facilitated its Prosecutions?

Article 12 *bis* (3) of the ICTR Statute states that:

The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election⁶⁵¹

These four year terms in office as an ICTR judge have been more commonly referred to as 'mandates' and the first mandate begun in 1995, which seems a little surprising given that the first trial did not take place until 1997.⁶⁵² However there was much work to be done before the ICTR could begin its trial proceedings, for although the ICTR and what has now become known as its sister tribunal the ICTY shared many common factors, including a Prosecutor and Appeals Chamber, the ICTR would be the first court/tribunal to prosecute the crime of genocide since the Nuremberg and Tokyo Trials after the Second World War and was also the first time genocide had been prosecuted since creation of the Genocide Convention in December of 1948.⁶⁵³ This is significant because the ICTR would not have any court to look to for guidance on sentencing rationale or what could be deemed a sentence that would be proportionate to a crime of this gravity, because the post-World War II tribunals⁶⁵⁴ had the death penalty at their disposal, whilst the ICTR did not. Whilst the Genocide Convention (1948) clearly defines the act of genocide in Articles 2 and 3, which mirrors Article 2 of the ICTR Statute, the Genocide Convention (1948) unfortunately remains silent on what is deemed as suitable punishment for these crimes, so it is not surprising that the ICTR and ICC statutes also remain silent on this point.

⁶⁵¹ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 12bis(3)

⁶⁵² *Prosecutor v Jean-Paul Akayesu* (Amended Indictment) ICTR-96-4-T (17 June 1997)

⁶⁵³ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

⁶⁵⁴ The International Military Tribunals following World War II as detailed in Madoka Futamura, *War Crimes Tribunals and Transitional Justice: the Tokyo Trial and the Nuremberg Legacy* (Routledge Press 2008)

Therefore, the first mandate of the ICTR can be accredited with having ‘... tackled the issue of the appropriate punishment for genocide (the crime of crimes), and its sentencing jurisprudence has established many important precedents ...’⁶⁵⁵; which is quite an achievement given that the judges could glean very little guidance from the ICTR Statute with regards to any form of comprehensive sentencing praxis. For example Article 23 of the ICTR Statute, much like Article 77 of the Rome Statute 1998 is very vague and provides less guidance than Article 77 of the Rome Statute 1998 does, because other than stating that prison sentences are the only form of penalty available,⁶⁵⁶ that the judges should take into account the sentencing practices of the Rwandan national courts and that the ICTR judges should also ‘... take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.’⁶⁵⁷ Article 23 of the ICTR statute clearly provides wide and vague considerations for the ICTR judges to factor when making their sentencing determinations, which up until 2007 when Rwanda abolished the death penalty⁶⁵⁸ included trying to take into consideration the sentencing practices of a State that still enforced the death penalty, not to mention the fact that Rwandan organic laws were still constantly evolving and subsequently changing the categories of offences and their punishments. Thus the achievements of the first ICTR mandate were in reality not as poor as they would first appear on paper, because the sentencing jurisprudence it created now sets a precedent for many international courts and tribunals,⁶⁵⁹ including the ICC.

Nonetheless, whilst the first mandate of the ICTR may appear to have done very little if this thesis were to use number of trials completed as the bench mark for success, but when viewed in the context that the tribunal chambers were not completed until halfway into the

⁶⁵⁵ Barbara Hola, Katrine Bi-level & Aletta Smoulders, ‘Punishment for Genocide – Exploratory Analysis of ICTR Sentencing’ (2011) 11 Int CLR 745, 747

⁶⁵⁶ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 23(1)

⁶⁵⁷ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 23(1) & (2)

⁶⁵⁸ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) Abolishing the death penalty meant that the potential for disparate sentences between the Rwandan national courts and the ICTR was decreased.

⁶⁵⁹ Anne Fruma Bayefsky & Joan Fitzpatrick, *Human Rights and Forced Displacement* (Martinus Nijhoff Pub 2000) 263

first mandate, coupled with the fact that one of the six trials completed in this period, was one of the ICTR's biggest to date,⁶⁶⁰ serves to make their achievements not seem so insignificant. The high profile case mentioned above was that of *Prosecutor v Jean Kambanda* (Judgment and Sentence) ICTR 97-23-S (4 September 1998), who was the Prime Minister of Rwanda during the period leading up to and during the genocide of 1994. Mr Kambanda pleaded guilty to six counts,⁶⁶¹ four of which included committing the act of genocide, conspiracy and incitement to commit genocide along with two counts of crimes against humanity.⁶⁶² This type of high profile trial has been viewed by many as a benchmark success in which the ICTR was able to '... establish individual guilt and thereby move suspicion and blame from one group to the individual.'⁶⁶³ Which if true would mean that a lot of the blame placed on the whole Hutu social group would have been lifted, however given the instability that eventually led to the genocide in Rwanda and still to some degree continues today,⁶⁶⁴ this seems somewhat questionable.

Moving swiftly on to the second and third mandates of the ICTR, the tribunal continued to see the number of cases completed doubling⁶⁶⁵ with each new mandate and with this came some amendments to the structure of the tribunal. The first big change was the realisation that two trial chambers would be wholly inadequate, so UN Security Council Resolution 1165 of the 30 April 1998⁶⁶⁶ granted the creation of an additional trial chamber. This third trial chamber was subsequently added to the ICTY in May 1998, under Resolution 1166.⁶⁶⁷ and the new trial chamber was constructed in record time and was complete and ready for use by the end of 1998, when the number of judges was increased from eleven to fourteen

⁶⁶⁰ *Prosecutor v Jean Kambanda* (Judgment and Sentence) ICTR 97-23-S (4 September 1998)

⁶⁶¹ *Prosecutor v Jean Kambanda* (Judgment and Sentence) ICTR 97-23-S (4 September 1998) Para 5

⁶⁶² *Prosecutor v Jean Kambanda* (Indictment) ICTR-97-23-DP (16 October 1997) 6-7

⁶⁶³ Jackson Nyamuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects' (2004) 73 Nord J Int'l L 187, 194

⁶⁶⁴ - - 'Rwanda: How the Genocide Happened' (BBC News Africa, 17 May 2011) <<http://www.bbc.co.uk/news/world-africa-13431486>> (Accessed on 02/03/2013)

⁶⁶⁵ Eric Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 923

⁶⁶⁶ UNSC Res 1165 'On the International Tribunal for the former Yugoslavia' (30 April 1998) UN Doc S/RES/1165

⁶⁶⁷ UNSC Res 1166 'On the International Tribunal for the former Yugoslavia' (13 May 1998) UN Doc S/RES/1166

to man this new trial chamber⁶⁶⁸. The next innovative amendment for the ICTR, was the change to the use of a morning and afternoon trial shift system, during the second mandate, which spanned the period from 1999-2003.⁶⁶⁹ The purpose of this split shift system was to allow two trials to run in each trial chamber concurrently, providing a more equal split of time given to both cases in each trial chamber. In August of 2002⁶⁷⁰ it was identified that the trial chambers required more judges that could step in should one of the elected judges, be unable to attend and it was requested that a pool of ad litem judges be created and Resolution 1431 (2002)⁶⁷¹ created this pool, which consisted of eighteen judges of which originally four at any one time could be attached to the trial chambers, this now stands at nine judges at any given time, as amended by Resolution 1512 (27 October 2003).⁶⁷²

The biggest changes to the structure of the ICTR occurred in 2003, following the adoption of UN Security Council Resolution 1503 (28 August 2003), which set out the completion strategy dates for both the ICTY and ICTR. The original strategy stated that all trials should be completed by the end of 2008 and that all appeals before the then shared Appeals Chamber at The Hague in the Netherlands; were to be complete by the end of 2010.⁶⁷³ Given the enormity of this task the UN Security Council decided to give the ICTR its own Prosecutor, and through Resolution 1505 (2003) appointed Hassan Bubacar Jallow as the sole Prosecutor of the ICTR. Since appointment as Prosecutor to the ICTR, Mr Jallow has had to amend the completion strategy several times, to ensure that the complex trials that have and are currently being processed by the ICTR can be carried out to the highest standards of procedural fairness as stipulated in Article 20 (2) of the ICTR. This article guarantees that all who are tried before the ICTR, have the unequivocal right to a ‘... fair and public hearing

⁶⁶⁸ On 30/11/2000, the UN Security Council decided that two additional judges be elected, increasing the number of permanent judges to sixteen. UNSC Res 1329 ‘Amending the Statute of the International Criminal Tribunal for the Former Yugoslavia’ (30 November 2000) UN Doc S/RES/1329

⁶⁶⁹ Eric Mose, ‘ Appraising the Role of the ICTR: Main Achievements of the ICTR’ (2005) 3 JICJ 920, 926

⁶⁷⁰ UNSC Res 1431 ‘On the International Criminal Tribunal for Rwanda’ (14 August 2002) UN Doc S/RES/1431

⁶⁷¹ UNSC Res 1431 ‘On the International Criminal Tribunal for Rwanda’ (14 August 2002) UN Doc S/RES/1431

⁶⁷² UNSC Res 1512 ‘On the International Criminal Tribunal for Rwanda’ (27 October 2003) UN Doc S/RES/1512

⁶⁷³ UNSC, ‘Letter dated 3 October 2003 from the Secretary-General addressed to the President of the Security Council’ (6 October 2003) UN Doc S/2003/946 2003) & UNSC Res 1503 ‘ On the ICTY & ICTR’ 28 August 2003) UN Doc S/RES/1503

...⁶⁷⁴ and what constitutes a 'fair' hearing is detailed in Article 20 (3) of the ICTR statute. Therefore, the current completion strategy states that as of the 10 May 2013, the ICTR has completed all of its work at the trial level, totalling 93 individuals who have been indicted⁶⁷⁵ by the ICTR and that the final case in the Appeals Chamber is due to be completed by the end of July 2015.⁶⁷⁶ This delay, which sees the current completion strategy, five years behind the original plan, is due to issues with witnesses failing to attend, alleged illness, problems with getting translations from the commonly spoken native language of Kinyarwanda into the two official languages of the ICTR, which are French and English. This was further exacerbated by various other issues related to collecting evidence, from often less than willing witnesses and victims, which has been suggested is in part due to the continuing although lower levels of violence that continues to plague Rwanda⁶⁷⁷ and compounded by the fact that, the ICTR is situated outside of Rwanda and people are unwilling to travel so far, especially when they feel detached from the justice that is being metered out at the ICTR in Arusha. Thus whilst many including the UN feel that the ICTR has succeeded in the sense that:

There can be no doubt that the Tribunal's proceedings relating to persons in very high positions have sent a strong signal to the world, including the African continent, that impunity will not be accepted by the international community.⁶⁷⁸

Whilst there can be no doubt that the decisions of the high profile case load of the ICTR certainly have sent a message to the world, by illustrating that crimes against humanity and more importantly the crime of genocide will not go unpunished and have also set a precedent (especially with regards to sentencing and sentencing rationale) for future prosecutions by both the ICC and national courts. There still remains the question, why if this message has the deterrent affect that it was hoped to have and that the ICC states

⁶⁷⁴ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 20(2)

⁶⁷⁵ UN webpage for the International Criminal Tribunal for Rwanda, 'The ICTR in Brief' <<http://www.unictr.org/en/tribunal>> (Accessed on 06/06/2013)

⁶⁷⁶ UNSC, 'Letter dated 23 May 2013 from the President of the ICTR to the President of the UN Security Council' (23 May 2013) UN Doc S/2013/310 4.

⁶⁷⁷ Jackson Nyamuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects' (2004) 73 Nord J Int'l L 187, 199

⁶⁷⁸ Erik Mose, 'Appraising the Role of the ICTR: Main Achievements of the ICTR' (2005) 3 JICJ 920, 932

within its preamble to the Rome Statute 1998 as being one of its continuing objectives, are similar atrocities still taking place in Darfur, Sierra Leone, the Democratic Republic of the Congo and Uganda? However, how to truly address this problem is not the purpose of this case study, but serves to provide an illustration of the problems that the ICC will potentially face when trying to enforce its principle of complementarity, when dealing with a State that mandates harsher sentences than those available to the ICC. Therefore whilst the ICTR, certainly has provided some invaluable lessons for the ICC, such as the fact that any national prosecutions that offer harsher penalties than the ICC may potentially undermine the credibility of the ICC's prosecutions or that for justice on the scale required in a post-genocidal or post-conflict State to be achieved, the ICC will need to work with the national courts to achieve this. With particular attention being paid to trying to develop some form of consistency and subsequently a level of proportionality in sentencing between the national courts and the ICC, so that those deemed to be of a higher level of culpability receive the harsher sentences to be consistent with the increased perceived gravity of their crimes. Nonetheless, this is not something that a single court or tribunal can reasonably be expected to undertake, as was highlighted by Kathy Ward, who stated that:

The ICTR cannot bring justice to Rwanda on its own. It is a limited tribunal that will try only the senior architects of the 1994 atrocities. It is meant to work in coordination with Rwandan domestic efforts to serve justice.⁶⁷⁹

This neatly brings the discussion to the next section of the case study, which is an overview of what the Rwandan courts have done to ensure justice for the genocide of 1994, as the 93 offenders tried by the ICTR, certainly does not even begin to scratch the surface of the estimated 125,000 offenders currently sitting in Rwandan prisons.⁶⁸⁰ Furthermore, by looking at the national courts in Rwanda both during the immediate aftermath of the genocide of 1994 and also as they progressed and branched out into more traditional routes of justice, the difficulties that can occur when the international and national courts do not seem to have the same ideals or standards of justice, punishment and respect for human

⁶⁷⁹ Kathy Ward 'Seeking Justice in Rwanda'(2000) 117(24) *Christian Century* 870, 872

⁶⁸⁰ Jackson Nyamuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects'(2004) 73 *Nord J Int'l L* 187, 198

rights will become apparent. It will also highlight the amount of time and level of work required to facilitate a State in the aftermath of crimes of this gravity, to be in a position to be able to take on the responsibility for prosecution at the national level, which subsequently will illustrate why the ICC does need to actively pursue positive complementarity if it hopes to only be a court of last resort.⁶⁸¹

5.6 Rwandan National Justice

In Rwanda we are trying our best. We are really trying our best as far as the judiciary is concerned ... in post-genocide traumatized society you will not expect us to be on international standards like that in the U.S. or Canada, but you will expect us to be on international standards on the continent of Africa.⁶⁸²

In the aftermath of a genocide in which it is estimated that approximately three quarters of the Rwandan Tutsi population were killed,⁶⁸³ along with an estimated twenty five thousand to sixty thousand Hutus⁶⁸⁴ who lost their lives, it is not surprising that Rwanda effectively had become '... a country whose social fabric and infrastructure were destroyed during the genocide.'⁶⁸⁵ Add to this the fact that the country had been in a state of civil unrest and amidst a brutal political struggle for at least the past forty years; it is hardly surprising that there was next to no recognisable or functioning legal system in place in Rwanda by the end of July 1994.⁶⁸⁶ Moreover, rebuilding a legal system following in the wake of what had

⁶⁸¹ Coalition for the International Criminal Court, 'Delivering on the Promise of a Fair, Effective and Independent Court: Review Conference of the Rome Statute> Stocktaking> Complementarity' Para 1 <<http://www.iccnw.org/?mod=complementarity>> (Accessed on 20/08/2014)

⁶⁸² John Bosco Mutangana is a Rwandan Prosecutor of National Competence. The quotation was provided in an interview in Kigali, Rwanda, 7 June 2005. Cited in Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 80

⁶⁸³ John Bosco Mutangana is a Rwandan Prosecutor of National Competence. The quotation was provided in an interview in Kigali, Rwanda, 7 June 2005. Cited in Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 80

⁶⁸⁴ Max Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (Dec 2008) 53(3) *Afr Stud Rev* 25, 29

⁶⁸⁵ Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3(4) *JICJ* 944, 947

⁶⁸⁶ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) *L & Soc Inquiry* 467, 468

occurred in Rwanda, during the course of 1994, would have proved a big enough challenge, but in view of the fact that:

... [T]he previous justice system did not provide a foundation upon which the government could rebuild the desperately needed social institution. The Rwandan judiciary would have to be constructed from scratch in an environment that presented extraordinary conditions.⁶⁸⁷

To provide an illustration of just how decimated the Rwandan legal system was, reference can be made back to Table 1 in the chapter one of this thesis, where it was illustrated that almost three quarters of the legal profession in Rwanda was gone following the genocide. Furthermore, some reports have suggested that even less of the legal system remained following the genocide and one report suggested that ‘... only 40 jurists were said to remain in the entire country ...’,⁶⁸⁸ whilst others have reported as few as sixteen⁶⁸⁹ or twenty⁶⁹⁰ jurists and only twenty six police inspectors, which throws doubt as to the accuracy of some of the information, but nonetheless highlights that the majority of the legal profession and those bodies who would be necessary for investigation and prosecution via the national channels, were just a shadow of their pre-genocide numbers. In addition to the lack of legal professionals, Kigali had been left in ruins⁶⁹¹ and what little that did remain of the wheels of justice in Rwanda, was desperately lacking in basic resources, such as copies of their own legislation and in the case of the six remaining police inspectors, not one of them had any form of transport, for transporting them to the scenes of crimes, in order to collect evidence and witness statements.⁶⁹² Also the ‘... court buildings had been damaged and they lacked the most basic infrastructure as the former government stripped all its offices on its way

⁶⁸⁷ Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 81

⁶⁸⁸ African Rights and Redress- Report, ‘Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes’ (Nov 2008) 20

<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf> (Accessed 03/06/2013)

⁶⁸⁹ Audrey Doctor, ‘The Abolition of the Death Penalty in Rwanda’ (2009) 10 Hum Rts Rev 99, 101

⁶⁹⁰ William A Schabas reports that on a visit to Kigali in November 1994, he encountered only 20 jurists with any form of legal training. William A Schabas, ‘The Rwandan Courts in Quest of Accountability: Genocide Trials and the *Gacaca* Courts’ (2005) 3 JICJ 879, 883

⁶⁹¹ US Institute of Peace, Special Report No 13 ‘Rwanda: Accountability for War Crime and Genocide’ (1st January 1995) 5 <<http://www.usip.org/sites/default/files/SR13.pdf>> (Accessed 04/06/2013)

⁶⁹²

into exile ...'.⁶⁹³ This level of destruction is evidenced by the fact that in September of 1994, the then Minister of Justice Alphonse-Marie Nkubito, tasked with the job of deciding what the best course of justice would be for the Rwandan people; did so from his office, which had no remaining windows and whose wall were decorated with bullet holes.⁶⁹⁴

Due to the enormity of the crimes committed during the one hundred days of genocide and in the years preceding the genocide, it would be hard to imagine any legal system in the world, even that of the largest and most developed democratic States, that would realistically be able to deal with the case load (it has been approximated that there were around 200,000 Rwandan perpetrators)⁶⁹⁵ that stood before the Rwandan national courts. Moreover, given that the ICTR temporal jurisdiction was restricted to only the events that took place during 1994 and neglected to cover to what the newly formed (RPF) government saw as the genocide planning, that took place in the years prior to 1994, this meant that the Rwandan government would have to shoulder the burden of dealing with not only the lower level offenders not covered by the ICTR statute, but also the those who fell outside of the very limited temporal jurisdiction.

5.7 Rwanda Starts Over

As previously mentioned, it has been stated that:

No judicial system, anywhere in the world, has been designed to cope with the requirements of prosecuting genocide. Criminal justice systems exist to deal with crime on an individual level.⁶⁹⁶

⁶⁹³ African Rights and Redress- Report, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes' (Nov 2008) 20
<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf> (Accessed 03/06/2013)

⁶⁹⁴ William A Schabas, 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the *Gacaca* Courts' (2005) 3 JICJ 879, 883

⁶⁹⁵ Scott Straus, 'How Many Perpetrators Were There in the Rwandan Genocide? An Estimate' (2004) 6(1) JGR 85, 95

⁶⁹⁶ - - African Rights and Redress Report, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes' (November 2008)

Footnotes continued on next page

However given that the newly formed Rwandan (RPF) government was determined to take a hard line in order ‘... to eliminate the culture of impunity that had taken root ...’⁶⁹⁷ it comes as no surprise that by 1998 there were approximately 130,000⁶⁹⁸ prisoners in Rwandan prisons awaiting trial for the crimes that they were alleged to have committed during or in the years preceding the genocide of 1994. To further exacerbate the situation, the prisons that then existed in Rwanda were only built to accommodate fifteen thousand inmates.⁶⁹⁹ Such levels of overcrowding and lack of funding, can only conjure up horrific images of the inhumane conditions in which these people were awaiting trial. As illustrated in one village prison, where there was only space for the four hundred inmates to sleep side by side and the level of overcrowding necessitated that all prisoners be allowed out of the prison boundary during the day, as there was no space for them to actually move.⁷⁰⁰

However as mentioned previously, no legal system is equipped to deal with this level of prosecution; especially one that wishes to adhere to norms of procedural fairness and based on this fact, it has been estimated that for the Rwandan national courts to prosecute all of those detained by 1998 would take approximately four hundred years.⁷⁰¹ Based on the assumption that it would take the Rwandan courts another four hundred years to prosecute the 130,000 perpetrators in custody by 1998, and assuming that the majority of those in detention were fairly young and had at least another thirty years life expectancy remaining, this would have meant that only 9,750 of the 130,000 in custody by 1998⁷⁰² would have

20<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> (Accessed 03/06/2013)

⁶⁹⁷ Max Rettig, ‘*Gacaca*: Truth, Justice, and Reconciliation in Postconflict Rwanda?’ (Dec 2008) 53(3) *Afr Stud Rev* 25, 30

⁶⁹⁸ Neil J Kritz, Bernard Muna, Navanetbem Pillay & Theogene Rudasingwa, ‘The Rwanda Tribunal and its Relationship to National Trials in Rwanda’ (1998) 13 *AM U INT L REV* 1469, 1482

⁶⁹⁹ Filip Reyntjens & Stef Vandeginste ‘Rwanda: An Atypical Transition’, In Elin Skaar et al. Lanham (eds), *Roads to Reconciliation* (Lexington 2005) 110

⁷⁰⁰ Henk Rossouw, ‘Rwanda’s Search for Justice’ (09/08/2002) 48 *Chronicle of Higher Edu* A41, A42

⁷⁰¹ Neil J Kritz, Bernard Muna, Navanetbem Pillay & Theogene Rudasingwa, ‘The Rwanda Tribunal and its Relationship to National Trials in Rwanda’ (1998) 13 *AM U INT L REV* 1469, 1490

⁷⁰² Neil J Kritz, Bernard Muna, Navanetbem Pillay & Theogene Rudasingwa, ‘The Rwanda Tribunal and its Relationship to National Trials in Rwanda’ (1998) 13 *AM U INT L REV* 1469, 1482

potentially gone to trial before they came to the natural end of their lives. Thus ensuring that the majority people would potentially die in prison, without ever having the chance to defend themselves against the claims and charges issued against them or to ever receive any form of sentence, which completely undermines the concept of justice. This breach of the *Code de Procedure Penale*⁷⁰³ was something the newly formed Rwandan government was highly aware of, as was illustrated by the following statement:

We Rwandan national judiciary could not respond to the crisis by ordering the release of all the genocide suspects in detention. We were, and still are, of the view that the failure to respect procedural requirements for the arrest and detention of the suspects was the result of a very grave and unprecedented national crisis which could not, and had not, been foreseen. We took the view that the legislation should be passed to extend the period within which prosecutors could complete formalities legalizing the detention of these suspects.⁷⁰⁴

This makes reference to the fact that in 1994, the Government of Rwanda invoked Article 4 of the International Covenant on Civil and Political Rights, which states that:

‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations’⁷⁰⁵

They invoked this Article 4 of the ICCPR, so as to avoid breaching Article 38 of the Rwandan *Code de Procedure Penale* or international legal norms,⁷⁰⁶ whereby a defendant should not be detained unless the party detaining them is able to prepare a case against them and

⁷⁰³ Rwandan Code of Criminal Procedure (*Code de Procedure Penale*) of 23 February 1963, amended by Decree Law No 07/82 of 7 January 1982; amended by Law No 31/1985 of 8 November 1985 and more recently Law No 13/2004 of 17 May 2004

⁷⁰⁴ Government of Rwanda Report (2000) ‘Rwanda: The Troubled Course of Justice’, Response to Amnesty International Report (May 2000) 6 < www.gov.rw/government/06_11_00news_ai.htm > (Accessed on 03/03/2009).

⁷⁰⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 4(1)

⁷⁰⁶ Rwandan Code of Criminal Procedure (*Code de Procedure Penale*) of 23 February 1963, amended by Decree Law No 07/82 of 7 January 1982; amended by Law No 31/1985 of 8 November 1985 and more recently Law No 13/2004 of 17 May 2004 Art 38

within a set period of time. *The Code de Procedure Penale* stipulated that a person must appear before a judge within five days of an arrest warrant having been issued, the judge could then decide whether detention was necessary, but could only issue a demand for detention for a maximum of thirty days at a time, which could be renewed if necessary.⁷⁰⁷ However given the influx of prisoners, even within the first six months immediately following the genocide, there is not a legal system on earth that could possibly uphold such a rigorous detention policy, in the face of such a rapid detention rate.

5.8 No Crime of Genocide

It is common knowledge that the legal basis upon which any national or international court derives their power to prosecute the crime of genocide and also provides a basis for the legal definition of the crime,⁷⁰⁸ does so from the Genocide Convention of 1948. The Genocide Convention states in Article VI, that:

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction⁷⁰⁹

The responsibility to undertake the prosecution of the crimes by, the State in which it took place, was one that the Rwandan government took very seriously, but was sadly also one that was plagued with many obstacles. To begin with, in 1994 when the first alleged offenders were being rounded up and imprisoned in Rwanda and also whilst the UN Security Council was in the process of creating the ICTR, the Rwandan government realised that it had no legislation in place to actually try those imprisoned for the crime of genocide. Whilst Rwanda had ratified the Genocide Convention of 1948 on the 16 April 1975, the level of

⁷⁰⁷ Rwandan Code of Criminal Procedure (Code de Procedure Penale) of 23 February 1963, amended by Decree Law No 07/82 of 7 January 1982; amended by Law No 31/1985 of 8 November 1985 and more recently Law No 13/2004 of 17 May 2004 Art 38

⁷⁰⁸ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II

⁷⁰⁹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art VI

political instability that had occurred in Rwanda during the years following ratification, it is not surprising that either the Habyarimana government, which had taken power by means of a coup only three years prior to the ratification of the Genocide Convention and had not considered it a priority to enact the legislation, so as to give effect to it in national law. Thus resulting in the dire situation that Rwanda found itself in, wherein there was virtually no infrastructure to facilitate the lawful investigation, detention or prosecution of those involved in the genocide; coupled with no legislation capable dealing with these extraordinary crimes, which made for an impossible situation, that is best described in the words of a survivor of the genocide, from Butare:

All the survivors had a profound need of justice, but a justice that was effective. But there was no law about genocide in Rwanda's justice system, so all we could do at the beginning was to take a genocide suspect who had been captured to the nearest police station or commune office, and to look for witnesses to reinforce the prosecution's dossier. But we, the survivors, were the only people interested in testifying against them, even though the information we had was incomplete. Those who had the necessary information did not want to testify because they were related to the genocidaires. The other people who could have helped us are those who came back from exile. Unfortunately, they had no idea what had happened here during the genocide, and they had not mastered the justice system in Rwanda. So because of all this, the genocidaires themselves, or their relatives, were working in the institutions of justice. And they took advantage of their presence there to make files disappear, and to get rid of evidence.⁷¹⁰

This interview not only highlights the lack of any effective form of justice or relevant legislation, but also highlights the fact that of those law enforcement officers, judiciary and prosecutors many were survivors of the genocide or previously displaced Rwandans returning, who had no knowledge of how the Rwandan legal system worked. Furthermore, this serves to highlight the bias, intimidation and revenge justice that was taking place in Rwanda in the months immediately following the genocide.

⁷¹⁰ Interview with Alphonse a *Gacaca* Judge and genocide survivor (Butare, 20 February 2008) as cited in -- African Rights and Redress Report, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes' (November 2008) 20-21
<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> (Accessed on 03/06/2013)

Nonetheless this did not discourage the Rwandan government from seeking to bring an end to the violence and impunity through the facilitation of justice on such a mass scale and has been viewed by some, such as the UN General Assembly and also William Schabas, as an act of stubbornness⁷¹¹ in the sense that they were determined to pursue criminal prosecution of all potential perpetrators. This view was further compounded by the sentiment expressed by the newly appointed Minister of Justice for Rwanda, Marthe Mukamureni, who made it abundantly clear upon appointment to office, that Rwanda did not want foreign jurists sent into Rwanda, but would prefer, to have help to train new Rwanda jurists, so that they could carry out justice for themselves.⁷¹² Further to this, in October of 1995 the Rwandan government convened, what has become known as the 'Kigali Conference' which was an international conference held between the 31 October and the 4 November, the aim of which was to '... explore the various dimensions of accountability ...'⁷¹³ prior to Rwanda creating a national piece of legislation to deal with the crime of genocide and other related offences.

The outcome of the Kigali conference (1995)⁷¹⁴ was that, specialised chambers within the Rwandan national courts were recommended to deal with these extraordinary crimes,⁷¹⁵ a symbolic distinction that would distinguish them as crimes more serious than the ordinary crimes dealt with under the ordinary Rwandan penal code⁷¹⁶ and in the ordinary courts. In

⁷¹¹ William A Schabas, 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts' (2005) 3 JICJ 879, 880. Also Office of the High Commissioner for Human Rights Report, Moussalli M, 'Report of the Special Representative on the Situation of Human Rights in Rwanda' (8 February 1999) UN Doc E/CN.4/1999/33 7-9

⁷¹² Projet d'appui a' la reconstruction du syste'me judiciaire rwandais du Ministe're de la justice. UN doc. TCB/BT2/8/Add.9 (07/11/1994)

⁷¹³ William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the *Gacaca* Courts' (2005) 3 JICJ 879, 884

⁷¹⁴ Rwandan Office of the President, Recommendations of the Conference Held in Kigali from 1st to 5th November 1995, 'Genocide, Impunity, and Accountability: Dialogue for a National and International Response' (Kigali 1995) In C Braeckman, *Terreur Africaine: Burundi, Rwanda, Zaire. Les Racines des la Violence* (Fayard 1996) 323 -337

⁷¹⁵ Rwandan Office of the President, Recommendations of the Conference Held in Kigali from 1st to 5th November 1995, 'Genocide, Impunity, and Accountability: Dialogue for a National and International Response' (Kigali 1995) In C Braeckman, *Terreur Africaine: Burundi, Rwanda, Zaire. Les Racines des la Violence* (Fayard 1996) 323 -337

⁷¹⁶ Rwandan Penal Code, Decree Law No 27/77 of 18 August 1977

addition to the recommendation that specialist trial chambers be created, it was also advised that in order to ensure procedural fairness and uphold the basic principles of justice, such as the retributive principle of proportionality and ‘just deserts’, that the crimes be scaled so as to cover varied levels of offending.⁷¹⁷ All of these suggestions were embraced and came into effect with the enactment of Organic Law No. 08/96 of 30 August 1996, which tiered the levels of offender and divided them into 4 categories. Whilst this piece of legislation was in-line with recommendations made at the Kigali international conference, one fact that is often overlooked in relation to the creation of Organic Law No. 08/96 of 30 August 1996, is that it creates the offences retrospectively, something that the Rwandan government were very conscious of, as it is mentioned in the preamble to the piece of legislation:

...[G]iven that that crime of genocide and crimes against humanity are provided for specifically in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Geneva Convention relative to the protection of Civilian Persons in the Time of War 12 August 1949 and its additional Protocols, as well as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968; Given that Rwanda has ratified these three Conventions and has published them in an Official Gazette, but without having provided for penalties for these crimes; Given that, as a consequence, the prosecutions must be based on the Penal Code...⁷¹⁸

Here in the preamble, the Rwandan government is evidently conscious of the fact that by creating this retrospective piece of legislation, they have breached one of the fundamental principles of justice and procedural fairness, namely the principle of *Nullum crimen sine lege*. The definition of *Nullum crimen sine lege* is that there is ‘... no crime without law ... a principle that conduct does not constitute crime unless it has previously been declared to be so by the law ...’;⁷¹⁹ whilst acknowledging the breach of the *Nullum crimen sine lege* principle, the Rwandan government attempted to justify the breach by highlighting that none of the punishments are any greater than provided for under the Rwandan Penal

⁷¹⁷ Rwandan Office of the President, Recommendations of the Conference Held in Kigali from 1st to 5th November 1995, ‘Genocide, Impunity, and Accountability: Dialogue for a National and International Response’ (Kigali 1995) In C Braeckman, *Terreur Africaine: Burundi, Rwanda, Zaire. Les Racines des la Violence* (Fayard 1996) 323 -337 (Note: The author participated in the Kigali Conference and was responsible for delivering its conclusions and final report on 5 November 1995)

⁷¹⁸ Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990

⁷¹⁹ Elizabeth A Martin, *Oxford Dictionary of Law* (5th edn, OUP 2003) 336

Code,⁷²⁰ which at the time did proscribe the death penalty for the ordinary crime of homicide. In addition to this the Preamble states that the obligations created by ratification of the three conventions mentioned, were clearly stated to the public by publishing them in an official gazette, just that the Rwandan government had not had the opportunity to enact it. Nonetheless, the crimes which it seeks to cover are so reprehensible and clearly defined in international law, that the validity of the Organic Law No. 08/96 of August 30 1996 has never been challenged, so it is now to a brief overview of what the piece of legislation meant in reality for the Rwandan national courts, or what are often referred to as the National Genocide Tribunals (NGT's).

5.9 Organic Law No. 08/96 of August 30 1996

Articles 19 – 23 of the Organic Law No. 08/96 of August 30 1996 created the specialised chambers in Rwanda and the articles provide information on how the chambers are to be constructed, the function of the various members and they clearly set out the crimes which they have jurisdiction over (those stated in Article 1). Unfortunately very little is said about why there was a need to create these specialised chambers, but it would seem fair to assume that it was at least, in part due to the extraordinary nature of the crimes being dealt with, as well as a desire to not put any further strain on the ordinary courts, that were being rebuilt from the bottom up. However the most important part of the piece of legislation is Article 2 of Organic Law No. 08/96 of August 30 1996, which details the 4 categories of offence as below:

Category 1.

a) Person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity:

b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell level, or in a political party, the or fostered such crimes;

⁷²⁰ Rwandan Penal Code, Decree Law No 27/77 of 18 August 1977

c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;

d) Persons who committed acts sexual torture;

Category 2:

Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;

Category 3:

Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

Category 4:

persons who committed offences against property.

What is interesting is that not only does it categorise the type of offence, but also the command responsibility, which is coupled with a pretty comprehensive outline as to the level of punishment to be given for those found guilty of each category of offence in Articles 14-18 of Organic Law No. 08/96 of August 30 1996, as well as detailing variances for mitigating circumstance such as the timely entry of a guilty plea as outlined in Article 15. The significance of this, being that ‘... the discretion of judges in fixing sentence is thereby fettered, unlike at the ICTR where judges are accorded broad discretion regarding the length of sentence to be imposed.’⁷²¹ Whilst this is a positive factor in that it guarantees greater consistency and predictability, which in turn adds to the credibility⁷²² of the specialised chambers, it also created some problems, as the Organic Law No. 08/96 of August 30 1996 does not permit early release, whilst in contrast Articles 26 and 27 of the ICTR statute⁷²³ do make early release a possibility, where it is in accordance with the law of the State in which the sentence is being carried out⁷²⁴ and is approved by the President of the ICTR.⁷²⁵ This

⁷²¹ Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 73

⁷²² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 73

⁷²³ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

⁷²⁴ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 26

creates a disparity in the sense that the most culpable who will be tried before the ICTR may serve far shorter sentences than those sentenced by the national Rwandan courts, but are not deemed as culpable or highly ranked.

Linking in to the disparity of sentencing between the ICTR and the Rwandan national courts, one of the largest differences between the ICTR and the Rwandan courts, was that until 2007 and the enactment of Organic Law No. 31/2007 of 25 July 2007,⁷²⁶ which formally abolished the death penalty in Rwanda for all crimes, the death penalty had remained a viable penalty for the Rwandan courts. The significance of this is once again the disparity of penalties that existed prior to this harmonisation, because prior to 2007 those deemed of a lower culpability ranking, by way of political or military ranking and also by the seriousness of the offence, could potentially face a death sentence whilst those who were more culpable and therefore prosecuted by the ICTR would at most face a life sentences (and where parole was not exclusively ruled out).⁷²⁷ This dilemma became an actuality in 1998, when 22 persons convicted of Category one offences under the Organic Law No. 08/96 of August 30 1996, had their death sentences been carried out publicly by means of firing squad on the 24 April, in several football stadiums across Rwanda.⁷²⁸ This not only caused many problems in that it went against the growing trend towards abolition of death penalty as established in chapter two, as well as having the potential spark an uprising of further violence within Rwanda⁷²⁹, but the issue of most significance to this thesis is that it also undermined the efforts of the ICTR, thus:

... [P]roducing the paradoxical result that the worst offenders – the architects who were tried at the International Tribunal- received lighter sentences, than those who were convicted by Rwandan courts for mere participation in the genocide.⁷³⁰

⁷²⁵ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 27

⁷²⁶ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law)

⁷²⁷ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 27

⁷²⁸ Jens David Ohlin 'Applying the Death Penalty to the Crime of Genocide', (2005) 99(4) AJIL 747, 748

⁷²⁹ -- 'From Butchery to Executions in Rwanda' (BBC News World, 27 April 1998) <

http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/84120.stm> (Accessed 30/01/2013)

⁷³⁰ Jens David Ohlin, 'Applying the Death Penalty to the Crime of Genocide' (2005) 99(4) AJIL 747, 748

This paradox and surrounding issues will become more apparent later on when Rule 11bis⁷³¹ is explored in relation to ICTR handing over of outstanding investigations to the Rwandan courts. Nonetheless in the immediate context, this could potentially have caused many obstacles to justice, had the Rwandan government decided to carry out the hundreds of death sentences handed down by the specialised chambers, which is estimated to have been approximately 14.4%⁷³² of those convicted. It is undeniable that ‘... international peace and security is the central good of International Criminal Justice ...’⁷³³ and such a paradoxical form of justice for one of the worst incidents of genocide, could have been enough to tip an already unstable State back into the throes of violence and mass atrocities, as it has been suggested by Jens Ohlin that, ‘For the Rwandans, true national reconciliation would be possible only if there was justice for the genocide, and justice by their terms meant execution for the guilty.’⁷³⁴ However, the fact the Rwandan government showed great restraint in not carrying out the sentences of many people who were sentenced to death during the trials for genocide and crimes against humanity, shows a concerted effort to change the culture in Rwanda; one that was reinforced in the new Rwandan Constitution, which came into force on the 2 June 2003. The Rwandan Constitution,⁷³⁵ states in part two of its preamble that the Rwandan government seeks to ‘... fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional, and any other form of division.’⁷³⁶ This coupled with the many radical changes made to the Rwandan legislation and especially the Organic Laws of 2004,⁷³⁷ which drastically shook up the judiciary, public

⁷³¹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995)

⁷³² Moussalli M, UN GA, ‘Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda’ A/55/269 (4 August 2000) 136

⁷³³ Jens David Ohlin, ‘Applying the Death Penalty to the Crime of Genocide’ (2005) 99(4) AJIL 747, 750

⁷³⁴ Jens David Ohlin, ‘Applying the Death Penalty to the Crime of Genocide’ (2005) 99(4) AJIL 747, 748

⁷³⁵ Constitution of the Republic of Rwanda (OG No Special of 4 June 2003 119) and its amendments of 2 December 2003 (OG No Special of 2 December 2003 11) and of 8 December 2005 (OG No Special of 8 December 2005 22)

⁷³⁶ Constitution of the Republic of Rwanda (OG No Special of 4 June 2003 119) and its amendments of 2 December 2003 (OG No Special of 2 December 2003 11) and of 8 December 2005 (OG No Special of 8 December 2005 22) Part II, Preamble

⁷³⁷ Organic Law No 6 bis/2004 of 14 April 2004 on the Statutes for Judges and Other Judicial Personnel, completely restructures the judiciary and set a law degree as the minimum criterion for becoming a Rwandan judge. Organic Law No 22/2004 of 13 August 2004 on the Statute of Public Prosecutors and Personnel of the

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prosecutors and other legal personnel, effectively causing them to have to reapply for their jobs and ascertain a set standard of legal qualification in order to retain their jobs, is truly an effort worthy of commendation. Add to this the various legal reforms that from 2007 onwards, that will be discussed at greater length in the section investigating the Rwandan government's quest to satisfy Rule 11*bis* of the ICTR Rules of Procedure and Evidence,⁷³⁸ in order to facilitate transfer of ICTR cases back to the Rwandan courts. Nonetheless:

It must be recognized, however, that the Rwandan justice system remains in a state of transition that is nowhere near completion. With the constitution as a foundational guide for future developments, there exists the potential for positive outcomes in the future.⁷³⁹

5.10 The *Gacaca* Courts – Giving Justice to the People?

As previously mentioned Rwanda had been detaining alleged perpetrators at an astonishing rate, but more worrying was the fact that based on the rate at which the specialised chambers of the Rwandan national courts were able to prosecute those under the Organic Law No. 08/96 of 30 August 1996, which covered the crime of genocide; it was going to take them anywhere between two hundred⁷⁴⁰ and possibly four hundred years⁷⁴¹ to complete their case load.⁷⁴² This was unacceptable for the simple reason that it put Rwanda in the position whereby it '... was simply incapable of respecting the provisions of its own criminal law, not to mention its obligations under international human rights law and international

Public Prosecution Service, (O.G No 17 of 1st September 2004) as amended and complimented by Organic Law No 12/2006 of 21/03/2006, (OG Special No of 28 March 2006) dealt with the minimum qualification requirements/training for public prosecutors and all other legal personnel.

⁷³⁸ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995) Rule 11*bis*

⁷³⁹ Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 100

⁷⁴⁰ Victor Peskin, 'International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation' (CUP 2008) 157

⁷⁴¹ Neil J Kritz, Bernard Muna, Navanetbem Pillay & Theogene Rudasingwa, 'The Rwanda Tribunal and its Relationship to National Trials in Rwanda' (1998) 13 AM U INT L REV 1469, 1490

⁷⁴² William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the *Gacaca* Courts' (2005) 3 JICJ 879, 883

criminal law.’⁷⁴³ The reference to Rwanda’s own criminal law, pertains to the Rwandan Code of Criminal Procedure (1963) (*Code de Procedure Penale*) where it is stipulated that the State has no right to detain a suspect unless they have ‘*indices serieux de culpabilite*’ (serious grounds suggesting guilt)⁷⁴⁴ and even then, the detention could only be enforced by a court of first instance. However an exception to this was made in Organic Law 9/96 of 8 September 1996⁷⁴⁵ which stated that in the case of those being detained for genocide and related crimes, they could be detained, so long as case files against them were prepared by the end of 1997.⁷⁴⁶

This derogation is quite obviously a breach of procedural and of human rights norms, an example of which being Article 9 (3) of the ICCPR (1976), which states that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release⁷⁴⁷

Whilst Article 4 of the ICCPR (1976) does permit a derogation in times of ‘... public emergency...’, it does so only to the extent necessary as required by the ‘... exigencies of the situation ...’ and only so long as such action was not contrary to the norms of international law. Moreover it is highly unlikely that there exists a norm within international law that permits the arbitrary detention of a suspect where they may never actually face trial before

⁷⁴³ William A Schabas ‘The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts’ (2005) 3 JICJ 879, 883

⁷⁴⁴ Rwandan Code of Criminal Procedure (*Code de Procedure Penale*) of 23 February 1963, amended by Decree Law No 07/82 of 7 January 1982; amended by Law No 31/1985 of 8 November 1985 and more recently Law No 13/2004 of 17 May 2004 Art 37

⁷⁴⁵ Organic Law No 9/96 of 8 September 1996 Relating to Provisional Modifications to the Criminal Procedure Code Art 2

⁷⁴⁶ William A Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (Cameron May 2008) 540-542

⁷⁴⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 9(3)

their natural life comes to an end. Thus in answer to this problem, the Rwandan government on the 18 June 2002 launched the contemporary *Gacaca* court system.⁷⁴⁸

It has been suggested that:

In institutionalizing *gacaca*, the Rwandan government has launched one of the most ambitious transitional justice projects the world has ever seen. Based on a traditional form of dispute resolution, *gacaca* is a local, participatory legal mechanism that seeks to blend punitive and restorative justice.⁷⁴⁹

Indeed the word *Gacaca* is Kinyarwanda for 'grass' or 'lawn' and was a traditional form of community led justice in which civil matters were adjudicated by village elders and those who were held to be of high moral integrity.⁷⁵⁰ The village elders who would be known as '*inyangamugayo*' (people of integrity) would resolve disputes relating to family matters, property issues and other civil matters of concern to the local community.⁷⁵¹ The participation of the traditional *Gacaca* process was voluntary and would not involve prison sentences, but would provide an outcome that would seek to '... salvage social peace and cohesion in the village.'⁷⁵² However the new hybrid form of *gacaca* (hybrid in the sense that it is an amalgamation of the traditional *gacaca* justice and '...typical criminal justice system decentralized to the village level ...',⁷⁵³ as created by Organic Law No. 40/2000 of 16 January 2001⁷⁵⁴ differs from the traditional form of *Gacaca* in three obvious ways. The first of which

⁷⁴⁸ National Service of Gacaca Courts Report, Domitilla Mukantaganzwa, 'Administrative Report on the National Service of Gacaca Courts' (Kigali 2012) 47 <

[http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Frw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FSpacesStore%25252Fd5a25936-9d5c-4330-a7ff-](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Frw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FSpacesStore%25252Fd5a25936-9d5c-4330-a7ff-811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usq=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc)

[811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usq=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Frw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FSpacesStore%25252Fd5a25936-9d5c-4330-a7ff-811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usq=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc)> (Accessed on 18/05/2013)

⁷⁴⁹ Max Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (Dec 2008) 53(3) *Afr Stud Rev* 25, 25

⁷⁵⁰ Allison Corey and Sandra F Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004) 103 *J Afr Af* 73, 81

⁷⁵¹ Peter Uvin & Charles Mironko 'Western and Local Approaches to Justice in Rwanda' (2003) 9 *Global Gov* 219, 226

⁷⁵² Allison Corey and Sandra F Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004) 103 *J Afr Af* 73, 82

⁷⁵³ Bert Ingelaere, 'The Gacaca Courts in Rwanda: Contradictory Hybridity' (E-International Relations, 4 May 2014) < <http://www.e-ir.info/2014/05/04/the-gacaca-courts-in-rwanda-contradictory-hybridity/> > (Accessed on 02/09/2014) Para 6

⁷⁵⁴ Organic Law No 40/2000 of 16/01/2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide

is that participation had now become mandatory, as all members of the community were compelled to attend or face government enforced fines and since 2007 and all Rwandan citizens must carry a book in which they gain a stamp each time they attend *Gacaca*.⁷⁵⁵ Failure to attend and ascertain the requisite number of stamps, results in a fine of \$4, which is extremely high given the monthly average household income in the more rural areas can be as little as \$20.⁷⁵⁶ Secondly the elders presiding over the cases were originally given discretion as to what the appropriate form of resolution would be, whereas now it is set out for them in great detail in Organic Law No 40/2000 of 26 January 2001 in Articles 68 – 75; what is notable here is that there is not a great deal of flexibility afforded to the *inyangamugayo* when deciding on the appropriate sentence. Finally, the most notable difference is the government centralisation of what was originally local ad-hoc hearings, but had now become regulated by national legislation and were far more complex in their organisation and structure.

5.11 Modern Day Gacaca

The modern form of *Gacaca* was created specifically to deal with the large numbers of those imprisoned and accused of the crimes of genocide has a very complex structure. The Rwandan government estimated that the new *Gacaca* courts would be capable of hearing somewhere in the region of 1,000,000 cases,⁷⁵⁷ which is impressive, but also alarming, given that there is no legal representation for the either side, and the training of the judges is

⁷⁵⁵ National Service of Gacaca Courts Report, Domitilla Mukantaganzwa, 'Administrative Report on the National Service of Gacaca Courts' (Kigali 2012) 164 <
<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Fw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FspacesStore%25252Fd5a25936-9d5c-4330-a7ff-811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usg=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc>> (Accessed on 18/05/2013)

⁷⁵⁶ Max Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (Dec 2008) 53(3) Afr Stud Rev 25, 37

⁷⁵⁷ William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts' (2005) 3 JICJ 879, 879

minimal (approximately three days).⁷⁵⁸ Organic Law No 40/2000 of 26 January 2001 has been so effective, due to utilising the very comprehensive and extensive layers of local government that had been instigated by the Belgians. This system of local governance is split into cells/cellule at the lowest level, of which there are at least 9000 in Rwanda, the cells are then grouped into sectors, of which there are 1500 and then the sectors are grouped into districts,⁷⁵⁹ which equates to approximately 11,000 *Gacaca* courts or jurisdictions.⁷⁶⁰ Within each jurisdiction there will be a general assembly, which consists of all those in that cell or sector that are over the age of eighteen. Then there is the 'seat' or bench which consists of the judges, which under the Organic Law of 2001⁷⁶¹ there were nineteen in each jurisdiction, these were to be 'honest' people who had good morals and had not been party to the genocide, which posed an obvious problem, given that very little of the Rwandan population had not been a part of the genocide in one form or another.⁷⁶² This provision generated some 250,000 judges, which was eventually streamlined in 2004 by means of Organic Law No 16/2004 of 19 June 2004, which reduced the number of judges from nineteen in each jurisdiction, to just nine. This meant a reduction from 250,000 to 170,000⁷⁶³ judges ready for the roll out of *Gacaca* across the whole of Rwanda. This reduction in the number of bench judges was deemed necessary following the trial period where the Rwandan government discovered '... widespread absenteeism among judges that led to the inability to achieve a quorum forth Bench in many cells ...',⁷⁶⁴ which in turn caused

⁷⁵⁸ National Service of Gacaca Courts Report, Domitilla Mukantaganzwa, 'Administrative Report on the National Service of Gacaca Courts' (Kigali 2012) 82 <

<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Fw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FspacesStore%25252Fd5a25936-9d5c-4330-a7ff-811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usq=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc> > (Accessed on 18/05/2013)

⁷⁵⁹ William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts' (2005) 3 JICJ 879, 893

⁷⁶⁰ Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 226

⁷⁶¹ Organic Law No 40/2000 of 16 January 2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide

⁷⁶² Organic Law No 40/2000 of 16 January 2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide, Art 10

⁷⁶³ William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts' (2005) 3 JICJ 879, 894

⁷⁶⁴ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Enquiry 467, 475

delays in delivering judgements and decisions on sentencing. Therefore the reduction in the number of judges within each jurisdiction which meant that not only would it be easier to attain a quorum so as to increase the frequency of hearings, but it would also permit greater training and instruction as there would be fewer judges to provide this for.⁷⁶⁵

It is worth briefly mentioning that Organic Law No 16/2004 of 19 June 2004⁷⁶⁶ also expanded the category one offences to include torture, indignity to a dead body and sexual violence (namely rape).⁷⁶⁷ The purpose of this was to remove some additional crimes from the remit of the *Gacaca* courts and to pass them to the specialised chambers, who were better equipped to deal with such complex trials. In addition to expanding category one offences, Organic Law No. 16/2004 of 19 June 2004 also merged categories two and three from the 2001 Organic Law, thus giving the *Gacaca* only two categories to be responsible for and only two sets of sentencing guidelines to have to follow, rather than three tiers, which could have proved too complex for non - legally trained judges. The final level of the *Gacaca* system was the 'coordinating committee' which were five of the elected judges, who would deal with the administrative functions of the courts⁷⁶⁸.

The way in which the *Gacaca* system then set about beginning trials, was through national data collection, which commenced, in January 2005⁷⁶⁹ so as to compile a list of the crimes

⁷⁶⁵ - - 'Eight Years on ... A Record of Gacaca Monitoring in Rwanda' (Penal Reform International, 2010) http://srsg.violenceagainstchildren.org/sites/default/files/consultations/restorative_justice/presentations/nikhil_roy/Gacaca.pdf> (Accessed on 09/06/2013) 24

⁷⁶⁶ Organic Law No 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts 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, (OG Special No of 19/06/2004)

⁷⁶⁷ Organic Law No 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts 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, (OG Special No of 19/06/2004) Art 51

⁷⁶⁸ Peter Uvin & Charles Mironko 'Western and Local Approaches to Justice in Rwanda' (2003) 9 Global Gov 219, 226

⁷⁶⁹ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Enquiry 467, 474

committed in the various sectors and cells of Rwanda. Given how effective the localised system of government was at collating and disseminating information on the whereabouts of Tutsis and Tutsi collaborators during the genocide, it seems logical to presume that it will have been effective at collecting data on the alleged crimes and perpetrators.

An example of the efficiency of this data collection is illustrated by the fact that during the trial period which took place between 2002 and 2004; in which only ten percent of the overall number of Rwanda's cells were involved in data collection, an additional 63,447 suspects were identified.⁷⁷⁰ However, despite the associated problems, the fact remains that, 'It has always been expected that as some form of democracy or majority rule took over in Rwanda, there would be no heart for further prosecution.'⁷⁷¹ Given that the RPF based government has remained resolute in its quest to stamp out impunity for the crimes of genocide and war crimes that took place during 1994, by means of not allowing anyone to escape some form of justice, it would seem to suggest that despite Rwanda having become a democratic State, they have not lost the drive or determination to continue with the prosecutions. However as the preamble to Organic Law No. 16/2004 of 19 June 2004 makes it abundantly clear, the reason why this mass justice is deemed necessary is due to the fact that the crimes were '... publicly committed before the very eyes of the population ...'⁷⁷² and therefore the population in the form of the general assemblies of the *Gacaca* '... must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators.'⁷⁷³ Therefore it is not surprising to learn that in the 1st phase of *Gacaca*, the data collection involved required all the general assemblies at the cell level to complete six surveys over a period of several months, with the aim collating a list of who lived in the area prior to the genocide, who from the are died during the genocide, details of

⁷⁷⁰ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Enquiry 467, 477

⁷⁷¹ William A Schabas 'The Rwandan Courts in Quest of Accountability: Genocide Trials and the Gacaca Courts' (2005) 3 JICJ 879,894

⁷⁷² Organic Law No 40/2000 of 16 January 2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide, Preamble

⁷⁷³ Organic Law No 40/2000 of 16 January 2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide, Preamble

property damage/loss and finally the creation of a list of those alleged to have committed these crimes. This has been described as a 'grassroots' retelling of the events of 1994 and also of the years leading up to 1994, starting from 1990 onwards, as specified in the temporal jurisdiction given to *Gacaca* in the Organic Law No. 40/2000 of 26 January 2001.⁷⁷⁴

The next phase of the process is then conducted out of the view of the public, whereby the judges elected by the general assembly meet to consider the testimony and data collected during the first phase and use this information to allocate the trials to the relevant court. Under Organic Law No. 10/2007 of the 1 March 2007,⁷⁷⁵ the cell level *Gacaca* court has authority to deal with '... the first and last resort, with offences relating to property.'⁷⁷⁶ Those accused of crimes that fall into the second category will have their case decided before the sector level *Gacaca* courts and this level of *Gacaca* will also hear the appeals against cell level decision.⁷⁷⁷ This category was created by merging categories two and three from Organic Law No. 08/96 of 30 August 1996, which originally defined the crimes of genocide and crimes against humanity within Rwanda. And then finally the sector level appeal chambers will deal with appeals against decisions made at the sector level and will also deal with appeals for those whose sentence was given in their absence. It is worth noting that whilst there is a hierarchy within the *Gacaca* system, there is still no formal legal training for any of the judges, other than the three days of training that they receive prior to commencing work as a judge.⁷⁷⁸ However the coordination committees that look after the administrative functions of the *Gacaca*'s work must be able to read and write in Kinyarwanda,⁷⁷⁹ thereby ensuring some minimum level of competency and record making of the workload of the *Gacaca* courts.

⁷⁷⁴ Organic Law No 40/2000 of 16 January 2001 Setting up "Gacaca Jurisdictions " and Organizing Prosecutions for Offences Constituting the Crime of Genocide Preamble

⁷⁷⁵ Organic Law No 10/2007 of 1 March 2007 (Gacaca Amendment Law)

⁷⁷⁶ Organic Law No 10/2007 of 1 March 2007 (Gacaca Amendment Law) Art 7

⁷⁷⁷ Organic Law No 10/2007 of 1 March 2007 (Gacaca Amendment Law) Art 8

⁷⁷⁸ Max Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (Dec 2008) 53(3) Afr Stud Rev 25, 31

⁷⁷⁹ Organic Law No 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other

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The final phase of the *Gacaca* process is that of the actual trial phase and sentencing, where neither the prosecution nor the defence have legal representation.⁷⁸⁰ The hope at this level is to ascertain the truth through confessions, to learn the names of any accomplices and to lean towards more lenient sentencing or possibly social reintegration,⁷⁸¹ where the person has already served their time, whilst awaiting trial. This form of justice not only serves the much needed objective of drastically reducing the number of those imprisoned in Rwanda's dangerously overcrowded prisons, but also goes some way to ensuring restorative justice is carried out, through '... reintegrative shaming ...'⁷⁸² something that Western styles of justice do not pursue, but is essential when a large percentage of the population of a nation were party to the crimes. As without forgiveness and reintegration Rwanda cannot hope to rebuild itself, whilst a large percentage of its population is imprisoned and costing the State money, rather than contributing to rebuilding the State and its economy.

5.12 Gacaca Not Without its Flaws

One of the key criticisms of *Gacaca* is that its openness may have caused more harm than good, as many fear reprisals because of their testimony and tension and suspicion amongst the population still remains present.⁷⁸³ Furthermore, many victims who have testified have reported in a Redress report⁷⁸⁴ that they have received '...threats, taunts and reprisals ...'⁷⁸⁵

Crimes Against Humanity, Committed Between October 1 1990 and December 31 1994, (OG Special No of 19/06/2004) Art 11

⁷⁸⁰ Alison Corey & Sandra F Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004) 103 J Afr Af 73, 85

⁷⁸¹ Max Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (Dec 2008) 53(3) Afr Stud Rev 25, 31

⁷⁸² Mark Drumbl, 'Punishment, Post genocide: From Guilt to Shame to Civis in Rwanda,' (2000) 75(5) NYL Rev 1221, 1326

⁷⁸³ - - 'Eight Years on ... A Record of Gacaca Monitoring in Rwanda' (Penal Reform International, 2010) 65 <http://srsg.violenceagainstchildren.org/sites/default/files/consultations/restorative_justice/presentations/nikhil_roy/Gacaca.pdf> (Accessed on 09/06/2013)

⁷⁸⁴ - - African Rights and Redress Report, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes' (November 2008) <<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> (Accessed 03/06/2013)

and have been left feeling ostracised from their own communities in addition to still living in a state of fear.⁷⁸⁶ There are also concerns about ‘... the potential for trauma as victims and witnesses recount and relive the horrors that they experienced ...’⁷⁸⁷ and are then forced to co-exist in close proximity. An illustration of the Rwandan government’s ignorance or choice to prioritise quantity of justice over quality of justice attained was evident in the decision to return the crime of rape to the *Gacaca* system under the Organic Law No. 13/2008 of the 19 May 2008, Article 6.⁷⁸⁸ Whilst Article 6 does state that any confessions or testimonies of the crime of rape are to be made ‘in camera’ and not in public, the lack of procedural safeguards and legal training, has made all parties to this specific crime particularly nervous.⁷⁸⁹ As many women fear the stigma that they will carry within their community if they are discovered to be a rape victim or far worse, they should they be forced to face the person who raped them.⁷⁹⁰

It is believed that the Rwandan government took the drastic step to re-categorise the crime of rape and to place it back within the jurisdiction of the *Gacaca*, not to devalue the magnitude of the offence, but simply to ensure that justice was carried out, in a more prompt fashion and also before it became too late.⁷⁹¹ This can partly be attributed to an

⁷⁸⁵ - - African Rights and Redress Report, ‘Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes’ (November 2008)
<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> (Accessed 03/06/2013) 4

⁷⁸⁶ - - African Rights and Redress Report, ‘Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes’ (November 2008)
<<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> (Accessed 03/06/2013) 5-6

⁷⁸⁷ Allison Corey and Sandra F Joireman, ‘Retributive Justice: The *Gacaca* Courts in Rwanda’ (2004) 103 J Afr Af 73, 86

⁷⁸⁸ Organic Law No 13/2008 of 19 May 2008 (Gacaca Amendment Law)

⁷⁸⁹ Allison Corey and Sandra F Joireman, ‘Retributive Justice: The *Gacaca* Courts in Rwanda’ (2004) 103 J Afr Af 73, 85

⁷⁹⁰ Allison Corey and Sandra F Joireman, ‘Retributive Justice: The *Gacaca* Courts in Rwanda’ (2004) 103 J Afr Af 73, 85

⁷⁹¹ National Service of Gacaca Courts Report, Domitilla Mukantaganzwa, ‘Administrative Report on the National Service of Gacaca Courts’ (Kigali 2012) 137 <
<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Frw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FspacesStore%25252Fd5a25936-9d5c-4330-a7ff->

Footnotes continued on next page

awareness whereby the more time that passes between the prosecution and the act, naturally the memories of witnesses and defendants become less certain and have the potential to be influenced or clouded. This is problematic when the sole basis of a prosecution is witness testimony, rather than any form of scientific evidence, as is the norm in Western investigations of the crime of rape. Furthermore, the Rwandan government were very conscious of the high numbers of people suffering from HIV/AIDS; with many of them being rape victims, who contracted the disease following the events of 1994.⁷⁹² Given the lack of easily accessible and affordable anti-retroviral drugs, many of the rape victims and the alleged rapists have short life expectancies and without the key witness or the perpetrators, the *Gacaca* courts or even the specialised chambers would be hard pressed to form a case on such scant evidence.⁷⁹³ Thus once again the Rwandan government chose to forfeit the quality of justice, especially from the victim's perspective, in favour of boosting its own prosecution statistics.

Overall, whilst there are many potential flaws to the *Gacaca* system, such as the lack of procedural safeguards especially given that trials are based upon hearsay, witness testimony and the confessions of those accused, plus the fact that the *Gacaca* system created issue of 'double jeopardy' whereby people who had been acquitted by the specialised chambers, could find themselves before a *Gacaca* court and facing an equally lengthy sentence if found guilty, it did have some positives. Such as the fact that by the time *Gacaca* trials were drawing to a close in 2010 they had processed somewhere in the region of two million people at a cost of \$40 million, which is pretty impressive compared to the comparative

[811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usg=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529.d.dGc](http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf) (Accessed on 18/05/2013)

⁷⁹² Human Rights Watch: Report 'Justice Compromised: The Legacy of Rwanda's Community - Based *Gacaca* Courts', 1-56432-757-4 (May 2011) 5

http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf (Accessed on 01/08/2013)

⁷⁹³ Human Rights Watch: Report 'Justice Compromised: The Legacy of Rwanda's Community - Based *Gacaca* Courts', 1-56432-757-4 (May 2011) 120

http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf (Accessed on 01/08/2013)

sixty nine trials conducted by the ICTR at a cost of over \$1 billion.⁷⁹⁴ Whilst there can be no direct comparison between the work of the ICTR and the work of the *Gacaca* courts, as they both had very different objectives, it is undeniable that the *Gacaca* has brought about mass justice for Rwanda. However, how the Rwandan government seeks to remedy the inevitable injustices that have occurred in the *Gacaca* court system still remains to be seen, so a final judgement on the way in which the Rwandan national courts have overall achieved their objective of ensuring that all or the majority of those who committed the crimes of genocide or crimes against humanity will not go unpunished, still remains to be seen.

It is not necessary to go into greater detail about the case history of the *Gacaca* or to critically assess whether the *Gacaca* successfully achieved its goals as set out in the preamble to Organic Law No. 40/2000 of 26 January 2001, where it is stated that the aim of *Gacaca* is:

... to achieve reconciliation and justice in Rwanda, to eradicate for good the culture of impunity and to adopt provisions enabling to ensure prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandese society made decaying by bad leaders who prompted the population to exterminate one part of that society.⁷⁹⁵

The key lesson to be learnt from all this is that whilst *Gacaca* does not conform to conventional ideals of justice, such as the procedural safeguards, levels of fairness and due process of the ICC and ICTR. It does however, serve to highlight one of the issues the ICC may encounter when trying to follow its principle of complementarity, in the sense that whilst *Gacaca* or similar native and unconventional methods of justice (for example Acholi justice of Uganda or the Truth and Reconciliation Commission of South Africa), certainly will not provide anything near the level of justice offered by the ICC. They are held to be satisfactory forms of justice in the countries in which these war crimes and acts of genocide

⁷⁹⁴ Jean Baptiste Kayigamba, 'Rwanda's Gacaca Courts: A Mixed Legacy' (New Internationalist Magazine, 15 June 2012) <<http://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy/>> (Accessed on 30/07/2013)

⁷⁹⁵ Organic Law No. 40/2000 of 26 January 2001, Preamble

take place, as to prosecute on the scale commensurate with the level of participation required for these crimes to have occurred, is neither a practical reality or a desirable outcome. The reason for this need for reconciliation over conventional ideals of justice is something that was succinctly put by President Paul Kagame of Rwanda at the launch of the Gacaca courts in 2002, when he stated that:

... [I]f we all together support Gacaca Courts, we'll have shown the love we have for our country and Rwandans. Justice that reconciles Rwandans will be a fertile ground for unity and a foundation for development ...⁷⁹⁶

Moreover, it is a form of justice that the ICC would be hard pushed to justify intervention against, as the national legal channels would technically be taking action and even where the ICC was able to justify intervention, it would most likely be met with hostility from the State in which the crimes took place as they could potentially feel that their State sovereignty had been unfairly breached simply because their ideals of justice did not conform to the more Westernised ideals of the ICC. Furthermore, as has been illustrated in Rwanda and will be further highlighted in the assessment of the changes Rwanda has made to its national legislation, so as to facilitate transfer of ICTR case load to its national courts, it is very difficult not to undermine justice and avoid leaving the victims feeling cheated, when the higher level offenders receive proportionately weaker sentences, than the lower level offenders. Thus flowing on from this, it is to the changes made to Rwanda's national legislation, particularly the abolition of the death penalty in 2007, to which the discussion now turns.

⁷⁹⁶ Rwandan President Paul Kagame, as cited in National Service of Gacaca Courts Report, Domitilla Mukantaganzwa, 'Administrative Report on the National Service of Gacaca Courts' (Kigali 2012) 1 <<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rwandapedia.rw%2Frw%2Fcmis%2Fviews%2Fworkspace%25253A%25252F%25252FspacesStore%25252Fd5a25936-9d5c-4330-a7ff-811929d90f09&ei=SP8xVNThLoTp8gWyxYL4CQ&usg=AFQjCNFce2oZmUO2UXaQ5BzxuhwfoHvybQ&bvm=bv.76802529,d.dGc>> (Accessed on 18/05/2013)

5.13 Abolition of the Death Penalty: Social Progress or a Slave to Rule 11bis?

Prior to the genocide in Rwanda, whilst the death penalty had remained a potential penalty for those found guilty of the crime of murder, there had not been an actual execution carried out since 1982.⁷⁹⁷ In addition to this President Habyarimana had commuted the death sentences of all those detained in Rwandan prisons in 1992 and changed it to a sentence of life imprisonment.⁷⁹⁸ Thus it does not come as a surprise that the UN Secretary General in a report entitled 'Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty',⁷⁹⁹ which he presented to the Economic and Social Council on the 8 June 1995, stated that Rwanda was one of the States across the globe, that was considered to be abolitionist de facto. However, the response given by the Rwandan Special Representative in November of 1994 in opposition of the then proposed ICTR, which stated:

Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned, and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence. This situation is not conducive to national reconciliation in Rwanda.⁸⁰⁰

This statement and objection to the creation of an international tribunal, which did not have the death penalty as a potential punishment, must surely have indicated that Rwanda was thinking about using the death penalty in its own domestic prosecutions for the genocide of 1994. Therefore the events of the 24 April 1998 should not have been a great surprise to the international community, when the execution of 22 persons convicted of category one offences under Organic Law No. 08/96 of 30 August 1996, took place in five stadiums across

⁷⁹⁷ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 250

⁷⁹⁸ - - 'How States Abolish the Death Penalty' (International Commission Against the Death Penalty Paper, July 2012) 22 < <http://www.icomdp.org/cms/wp-content/uploads/2013/04/Report-How-States-abolition-the-death-penalty.pdf> > (Accessed 03/03/2012)

⁷⁹⁹ UN Economic & Social Council Report, 'Crime Prevention and Criminal Justice: Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty' UN Doc E/1995/78 (8 June 1995) 6

⁸⁰⁰ UNSC Meeting, 'The International Tribunal – Rwanda' (8 November 1994) UN Doc S/PV.3453, 16

Rwanda.⁸⁰¹ It must be noted that these were the only executions, officially carried out by the Rwandan government for the crimes of genocide and whilst many more were sentenced to death after this date, none actually had their sentences carried out. However the most interesting factor about the way in which Rwanda has set about dealing with its own national prosecutions for the crime of genocide, came about in 2007 when it enacted Organic Law No. 31/2007 of 25 July 2007⁸⁰² which formally abolished the death penalty for all crimes in Rwanda and made Rwanda the 90th officially abolitionist State worldwide.⁸⁰³ Whilst this must have appeared to be a surprising change of attitude to many; especially given that at the time of abolition Rwanda had approximately 600 inmates on death row.⁸⁰⁴ The question has to be asked, was it really a great surprise? Or was it merely a reaction to the ICTR's reaction to the Organic Law No. 11/2007 of 16 March 2007⁸⁰⁵ and the concerns over whether or not the ICTR was satisfied that rule 11*bis* of the ICTR's Rule of Procedure and Evidence had been satisfied?

5.14 Rule 11*bis*

As previously mentioned the original completion strategy for the ICTR was created in August 2003, via UN Security Council Resolution 1503, which stated in its preamble that the UN Security Council was:

Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its

⁸⁰¹ Amnesty International Report, AI Index AFR 47/15/98 (27 April 1998) 1
<<http://www.amnesty.org/es/library/asset/AFR47/015/1998/es/285a93fd-f880-11dd-b378-7142bfb1838/%20afr470151998en.pdf>> (Accessed on 23/06/2009).

⁸⁰² Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law)

⁸⁰³ Audrey Bector, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rts Rev 99,100

⁸⁰⁴ Amnesty International Report, 'Rwanda Abolishes Death Penalty' (2nd August 2007)
<<http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>>
(Accessed 01/08/2013).

⁸⁰⁵ Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States

work in 2010.⁸⁰⁶

Furthermore UN Security Council Resolution 1503 also made reference to the need for the national judicial systems to be strengthened prior to any contemplation of handing over the outstanding ICTR prosecutions to the national courts:

Calls 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;⁸⁰⁷

Therefore it seems reasonable to assume that in 2003, the UN Security Council, certainly felt that the Rwandan national judiciary and Rwandan legislation, still needed to develop and become more in keeping with the western ideals of justice, that have become norms of international criminal and human rights law. Especially, before they would contemplate handing over the remaining case load of the ICTR to the national courts of Rwanda, or the courts of other relevant nations, such as France. The section of the ICTR statute that governs the transfer of cases is Rule 11*bis* of the Rules of Evidence and Procedure and it states that it will only be able to refer a case to a State if they have the 'relevant jurisdiction'. What constitutes relevant jurisdiction is defined in Rule 11*bis* (A)(i) which stipulates that a State will have jurisdiction when the crime was committed within their territory or alternatively, as stated in Rule 11*bis* (A)(ii) when the accused was arrested within their territory. In addition to setting out, when a State can be said to have sufficient jurisdiction, so as to satisfy the requirements for the referral, Rule 11*bis* (C) also states the following:

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.⁸⁰⁸

⁸⁰⁶ UNSC Res 1503 'On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda' (28 August 2003) UN Doc S/RES/1503 Preamble

⁸⁰⁷ UNSC Res 1503 'On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda' (28 August 2003) UN Doc S/RES/1503 Para 1

⁸⁰⁸ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995) Rule 11*bis*(c)

This requirement that the trial procedure be fair has always been an obstacle in the referral of cases to Rwanda, as the speed with which the Rwandan specialised chambers have processed cases, has led human rights organisations such as Amnesty International⁸⁰⁹ and also the ICTR⁸¹⁰ to question, whether due process and procedural safeguards are being adhered to, when cases are being processed so quickly and with such insufficient levels of evidence and investigation. However the biggest concern for the ICTR was the issue of the death penalty, which ICTR President Erik Mose remarked in a report on the ICTR completion strategy. In the report he remarked that he believed that the forty cases that the prosecutor was looking to transfer to the Rwandan courts, was not viable, because ‘... at the moment , transfer is made difficult by the fact that Rwandan law prescribes the death penalty as a sentence for certain crime.’⁸¹¹ However, it is worth noting that the issue relating to the death penalty, being a major obstacle to the referral of cases to national courts, was an amendment that was made to Rule 11*bis* in May 2005.⁸¹² Prior to this Rule 11*bis* had simply stated that the ICTR Trial chamber must only be satisfied that ‘... that the accused will receive a fair trial with due process in the courts of the State Concerned.’⁸¹³ Therefore, the retention of the death penalty has often been noted as the biggest obstacle to cooperation between the ICTR and the Rwandan national courts and until 2007, it also appeared to be the main obstacle to Rwanda receiving the outstanding case load of the ICTR as it prepared to wind down and enforce its completion strategy.

⁸⁰⁹ - - Amnesty International Report, ‘Rwanda: Gacaca: A Question of Justice’ AFR 47/007/2002 (17 December 2002) <http://www.amnesty.org/en/library/asset/AFR47/007/2002/en/c0b61832-d769-11dd-b024-21932cd2170d/afr470072002en.html>

⁸¹⁰ *Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*) Case No ICTR-97-36-R11*bis* (8 October 2008) 19, Para 50.

⁸¹¹ UNSC, ‘Letter dated 3 October 2003 from the Secretary-General addressed to the President of the Security Council’ (6 October 2003) UN Doc S/2003/946 (2003)23

⁸¹² International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995)

⁸¹³ *Ibid* (ICTR Rules of Procedure and Evidence) Rule 11*bis* (c) (in the version last amended May 2003, not the current updated version)

5.15 Why Did Rwanda Abolish the Death Penalty?

It has been suggested that Rwanda's apparent change of heart with regards to the use of the death penalty, for both ordinary and extraordinary crimes can be attributed to '... the desire to have access to the leaders of the Rwandan genocide...'⁸¹⁴ whilst others have suggested that the legislative changes are simply another example '... as a mere result of top-down pressure from the International Criminal Tribunal for Rwanda.'⁸¹⁵ Whilst neither of these two reasons suggest that the decision to remove the death penalty completely from the statute books of Rwanda, came from a bottom up pressure from within or consensus amongst the general population of Rwandan that it signalled social and cultural advances in the historically volatiles political situation in Rwanda. It should be noted that even in developed Western States such as France⁸¹⁶ and Great Britain⁸¹⁷ there was no public consensus that the death penalty should be abolished, at the time when their respective governments took the decision to remove it from their statute books. Nonetheless, the key issue remains the same; namely that Rwanda decided to join the many other States across the globe and become completely abolitionist. Thus the motivating factors become irrelevant, so long as Rwanda continues to adhere to this legislative change and keeps the death penalty out of its legal proceedings.

Whilst some believe that Rwanda's move towards abolition of the death penalty was a direct response to amendments made to Rule 11*bis* in May 2005,⁸¹⁸ which came about following the creation of UN Security Council Resolution 1503 that tasked the ICTR with implementing a completion strategy aimed at having the ICTR complete all of its work by 2010 and hand over any outstanding cases or investigation, ideally to the Rwandan

⁸¹⁴ Melynda J Price, 'Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide (Lessons from Rwanda)' (2007) 21 Emory Int'l L Rev 563, 595

⁸¹⁵ Audrey Boctor, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rights Rev 99, 99

⁸¹⁶ - - 'How States Abolish the Death Penalty' (International Commission Against the Death Penalty Paper, July 2012) 13 <<http://www.icomdp.org/cms/wp-content/uploads/2013/04/Report-How-States-abolition-the-death-penalty.pdf> (Accessed 03/03/2012)

⁸¹⁷ HC Deb 16 December 1969, vol 793, cols 1148-297

⁸¹⁸ Jean Baptiste Kayigamba, 'Rwanda's Gacaca Courts: A Mixed Legacy' (New Internationalist Magazine, 15 June 2012) <<http://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy/>> (Accessed on 30/07/2013)

courts.⁸¹⁹ However, because the Rwandan courts were not the most equipped or legally advanced courts, it may have been added so as to ensure due process and procedural fairness to the same standard as is common in Westernised states, because geographically and culturally the Rwandan courts are best placed to ensure that the prosecutions contribute to the goal of bringing an end to impunity.⁸²⁰ Others such as Audrey Boctor argue that the signs were already apparent in Rwanda and that they were leaning towards an abolitionist stance⁸²¹ prior to the top down pressure which stemmed from the ICTR's completion strategy and the numerous refusals by the ICTR trial chambers to refer ICTR cases, especially those with indictments to the Rwandan courts.⁸²² Boctor stated that:

To be sure, pressure from the ICTR and the concerns over the internal consistency of the law undoubtedly formed part of the rationale, but these justifications take a backseat to those connected with a larger objective to be perceived as a progressive, democratic state committed to the Rule of Law and the promotion and protection of Human Rights.⁸²³

Here Boctor is arguing that to take the view that the Rwandan government only changed its legislation on the death penalty, so as to facilitate the transfer of ICTR cases to its own national courts would be a narrow minded stance to take, as the decision to abolish the death penalty may also have occurred due to the natural progression of an emerging democratic State.⁸²⁴ Furthermore, Rwanda was a highly conscious of the fact that due to the many corrupt political regimes, which had controlled Rwanda for many years, resulting in all respect for the sanctity of human life having been lost and subsequently attributed to the events of 1994,⁸²⁵ it was strongly believed that this could not be rectified so long as the death penalty was still used.⁸²⁶

⁸¹⁹ UNSC Res 1503 'On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda' (28 August 2003) UN Doc S/RES/1503 Preamble, Para 7

⁸²⁰ As cited in Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Preamble and Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990 Preamble

⁸²¹ Audrey Boctor, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rts Rev 99, 101

⁸²² *Prosecutor v Ildephonse Hategekimana* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis) ICTR-00-55B-R11bis (4 December 2008) Para 38

⁸²³ Audrey Boctor, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rts Rev 99, 112-113

⁸²⁴ Audrey Boctor, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rts Rev 99, 112

⁸²⁵ Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 209

⁸²⁶ Audrey Boctor, 'The Abolition of the Death penalty in Rwanda' (2009) 10 Hum Rts Rev 99, 112. Boctor cites her source for this to be 'The Explanatory Note to the Draft Law Relating to the Repeal of the Death Penalty'.

In addition to this, certain events following on from the execution of the twenty two persons convicted of genocide, which took place publicly on the 24 April 1998,⁸²⁷ signalled a change in attitude towards the death penalty. Whilst no further executions took place, the death penalty did continue to be handed out to those convicted of category one offences under the Organic Law No. 08/96 of 30 August 1996 and by the time of abolition in 2007, it was estimated that there were approximately 600 people on death row in Rwanda convicted on the crime of genocide.⁸²⁸ Similarly, in a speech given by President Kagame at the eighth commemoration of the genocide in April of 2002, he highlighted the fact that the death penalty was an issue that needed to be addressed ‘... in a wider context, not necessarily because it is related to the transfer of ICTR trials to Rwanda ...’.⁸²⁹ Therefore, highlighting and affirming Boctor’s assertion that the Rwandan government had been considering removing the death penalty from their statute books prior to the implementation of UN Security Council Resolution 1503⁸³⁰ when it increasingly became more of an act of necessity if the Rwandan courts were to have any chance of ensuring that outstanding cases from the ICTR were handed over to them rather than other national courts, as the ICTR implemented its completion strategy.

5.16 The Organic Laws of 2007

The first piece of legislation to be passed in 2007 within Rwanda, was Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States. As would be expected from the full title of this particular organic law, it sets out how the Rwandan national courts

⁸²⁷ - - Amnesty International Report, ‘Major step back for human rights as Rwanda stages 22 public executions’ AFR 47/14/98 (24 April 1998)

⁸²⁸ Amnesty International Report ‘Rwanda Abolishes Death Penalty’ (2 August 2007)
<<http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>>
(Accessed on 01/08/2013)

⁸²⁹ - - Interview by local and international press with President Kagame (Kigali, 6 April 2002)
<<http://www.gov.rw/Government/president/index.html>> (Accessed on 29/07/2013)

⁸³⁰ UNSC Res 1503 ‘On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda’ (28 August 2003) UN Doc S/RES/1503

would proceed to conduct a trial, should a case be referred to their jurisdiction from the ICTR and in the main tries to assure the ICTR, that their rules relating to evidence and witnesses will be adhered to, rather than the Rwandan procedures. However we are not concerned with these sections and will skip to Article 6 of Organic Law No. 11/2007 of 16 March 2007, which deals with the penalties that the national courts would impose in the case of an ICTR referral. Article 21 states that, 'Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR.' Similarly Article 22 of Organic Law No. 11/2007 of 16 March 2007 states that credit will be given for any time already served whilst in custody and Article 23 stipulates that the detention conditions for ICTR referral cases, will be in accordance '...with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.'⁸³¹ The distinct lack of any reference to the death penalty suggests that Rwanda was already more than willing to accede to international pressure with regards to prosecution of ICTR cases, so it comes as no surprise that only four months later a second piece of legislation was created, removing the death penalty in its entirety from Rwandan law.

In July of 2007, Organic Law No. 31/2007 of 25 July 2007 relating to the abolition of the death penalty was passed and in Article 2 it quite simply states 'The death penalty is hereby abolished.'⁸³² Furthermore, Article 3 of Organic Law No. 31/2007 of 25 July 2007 states that, 'In all the legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law.'⁸³³ Thus substituting the death penalty for a life sentence and for the crimes as set out within Article 5; which includes rape, torture, genocide and crimes against humanity, amongst several others, furthermore those convicted of these crimes, will receive life with 'special provisions'. Article 4 explains what 'special provisions'

⁸³¹ Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Art 23

⁸³² Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) Art 2

⁸³³ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) Art 3

means and in summary, it is life imprisonment whereby conditional release, mercy or any form of rehabilitation is not permitted until a minimum of twenty years of the sentence has been served. In addition to this Article 2(2) of Organic Law No. 31/2007 of 25 July 2007 states that a convicted person, who has been sentenced to life with special provisions, will be ‘... kept in isolation ...’⁸³⁴ and due to the ambiguity of the organic law, it would seem to suggest that the period of isolation could last the stipulated twenty years, before they became eligible for early release or at least rehabilitation, via reintegration into the mainstream prison population.

Whilst there has been no definitive ruling that long-term isolation is a breach of human rights, the International Human Rights Committee noted in General Comment No. 20 on Article 7 of the ICCPR (1994), that, ‘... prolonged solitary confinement of the ... imprisoned person may amount to acts prohibited by Article 7.’⁸³⁵ And Article 7 of the ICCPR states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’⁸³⁶ and further to this Article 15 of the Rwandan Constitution⁸³⁷ also states ‘... no person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment.’⁸³⁸ Therefore the contradictory pieces of Rwandan legislation caused much confusion and alarm amongst the ICTR, because normally the general rule would be that the most recent piece of legislation would take precedence and this is the stance the ICTR Trial Chambers have taken, meaning that ICTR suspects referred from the ICTR to Rwanda will potentially be to be sentenced to life with special provisions and this is something which the ICTR does not feel it can permit. Furthermore, this serves to illustrate that even when a State abolishes the death penalty, they may still have forms of punishment that are deemed

⁸³⁴ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) Art 2(2)

⁸³⁵ Human Rights Committee, General Comment No 20 Art 7 UN Doc HRI/GEN/1/Rev 1 at 30 (1994) Para 6

⁸³⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 7

⁸³⁷ Constitution of the Republic of Rwanda (OG No Special of 4 June 2003 119) and its amendments of 2 December 2003 (OG No Special of 2 December 2003 11) and of 8 December 2005 (OG No Special of 8 December 2005 22)

⁸³⁸ Constitution of the Republic of Rwanda (OG No Special of 4 June 2003 119) and its amendments of 2 December 2003 (OG No Special of 2 December 2003 11) and of 8 December 2005 (OG No Special of 8 December 2005 22) Art 14

unacceptable at the international level, further highlighting more potential obstacles to proportionality and consistency of penalties between the ICC and the national courts. In addition to this it also raises the question, of how a court that is created to champion human rights and lead in the fight against impunity could then standby and watch those deemed of lower rank and subsequently less culpable be sentenced to forms of punishment that are deemed contrary to international norms of human rights?

The ICTR's concern about the potential for human rights abuses via the new Rwandan penalty for the crimes of genocide and the other related offences was illustrated in several ICTR referral cases during 2008; one of which being *Prosecutor v Ildephonse Hategekimana* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis) ICTR-00-55B-R11bis (4 December 2008) where it was argued that the ambiguity caused by the two organic laws of 2007,⁸³⁹ meant that the ICTR Appeals Chamber, could not be certain that the defendant would not possibly face life imprisonment with special provisions and felt that because:

Hategekimana may face life imprisonment in isolation without adequate safeguards, in violation of his right not to be subjected to cruel, inhumane and degrading treatment.... The Appeals Chamber is therefore unable to conclude that the ambiguity as to the applicable punishment under Rwandan law for transfer cases has been resolved.⁸⁴⁰

In addition to the above mentioned case, there were an additional two similar cases⁸⁴¹ during 2008, where the decisions of the Trial Chambers not to transfer to the Rwandan courts were upheld, based on the ambiguity of the penalty. One of which was the case of *The Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution's Appeal Against Decision

⁸³⁹ Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States & Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law)

⁸⁴⁰ *Prosecutor v Ildephonse Hategekimana* (Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis) ICTR-00-55B-R11bis (4 December 2008) Para 38

⁸⁴¹ *The Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis) Case No. ICTR-97-36-R11bis (8 October 2008) Para 20 & *Prosecutor v Kanyarukig* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis) ICTR-2002-78-R11bis (6 June 2008) Para 4

on Referral Under Rule 11bis) Case No. ICTR-97-36-R11bis (8 October 2008) where it was also stated that:

Since there is genuine ambiguity about which punishment provision would apply to transfer cases, and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11bis of the Rules.⁸⁴²

In an attempt to rectify this ambiguity which the ICTR believed existed, the Rwandan government felt compelled to enact Organic Law No. 66/2008 of 21 November 2008 despite the existence of Article 24 of Organic Law No. 11/2007 of 16 March 2007 which clearly stated that:

This Organic Law applies mutatis mutandis in other matters where there is transfer of cases to the Republic of Rwanda from other States or where transfer of cases or extradition of suspects is sought by the Republic of Rwanda from other States.

Thus, what occurred as a result of the creation of Organic Law No. 66/2008 of 21 November 2008, enacted specifically so as to amend Organic Law No. 31/2007 of 25 July 2007 was not necessarily the objective the ICTR was seeking, because instead of abolishing the penalty of life with 'special provisions', it created a dualist system wherein those transferred from the ICTR will receive a maximum of life imprisonment, whilst those subject to ordinary Rwandan law could receive a life sentence with twenty years of that potentially spent in isolation. Once again creating a significant disparity of penalties between the national courts and the international, which could be interpreted as sending mixed signals as to the culpability and gravity of the offences being prosecuted, because surely those receiving the harsher sentences must be the more culpable? And if not, what kind of message would this send to potential future perpetrators, surely not one of deterrence.

⁸⁴² *The Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis) Case No. ICTR-97-36-R11bis (8 October 2008) Para 20 & *Prosecutor v Kanyarukig* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis) ICTR-2002-78-R11bis (6 June 2008) Para 4

5.17 Dualist System: A Satisfactory Outcome?

Overall whilst the death penalty has been removed from the equation, the fact remains that there is now a new double standard of penalties, between ICTR referral cases and the Rwandan cases. What this will mean for the stability of Rwanda and its quest to bring an end to impunity still remains to be seen, as it is only in the last few years, that the ICTR has finally acceded and begun to transfer its caseload to the Rwandan courts. Nonetheless, it has served to highlight that difficulties that an international court that is bound by multilateral human rights treaties as well as customary norms of human rights, when trying to work alongside a national court which does not adhere to the same standards of human rights, due process, procedural safeguards or similar sentencing policy. Furthermore, this can only serve to illustrate the potential difficulties the ICC will encounter when dealing with countries where the death penalty still remains an applicable penalty, because that will potentially create an even larger penalty disparity than was illustrated between the Rwandan legislation and that of the ICTR as the ICTR began to wind down and prepared to hand some of its outstanding or ongoing cases and investigations to Rwanda. Therefore, if the ICTR were unhappy to transfer cases to the Rwandan courts for fear that life imprisonment with special provisions⁸⁴³ may be imposed by the national courts, then why should the ICC tolerate national courts prosecuting in a 'complementary' manner⁸⁴⁴ and applying the ultimate penalty of death? However it has been argued that whilst the international criminal tribunals (ICTY and ICTR) have failed to lead by example and inspire the national courts to follow their example,⁸⁴⁵ through the strict requirements for case referral, as detailed in Rule 11*bis* of the ICTR and ICTY's Rules of Procedure and Evidence,

⁸⁴³ Organic Law No 31/2007 of 25 July 2007 (Death Penalty Abolition Law) Art 4

⁸⁴⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17

⁸⁴⁵ William W Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' (2007) 46 Colum J Transnat'l Law 279, 324 & Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 6

they have provided a ‘...carrot and stick...’⁸⁴⁶ approach resulting in coaxing the national governments to adhere to international norms of criminal law, as well as having a ‘... legitimating effect ...’⁸⁴⁷ on these relatively newly formed governments and their legal systems.

Some ICTR judges have stated, that they feel it was never the job of the ICTR to help Rwanda to rebuild its legal system, but rather to provide an ‘... international response ...’⁸⁴⁸ which would in turn provide legal precedents and a system of comprehensive case law for the Rwandan courts, other national courts and now more importantly for the ICC to follow. Moreover ‘... the international court has operated on the assumption that the domestic courts are, or should be, pursuing the ICTR's objective of developing the application of international criminal law.’⁸⁴⁹ And whether or not this is an arrogant stance, it is at least in part true because the Rwandan government and judiciary have been left with little option that to follow international legal norms, due process and to ensure adherence to human rights and other sentencing norms. Thus it would seem fair to surmise that ‘... Rule 11*bis* decisions are not only an issue of transfer, they [have also been] a call for transformation.’⁸⁵⁰

The transformation which has been brought about within Rwandan national courts and legal system, has certainly paid off and is evident in the number of cases that the ICTR is currently or has prepared to hand over to Rwanda as part of their completion strategy. This change of

⁸⁴⁶ William W Burke-White, ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina’ (2007) 46 Colum J Transnat'l Law 279, 324

⁸⁴⁷ William W Burke-White, ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina’ (2007) 46 Colum J Transnat'l Law 279, 324

⁸⁴⁸ Interview with Legal Officer (Participant 3), Chambers, UN ICTR (Arusha, Tanzania 7 July 2008) 3 Interview conducted by Nicola Palmer as cited in, ‘Transfer or Transformation?: A Review of the Rule 11 *bis* Decisions of the International Criminal Tribunal for Rwanda’ (2012) 20(1) Afr J Int Comp L 1, 15

⁸⁴⁹ Nicola Palmer, ‘Transfer or Transformation?: A Review of the Rule 11 *bis* Decisions of the International Criminal Tribunal for Rwanda’ (2012) 20(1) Afr J Int Comp L 1, 15

⁸⁵⁰ Nicola Palmer, ‘Transfer or Transformation?: A Review of the Rule 11*bis* Decisions of the International Criminal Tribunal for Rwanda’ (2012) 20(1) Afr J Int Comp L 1, 2.

attitude first became evident in the case of the *Prosecutor v Jean-Bosco Uwikindi* (Referral Chamber) ICTR-2001-75-R11bis (28 June 2011) which saw the newly created ICTR referral bench approve the transfer of a case to the Rwandan national courts. Uwikindi was a Pastor of a Pentecostal Church in Kanzenze, Rwanda and is charged with three counts of genocide, conspiracy to commit genocide and extermination as a crime against humanity.⁸⁵¹ Since the *Uwikindi* case⁸⁵² the ICTR have upheld the transfer of one other case to the Rwandan courts where the perpetrator was in detention⁸⁵³ and six fugitive cases.⁸⁵⁴ The other case that has been transferred, where the perpetrator was already in detention was the case of *The Prosecutor v Bernard Munyagishari* (Referral Chamber) ICTR-2005-89-R11bis (6 June 2012) where despite the defendants counsel attempting to argue on many points that the Rwandan national courts are not competent of ensuring Munyahgishari receives a fair trial, the ICTR has nonetheless concluded that they are ‘... satisfied that the judges of the High Court and Supreme Court of Rwanda are competent, qualified and experienced.’⁸⁵⁵ The ICTR chamber then went on to further reinforce its belief in the competency of the Rwandan national courts and commend the Rwandan reforms, by stating:

‘Following an analysis of the Rwandan legal framework applicable to the judiciary, the Chamber concludes that it is consonant with international fair trial standards. It offers clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of judiciary and disciplinary sanctions taken against them. Furthermore, it welcomes the legislative amendments permitting the appointment of international judges and a quorum of three judges as a positive step towards further strengthening and maintaining the independence and impartiality of the judiciary in relation to transferred cases.’⁸⁵⁶

⁸⁵¹ *Prosecutor v Jean-Bosco Uwikindi* (Referral Chamber) ICTR-2001-75-R11bis (28 June 2011)

⁸⁵² *Prosecutor v Jean-Bosco Uwikindi* (Referral Chamber) ICTR-2001-75-R11bis (28 June 2011)

⁸⁵³ *The Prosecutor v Bernard Munyagishari* (Referral Chamber) ICTR-2005-89-R11bis (6 June 2012)

⁸⁵⁴ *Prosecutor v Fulgence Kayishema* (Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda) ICTR-01-67-R11bis (16 December 2008), *Prosecutor v Charles Sikubwabo* (Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda) ICTR-95-1D-R11bis (26 March 2012), *Prosecutor v Ladislas Ntaganzwa* (Referral Proceedings Pursuant to Rule 11bis) ICTR-96-9-R11bis (8 May 2012), *Prosecutor v Ryandikayo* (Referral Proceedings Pursuant to Rule 11bis) ICTR-95-1E-R11bis (20 June 2012), *Prosecutor v Aloys Ndimbati* (Decision on the Prosecutor’s Request for Referral of the Case of Aloys Ndimbati to Rwanda) ICTR-95-1F-R11bis (25 June 2012) & *Prosecutor v Phénéas Munyarugarama* (Referral Proceedings Pursuant to Rule 11bis) ICTR-02-79-R11bis (28 June 2012)

⁸⁵⁵ *The Prosecutor v Bernard Munyagishari* (Referral Chamber) ICTR-2005-89-R11bis (6 June 2012) Para 198

⁸⁵⁶ *The Prosecutor v Bernard Munyagishari* (Referral Chamber) ICTR-2005-89-R11bis (6 June 2012) Para 197

This statement encapsulates the high standard of procedural fairness and safeguards as well as the many legislative changes that the Rwandan government and its judiciary have had to bring about, just to ensure that it could receive at least some of the caseload of the outgoing ICTR. Therefore, if the ICC were to stand by and watch national prosecutions that do not adhere to the commonly accepted standards of procedural fairness and human rights norms, after the international criminal tribunals strived to lead by example and bring about procedural and legislative changes within the states involved, would this not signal to its member States that a few trophy high profile cases are more important than seriously attempting to bring an end to the impunity?

5.18 Outreach Programmes: Did They Reach Far Enough?

The mandate of the ICTR as detailed in UN Security Council Resolution 955, stated in addition to prosecuting the most culpable offenders of the 1994 genocide, they were also to assist the Rwandan judicial system to rebuild itself; with the aid of international assistance in the form of what is presumably State assistance and NGO's. This additionally responsibility upon the international community as a whole, is evident in paragraph two of Resolution 955,⁸⁵⁷ where it was stated that the UN was 'Stressing also the need for international cooperation to strengthen the Courts and Judicial System of Rwanda, having regard in particular to the necessity for those Courts to deal with large numbers of suspects'⁸⁵⁸

However, as previously mentioned, whilst the ICTR did very little to assist the Rwandan legal system to help rebuild itself from the ground up on a practical level, the ICTR instead chose

⁸⁵⁷ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

⁸⁵⁸ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010), Para 2

to see their responsibility as being that of ensuring that the most culpable were held accountable, so as to ensure that justice was seen to be done.⁸⁵⁹ And most importantly, to set the bar for the prosecution of the crime of genocide and create a legal precedence and establish case law for future national and international courts to follow, which is indeed an important job in itself. Furthermore, in spite of the legal precedents it set as well as drawing global attention to the situation in Rwanda, it has been suggested by some, that the mere fact that the ICTR managed to function at all, could be claimed as its biggest success:

I think the successes of the tribunal is that it exist[ed] at all and that if it does result in people who were active in or complicit in mass murders being tried in proper courts, having a proper defence, had a fair trial hearing, and being punished in appropriately humane, but severe way, that will be an achievement.⁸⁶⁰

Nonetheless, the ICTR has not been perceived in a positive light by all, with particular reference made to the small number of prosecutions (seventy seven completed)⁸⁶¹ that it has completed in comparison to the magnitude of the crimes committed in Rwanda, which has been criticised as lamentable and a mere drop in the ocean.⁸⁶² Which is a criticism that the ICC has also endured in recent years, as is evidenced by various articles in the press, where the ICC and its success has been judged based on the number of prosecutions completed in comparison to the money it has cost.⁸⁶³ In addition to this, the people of Rwanda did not need a foreign court in a faraway country with foreign lawyers going about their business behind closed doors, subsequently isolating itself from the society it was

⁸⁵⁹ Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 119. Where Jones states '...for justice to be done, it must be seen to be done.'

⁸⁶⁰ Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 129

⁸⁶¹ - - 'Key Figures of ICTR Cases' (ICTR Website) <
http://www.unict.org/sites/unict.org/files/file_attach/KeyFigures-ICTR-cases-141028_EN.pdf> (Accessed 03/09/2014)

⁸⁶² - - 'International Criminal Tribunal for Rwanda: Justice Delayed' (International Crisis Group, Africa Report No 30, 7 June 2001) 5 <<http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>> (Accessed on 23/04/2013)

⁸⁶³ Jon Silverman, 'Ten Years, \$900m, One Verdict: Does the ICC Cost too Much?' (BBC News, 14 March 2012) <<http://www.bbc.com/news/magazine-17351946>> (Accessed on 24/08/2014) & David Davenport, 'International Criminal Court: 12 Years, \$1 Billion, 2 Convictions' (Forbes 400 Online, 12 March 2014) <<http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/>> (Accessed on 24/08/2014)

created to bring justice to.⁸⁶⁴ Whilst the events of 1994 and the genocide in Rwanda provided the UN through the ICTR with the opportunity to ‘... infuse [a] broken community with a new view of justice and law ...’⁸⁶⁵ it does appear at the surface level, that this was an opportunity the ICTR chose to pass on and like the ICC with its positive complementarity stood back and allowed NGO’s and other States to help Rwanda rebuild and subsequently help itself. Moreover, what the ICTR has managed to do for the Rwandan legal system is a question that has varying answers, depending upon who you ask. The common view within Rwanda, has been that many people know very little or nothing about the work of the ICTR,⁸⁶⁶ and feel that whatever purpose it has served, has had very little or no impact upon their lives, which leads to question, what purpose have the outreach programmes of the ICTR serve?

The ICTR’s information and outreach officer Tim Gallimore has argued that ‘... the most this legal institution can do is to assist with reconciliation in limited ways as an ancillary contribution to its main judicial function of trying the cases before it.’⁸⁶⁷ Gallimore, like many supporters of the ICTR has only seen the role of the ICTR, to be that of ensuring that the most culpable are brought to justice and through this they hope that the rule of law will be established within Rwanda, thus bringing about peace and reconciliation. As was evident from his statement made at the ICTR conference on ‘challenging impunity’ in Kigali (November 2006), where he stated that:

⁸⁶⁴ - - ‘International Criminal Tribunal for Rwanda: Justice Delayed’ (International Crisis Group, Africa Report No 30, 7 June 2001) 23 <<http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>> (Accessed on 23/04/2013) & Nicholas Jones, *Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2009) 128-129

⁸⁶⁵ Melynda J Price, ‘Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide (Lessons from Rwanda)’ (2007) 21 *Emory Int'l L Rev* 563, 597

⁸⁶⁶ Alison Des Forges and Timothy Longman, ‘Legal Responses to Genocide in Rwanda’ in Eric Stover and Harvey M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Atrocity* (CUP 2004) 56

⁸⁶⁷ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1 <<http://www.ictor.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

By prosecuting those who committed genocide and other serious violations against human rights, the ICTR intends to break the cycle of impunity by re-establishing the fundamental rule of law, under which the guilty are held accountable for their offences. It is expected that the outcome of these prosecutions will also promote national reconciliation and restore peace in Rwanda.⁸⁶⁸

This statement made by Gallimore sets out the reality of what the ICTR has seen its true mandate to be, which is setting an example of how justice should be conducted for these serious crimes and by creating a body of case law which sets a legal precedence. The part of the UN mandate from resolution 955,⁸⁶⁹ to actively rebuild the Rwandan legal system was noted by Gallimore at the UN conference 'Challenging Impunity' held at Kigali (2006) but was dismissed because there was no specific mandate requesting that the ICTR get involved in '... institutional or social reconstruction ...'⁸⁷⁰ these were objectives that Gallimore 'expected' to occur as a mere by product to the trial work of the ICTR.⁸⁷¹ Whilst it had been hoped that the ICTR outreach programme would evolve and actively engage in rebuilding the Rwandan legal system, via methods such as undertaking '... initiatives to train Rwandan judges and lawyers as well as Rwandan human rights activists ...'⁸⁷² this however, was not to be the case.

⁸⁶⁸ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1

<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁶⁹ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Preamble where it states: 'Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,'

⁸⁷⁰ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1

<<http://www.ictr.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁷¹ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1

<<http://www.ictr.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁷² This form of outreach, Peskin has described as '... [an] engagement model of outreach'. Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 JICJ 950, 954

The ICTR's outreach programme, along with that of the ICTY was not established until 1998,⁸⁷³ a few years after the inception of the ad-hoc tribunals and the aim of their outreach programme is to bring the work of geographically distant tribunals, directly to the general populace of the countries which it seeks to help,⁸⁷⁴ namely Rwanda and the former Yugoslavia.⁸⁷⁵ It is hoped that by achieving this dissemination of information about the tribunals and their work, that the people of Rwanda will see that individuals and not collective ethnic groups are being held to account, at least by the international community and that this would then have the desired effect of aiding national reconciliation, by closing the gaps of the age old Hutu and Tutsi rivalry.⁸⁷⁶ So we now turn to look at exactly how the ICTR's outreach programme has disseminated this information to the citizens of Rwanda as well as their media and legal professionals.

5.19 The Essence of Outreach

One of the largest triumphs that the outreach programme has heralded, is the creation of its '*Umusanzu mu Bwiyunge*' which is Kinyarwanda for 'contribution to reconciliation', which is a document and information centre that the ICTR opened in Kigali during the September of 2000.⁸⁷⁷ The document centre contains the following resources: books, journals, newspapers, legal documents, audio-visual materials and information briefings, internet access and facilities for conferences, press conferences and meetings.⁸⁷⁸ Furthermore, since 2000 the ICTR has been able to translate all of its documentation including case files into the

⁸⁷³ Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 JICJ 950, 953

⁸⁷⁴ Adama Dieng, 'Capacity Building Efforts of the ICTR: A Different Kind of Legacy' (2011) 9(3) Northwest J Int'l Hum Rts 403, 407

⁸⁷⁵ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 2
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁷⁶ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁷⁷ Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 JICJ 950, 956

⁸⁷⁸ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 2
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

native language of Kinyarwanda,⁸⁷⁹ which should help make the information accessible to a wider audience. However, whilst these resources are available in hard copy at the library within the document centre and also online, the fact that most of Rwanda does not have regular electricity and therefore no access to the internet, still provides a substantial obstacle to making the information accessible to all as well as to the vast majority of the Rwandan judiciary.⁸⁸⁰ In order to try and combat this problem, it was announced in 2006 that the ICTR in conjunction with the Rwandan government, was hoping to open a further ten document centres around Rwanda,⁸⁸¹ which it was hoped, would be open by the end of 2007. Sadly this does not appear to have happened anywhere near as quickly as envisaged, as the only documented evidence of additional document centres being opened in Rwanda, is an ICTR newsletter dated 23 February 2009.⁸⁸² An ICTR newsletter⁸⁸³ reports that on the 18 and 20 February 2009, the ICTR Prosecutor Hassan Bubacar Jallow officially opened document centres in the Nyamagabe and Muhanga Districts in the Southern Province of Rwanda and that the first of the ten additional document centres was only opened in October of 2008, as was opened in the Gasabo district of Kigali city.⁸⁸⁴

With regards to the other seven document centres, the newsletter simply reports that ‘... other centres are expected to be open soon ...’⁸⁸⁵ in the following seven locations across Rwanda and are to be located at the Intermediate Courts of Instance in Nyagatare, Rusizi,

⁸⁷⁹ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁸⁰ Victor Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme’ (2005) 3 JICJ 950, 957

⁸⁸¹ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 23 <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁸² ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

⁸⁸³ ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

⁸⁸⁴ ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

⁸⁸⁵ ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

Karongi, Ngoma, Musanze, Rubavu and Gicumbi.⁸⁸⁶ Adama Dieng in a 2011 journal article⁸⁸⁷ reported that all ten provincial document centres were up and running and were ‘... equipped with internet access and television screens where the Districts’ residents may follow ICTR court proceedings.’⁸⁸⁸ It is worth noting that these centres were heavily subsidised by the European Union, as was stated in the ICTR newsletter⁸⁸⁹ and that the new centres are all located at Intermediate Courts of Instance, meaning that they are directly aimed at providing access to the ICTR’s wealth of case law and jurisprudence for the national courts that will be taking over the work of the ICTR, following its completion strategy. Whilst this certainly does go some way in aiding the Rwandan legal system to uphold the rule of law and carry out prosecutions to an internationally acceptable standard, they still do not really facilitate dissemination of information to the general public; who are central to beating the culture of impunity, because it was the general public who committed the majority of the crimes and it is the members of the general public who are necessary to facilitate reconciliation and the rebuilding of Rwanda.⁸⁹⁰

As previously established within this chapter, whilst Rwanda generally lacked most modern forms of media transmission the use of radio was commonplace, but at the outset of the outreach programme the ICTR only ‘... provided financial support to allow journalists from the Office *Rwandais de l’Information* (ORINFOR) and the Ministry of Justice to report from Arusha.’⁸⁹¹ However, the ICTR outreach programme has since been able to facilitate other journalists from Rwanda to broadcast on a daily basis from the ICTR’s home in Arusha,

⁸⁸⁶ ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

⁸⁸⁷ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) *Northwest J Int’l Hum Rts* 403

⁸⁸⁸ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) *Northwest J Int’l Hum Rts* 403, 408

⁸⁸⁹ ICTR News Doc, ‘ICTR opens Two More Information Centres in Rwanda’ (23 February 2009) ICTR/INFO-9-2-586 <<http://www.unict.org/tabid/155/Default.aspx?ID=628>> (Accessed on 28/05/2013)

⁸⁹⁰ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1-2 <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁹¹ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

hopefully allowing a wider audience to be kept abreast of the ICTR's progress with prosecutions.⁸⁹² In addition to the radio broadcasts, the ICTR in conjunction with an American owned organisation called Internews, have shot documentaries for the ICTR in the native language of Kinyarwanda.⁸⁹³ These documentaries have then been shown to both members of the public in communes across Rwanda and have also been shown to those detained in the prisons of Rwanda and were usually followed by a question and answer session.⁸⁹⁴ The success of the type of documentary that Internews produces, has been evidenced recently by the fact that their latest set of documentaries aimed at encouraging reintegration and demobilization of *Forces Démocratiques de Libération du Rwanda* (FDLR), have been attributed with convincing a minimum of thirty six former FDLR combatants to return to Rwanda.⁸⁹⁵ Whilst not directly linked to the documentaries that they have created for the ICTR outreach, it still serves to show how powerful their documentaries can be. Thus overall, it would appear that the ICTR certainly have reached out to the vast majority of the Rwandan public, but what is not so clear is how much of the complex and the relatively foreign⁸⁹⁶ workings of the ICTR's processes have actually been understood.

In addition to the dissemination of information about the ICTR and its judicial decisions, the outreach programme has also actively encouraged legal professionals, law students and their lecturers to physically visit the tribunal at Arusha. In particular the ICTR has a strong bond with the National University of Rwanda, which sends up to six law students each

⁸⁹² Adama Dieng, 'Capacity Building Efforts of the ICTR: A Different Kind of Legacy' (2011) 9(3) *Northwest J Int'l Hum Rts* 403, 407-408

⁸⁹³ Mary Kimani, 'Rwanda: Internews Documentary on Genocide Screened in Ngonma, Kibuye Province' (*All Africa Report*, 11 December 2001) <<http://allafrica.com/stories/200112110048.html>> (Accessed on 02/04/2013)

⁸⁹⁴ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006)4

<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁹⁵ Internews Report, 'News Reports and Films Encouraged Rwandan Rebels to Return Home' (October 1 2011) <<http://www.internews.org/our-stories/program-news/news-reports-and-films-encouraged-rwandan-rebels-return-home>> (Accessed on 03/05/2013)

⁸⁹⁶ Jean-Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2005) 12(1) *New Eng J Int'l & Comp L* 89, 93

year,⁸⁹⁷ who are able to attend for eight weeks to conduct research and learn first-hand about the way that the ICTR works. Furthermore, several academics from the National University of Rwanda also attend Arusha to undertake research or to merely observe the trials.⁸⁹⁸ In addition to staff and students from the Rwandan National University, the outreach programme also organises regular visits for journalists,⁸⁹⁹ lawyers, human rights advocates, civil society representatives and members of the clergy.⁹⁰⁰ Furthermore, in October of 2009 the ICTR extended its outreach programme to the youths and teachers of Northern Rwanda with a programme aimed at creating a:

... [S]econdary-school level based genocide awareness network that will help enhance the youth awareness about ICTR achievements and challenges. The Project will also promote the respect of human rights values and sharing of knowledge and best practices generated by the ICTR as part of its legacy in strengthening the unity and national reconciliation in Rwanda.⁹⁰¹

Whilst the ICTR had been running workshops in schools across Rwanda since 2005, this was the first tailor made outreach programme, to educate the youth of Rwanda about the work of the ICTR and to explain why it is imperative to the role of preventing genocide. However, whilst educating people about the work of the ICTR and its significance in relation to preventing future human rights abuses is admirable and helps to bring justice closer to the victims, but this not enough to help the judiciary in Rwanda, who are the people tasked with

⁸⁹⁷ Caroline Thomas, 'Ignoring Rwanda: From Genocide to Justice' (Peace Magazine Article, Jan – Mar 2007) 20 <<http://peacemagazine.org/archive/v23n1p20.htm>> (Accessed on 03/03/2013)

⁸⁹⁸ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁸⁹⁹ Caroline Thomas, 'Ignoring Rwanda: From Genocide to Justice' (Peace Magazine Article, Jan – Mar 2007) 20 <<http://peacemagazine.org/archive/v23n1p20.htm>> (Accessed on 03/03/2013)

⁹⁰⁰ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 4 <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹⁰¹ ICTR News Doc, 'ICTR Launches a Pilot Outreach Project in Rwanda' (28 October 2009) ICTR/INFO-9-2-619.EN <<http://www.unict.org/tabid/155/Default.aspx?ID=1000>> (Accessed on 01/08/2013).

enforcing the rule of law⁹⁰² in a transitional State and bringing the remaining but many perpetrators of the 1994 genocide to justice.⁹⁰³

5.20 The Realisation that Capacity Building is Essential

On the 23 December 2005, the UN General Assembly issued a new mandate in Resolution 60/241⁹⁰⁴ to reaffirm the original mandate as set out in Resolution 955, the new Resolution:

... [R]eiterated the mandate and requested the Tribunal to increase its capacity-building efforts for the judiciary of Rwanda and to carry out an effective outreach program to assist with reconciliation by increasing the understanding of the Tribunal's work among Rwandans.⁹⁰⁵

However prior to this affirmation from the UN Security Council, that the ICTR was to assist the Rwandan judiciary in rebuilding itself; which was no doubt brought about by concerns over the impending completion strategy of the ICTR⁹⁰⁶ and the realisation that the Rwandan legal system as it stood in 2006, would never be able to take on the outstanding cases of the ICTR as it set about implementing its completion strategy.⁹⁰⁷ The outreach programme of the ICTR had already in November of 2005 with the assistance of the European Union,⁹⁰⁸ funded a workshop for ICTR officials and members of the Rwandan judiciary and the aim of

⁹⁰² Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 88

⁹⁰³ Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3(4) JICJ 944, 944 (Abstract)

⁹⁰⁴ UNGA Res 60/241 Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible 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 (23 December 2005) UN Doc A/RES/60/241, Para 10

⁹⁰⁵ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1 <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)4-5

⁹⁰⁶ Mba Chidi Nmaju, 'The Role of the Judicial Institutions in the Restoration of Post-Conflict Societies: the Cases of Rwanda and Sierra Leone' (2011) 16(2) JC & SL 357, 374

⁹⁰⁷ UNSC Res 1503 'On the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda' (28 August 2003) UN Doc S/RES/1503

⁹⁰⁸ Tim Gallimore, 'The ICTR Outreach Program: Integrating Justice and Reconciliation' UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 5 <<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

this workshop, was to, ‘... set an agenda for cooperation, to assess the needs of the justice sector and to devise a strategic plan for the ICTR to deliver capacity-building and other assistance to Rwanda.’⁹⁰⁹

As a result of the workshop in November 2005, a new relationship was formed between the ICTR and the Rwandan government, in which there appeared to be a renewed vigour to ensure that the ICTR and the Rwandan courts would work together to try and ensure that justice was carried out in a standardised manner,⁹¹⁰ and one which had the rule of law and human rights preservation at its core. Stemming from this workshop and its agenda, there have been numerous lectures and seminars for students and judges to educate them about the work and case law of the ICTR,⁹¹¹ and there have also been training sessions on information and evidence management for the Rwandese court registrars.⁹¹² All of which has gone some way to building upon the work that other charities and Non-governmental organisations, such as the American Bar Association, the MacArthur Foundation⁹¹³ and many others,⁹¹⁴ who have strived to help Rwanda build its legal system up, following the devastating events of 1994. However, the advantage of the ICTR conducting some of the education is that they can train the judiciary to think like their judges and to interpret and apply their case law in the relevant context and this would certainly seem to have had the desired influence if the legal reforms that took place during 2007 and 2008 in Rwanda

⁹⁰⁹ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 5
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹¹⁰ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 5
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹¹¹ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) Northwest J Int’l Hum Rts 403, 409

⁹¹² Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) Northwest J Int’l Hum Rts 403, 410

⁹¹³ International Bar Association, ‘ICC Monitoring and Outreach Programme: First Outreach Report’ (An International Bar Association Human Rights Institute Report, June 2006) 1

⁹¹⁴ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) Northwest J Int’l Hum Rts 403, 410

(abolition of the death penalty and transfer law) are viewed to be at least partially a product of this training and information sharing.⁹¹⁵

However, one of the most successful pieces of capacity building by the outreach programme has been facilitated by the librarians of the ICTR, with their online training in research, with particular attention paid to researching international criminal law and⁹¹⁶ in 2005, the ICTR library ran ‘... two training workshops in Rwanda in automation of library and information centres.’⁹¹⁷ These workshops consisted of educating the Rwandan legal professionals on how to use the library automation software CDS-ISIS, as developed by UNESCO and also trained them on how to use the WINISIS software.⁹¹⁸ This training was so successful that it led to the ICTR library staff creating similar training tailored specifically to the needs of the Rwandan judiciary.⁹¹⁹ In addition to the successful provision of online training, which no doubt owes its success in part to the increased number of document centres, at the Intermediate Courts of Instance across Rwanda, the ICTR has also conducted workshops for Rwandan journalists,⁹²⁰ to educate them about how best to report on the judicial matters of the ICTR, in an effective manner, so as to then facilitate wide spread education about these issue across Rwanda.

⁹¹⁵ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) Northwest J Int’l Hum Rts 403, 416-417

⁹¹⁶ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 1
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹¹⁷ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 5
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹¹⁸ Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ UN Conference on Challenging Impunity (Kigali, Rwanda, 7-8 November 2006) 6
<<http://www.unict.org/Portals/0/English/News/events/Nov2006/gallimore.pdf>> (Accessed on 01/08/2013)

⁹¹⁹ ICTR Completion Strategy (29 May 2010)18, Para 78 UNSC Doc S/2010/259
<http://www.unict.org/Portals/0/English/FactSheets/Completion_St/S-2010-259e.pdf> (Accessed on 23/03/2013)

⁹²⁰ Adama Dieng, ‘Capacity Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9(3) Northwest J Int’l Hum Rts 403, 407

In addition to these capacity building efforts, the United Nations has also established a residual mechanism called the 'Mechanism for International Criminal Tribunals' (MICT) and was created on the 22 December 2010 (Resolution 1966)⁹²¹, with the intention that it should, '... [continue] the jurisdiction, rights and obligations and essential functions (UNSC Resolution 1966) of the ICTR and the ICTY; and [maintain] the legacy of both institutions.'⁹²² The branch of the MICT that will deal with the residual functioning of the ICTR is based in Arusha and commenced its duties as of the 1 July 2012.⁹²³ The overlap between the start of the MICT and the completion of the ICTR is deliberate, so as to ensure a smooth handover from the ICTR to the Rwandan judiciary and any other national judiciary dealing with outstanding ICTR indictments, such as France. Whilst the MICT has many functions and responsibilities, the most notable one is that of 'Assistance to national jurisdictions',⁹²⁴ which will take the form of '... transferring dossiers, responding to requests for evidence, variation or rescission of protective measures for witnesses and responding to requests to question detained persons.'⁹²⁵ In addition to providing the national courts with the above mentioned information, the MICT will be responsible for updating and maintaining the ICTR's archives and databases, which is crucial if the online training that the outreach programme have undertaken is not to be wasted once the ICTR has wound up its business. In addition to this, the function of appeals and requests for retrials to be conducted by the MICT, this means that the Rwandan national courts will continue to feel an international legal presence and hopefully this will encourage adherence to ICTR jurisprudence and the continued application of the rule of law and human rights standards.

5.21 Case Study Conclusion

The aim of this Rwandan case study has been to illustrate the potential issues, which the ICC is likely to encounter as it gradually takes over from where the ad-hoc courts and tribunals

⁹²¹ UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966

⁹²² Taken from the 'About' page of the MICT website <<http://unmict.org/en/about>> (Accessed on 24/03/2013)

⁹²³ Taken from the 'About' page of the MICT website <<http://unmict.org/en/about>> (Accessed on 24/03/2013)

⁹²⁴ Taken from the 'About' page of the MICT website <<http://unmict.org/en/about>> (Accessed on 24/03/2013)

⁹²⁵ Taken from the 'About' page of the MICT website <<http://unmict.org/en/about>> (Accessed on 24/03/2013)

have or are currently preparing to finish up. Therefore, it would seem fair to agree with former ICTR President, Judge Eric Mose when he stated that:

... over the span of a single decade, international criminal tribunals went from being a vague idea to an active reality, and have grown into institutions existing in their own right. Henceforth, the international community's main concern should be to hold alleged perpetrators of human rights abuses individually responsible for their actions, in cases where States are loath to punish such violations, or where they simply cannot do so. International tribunals are establishing practice and contribute to a culture of refusing impunity for human rights violations.⁹²⁶

However, as has been stated many times, the ICC cannot do this alone and is only intended to act as a court of last resort, that exists to complement the national courts, when they are '... unwilling or genuinely unable to carry out the investigation or prosecution ...'⁹²⁷ for themselves. Moreover, the Rwandan case study has served to illustrate that even when an international court or tribunal intervenes to prosecute those individuals who carry the highest levels of responsibility for these crimes, the country in which the crimes took place will also feel the need to seek out their own form of justice in order to prevent the country from destabilising once more,⁹²⁸ and as Rwanda illustrated, much assistance will be required from the global community to facilitate this, which is where positive complementarity comes into play. Furthermore, as the case study highlights is quite commonplace that following the occurrence of the types of crimes which the ICC will investigate, the infrastructure of a State and its legal system will be decimated or severely corrupt and in need of drastic reform.⁹²⁹ If these States are left unguided and unassisted it is likely they will seek out a form of justice, that does not follow the accepted norms of international criminal law, with undue process and no adherence to commonly accepted standards of human rights (especially in terms of penalties and detention conditions) and if this is allowed to occur then there is a strong probability that the justice the lower level of perpetrators will

⁹²⁶ Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3(4) JICJ 944, 944

⁹²⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Art 17 (1)(a)

⁹²⁸ Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3(4) JICJ 944, 948

⁹²⁹ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (June 2007) 32(2) L & Soc Inquiry 467, 468

receive, will be excessive in comparison to that which the most culpable receive at the ICC. As occurred in Rwanda, where twenty two lower ranking offenders were executed in April of 1998,⁹³⁰ which is a much harsher penalty than any given by the ICTR, where the harshest sentence given was thirty five years imprisonment in the case of *Prosecutor v Augustin Ndirabatware* (Judgement and Sentence) ICTR-99-54-T (20 Dec 2012). Another illustration of where those prosecuted solely by the Rwandan courts receive harsher penalties than those prosecuted by the ICTR is whereby under Organic Law No. 31/2007 of 25 July 2007, there now exists a dual system where those indicted and prosecuted by the Rwandan legal system face life imprisonment in isolation, whilst those transferred under Rule 11bis⁹³¹ do not face imprisonment in isolation.

This lack of consistency and lack of clarity as to what factors influence the sentencing determinations of the ICTR, has the potential to seriously undermine all of the good work that the ICTR has done in seeking to stamp out the culture of impunity that is inherent within Rwanda. Because as Barbara Hola argues, the inconsistent and unclear sentencing rationale of the ICTR is a ‘... practice [that] makes it extremely difficult to identify any patterns as to the sentencing ranges applicable to individual offences or the contribution of individual sentencing factors to sentence length.’⁹³² But as Barbara Hola⁹³³ has indicated, this could have been avoided had the ICTR been more consistent and transparent in its sentencing determinations.⁹³⁴ Which in turn means that not only could the ICTR have avoided inconsistencies in penalties, which at times can also equate to lack of proportionality in relation to the gravity of the crime amongst the ICTR sentencing, but it also made it very difficult for national courts and in particular the national courts of Rwanda,

⁹³⁰ Amnesty International Report, ‘Major step back for human rights as Rwanda stages 22 public executions’ AFR 47/14/98 (24 April 1998) < <http://www.amnesty.org/pt-br/library/asset/AFR47/014/1998/en/dc612aa9-cb11-41b2-b223-ded5df4cccd8/afr470141998en.pdf> > (Accessed on 22/02/2012)

⁹³¹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence UN Doc ITR/3/REV.1 (1995) (entered into force 29 June 1995)

⁹³² Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 23

⁹³³ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3

⁹³⁴ Barbara Hola, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4(4) Amsterdam Law Forum 3, 23

to follow the ICTR's sentencing. This lack of consistency and transparency in sentencing determination is something which the ICC can ill afford, as it will seek to assert its authority not just in one fractured State, but in many across the globe and if it wishes to lead by example so as to '... guarantee lasting respect for and the enforcement of international justice.'⁹³⁵ Furthermore, the fairly vague provisions in the Rome Statute 1998⁹³⁶ and the relevant sections ICC's Rules of Procedure and Evidence (2002) on the factors the ICC should consider when making their sentencing determinations and how much weight should be attributed to them, means that it is quite probable that the ICC's sentencing jurisprudence will be lacking the consistency and transparency that Hola deems essential if it is to be followed by others.⁹³⁷ However it should be noted that Rule 145 of the ICC's Rules of Procedure and Evidence does go a little further than that those of the ICTY and ICTR's by providing some examples of what is considered to be an aggravating or mitigating circumstance, but this is still not enough guidance to ensure consistency. Nonetheless, this thesis at the same time does not propose that the ICC be constrained by rigid sentencing guidelines, such as those provided for in Rwandan Organic Law No 08/96 of 30 August 1996, as such constraints are not feasible for a treaty based court the norms of customary international law are constantly changing and developing with society, because changing the multilateral treaty would be a lengthy and difficult process. It is simply regrettable that the Rome Statute 1998 and its Rules of Procedure and Evidence (2002) did not seek to at least clarify the objectives of the punishment beyond⁹³⁸ the vague objectives given in the preamble to the Rome Statute 1998, because then at least the judges of the ICC would have had a clearer understanding of what should drive their sentencing determinations and in turn this may have facilitated a more consistent approach

⁹³⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 Preamble

⁹³⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, Art 77 & 78

⁹³⁷ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 23-24

⁹³⁸ Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 6

This neatly leads to second lesson that the ICC can learn from the example set by the ICTR and also the ICTY, because in addition to attempting to have a consistent sentencing practice which would make it easier for national courts to follow, the ICC need to make sure the that their work is transparent and easily accessible at the national level. But in addition to the need to make the work of the ICC readily available, there also needs to be a sufficient national legal system in place to be able to utilise the information through legal proceedings of their own and therefore it has been suggested that:

In future international prosecutions, some of these difficulties could be addressed earlier, by more effective outreach to domestic audiences, and by more systematic efforts to design focused, well-conceived domestic capacity-building programs⁹³⁹

Indeed this would seem very true of the case in Rwanda, because had the ICTR not chosen to shy away from the part of its mandate under UN Security Council Resolution 955⁹⁴⁰ which required outreach and involvement in capacity building at the outset of its mandate, then we may well not have seen the penalty disparities between the ICTR prosecutions and those of the Rwandan specialised chambers and even the *Gacaca*. Because as mentioned above, if outreach had played a central role from the outset in the form of making legal resources readily available within Rwanda as well as providing training for the Rwandan legal professionals, then perhaps prior to the drastic Rwandan legal reforms of 2007 and 2008 we would have seen an alignment between the ICTR and Rwandan sentencing practices, that would have ensured that the justice for the genocide was both consistent and proportionate at both the national and international level.

The importance of outreach and capacity building (not necessarily conducted by the ICC) is thankfully a lesson that the ICC appears to have drawn upon from the experiences of the

⁹³⁹ Jane E Stromseth, David Wippman & Rosa Brooks 'Can Might Make Rights?: Building the Rule of Law After Military Interventions' (CUP 2006) 274

⁹⁴⁰ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010)

ITCY and ICTR,⁹⁴¹ as it has actively pursued outreach since its inception, possibly because it relies upon complementary prosecutions and therefore needs to do everything in its power to ‘...build stronger links between the work of international and hybrid criminal courts and improvements in domestic rule of law.’⁹⁴² Because in doing so, it would facilitate more prosecutions at the national level, which as it is commonly accepted that a weak or diminished legal system is unlikely to have the will or capacity to undertake such complex prosecutions of extraordinary crimes and the with ICC being a complementary court it is therefore reliant upon the national courts to carry the majority of the burden.⁹⁴³

⁹⁴¹ Janine Natalya Clark, ‘International War Crimes Tribunals and the Challenge of Outreach’ (2009) 9 Int CLR 99, 100

⁹⁴² Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 88

⁹⁴³ Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 99

Chapter 6: Conclusion

This thesis has explored the criticisms or failings of the ad-hoc tribunals to achieve not only consistent and proportionate sentencing amongst their own judgements, but also their failure to realise the potential outreach has in allowing them to impart the norms of international law into the national systems of the States they were involved with. The hope of this thesis and the critical analysis undertaken is to ultimately add to the existing literature that makes many hypotheses about whether the ICC will learn from the mistakes of its predecessors and set about ensuring that not only will it be a sustainable court by facilitating States to help themselves.⁹⁴⁴ Because International criminal law has been described as ‘... the fusion of two legal disciplines: international law and domestic criminal law’⁹⁴⁵ where the focus of the ICC’s mandate has been suggested as being ‘... to translate global legal obligations into functional justice at the local level.’⁹⁴⁶ But whether the ICC will take up this responsibility to impart international legal norms into national justice, remains to be seen because the ICC has only completed two cases⁹⁴⁷ and as the comparison of the sentencing rationale of these two cases in Chapter 5 illustrated, there once again seems to be confusion even amongst the ICC judges as to what the purpose of sentencing is and what objectives should be weighed up in the sentencing calculations.

In the *Lubanga*⁹⁴⁸ case the trial chamber took a very scientific and logical approach by setting a baseline sentence and then adjusted it in accordance with mitigating and aggravating circumstances,⁹⁴⁹ whilst in stark contrast in the *Germain Katanga* case,⁹⁵⁰ the trial chamber seem to have be confused as to what their sentencing rationale was, because

⁹⁴⁴ Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 HJRL 87, 88

⁹⁴⁵ Ilias Banketas and Susan Nash, *International Criminal Law* (3rd edn, Routledge-Cavendish 2007) 1

⁹⁴⁶ Graeme Simpson, ‘One Among Many: The ICC as a Tool of Justice During Transition’, In Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal Afr Soc March 2008) 73 <<http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ICC%20in%20Africa.pdf>> (Accessed on 14/10/2008)

⁹⁴⁷ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) and *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

⁹⁴⁸ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012)

⁹⁴⁹ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I - Sentencing) ICC-01/04-01/06 (10 July 2012) 9, Para 33

⁹⁵⁰ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014)

they cite retributive, deterrence, reconciliation and rehabilitative purposes⁹⁵¹ as being included in their sentencing rationale. Whilst it is hoped that the startlingly opposite approaches taken to sentencing determination by the ICC in its two completed cases, is just a result of the court trying to find its feet, it may well also be due to the inconsistent precedents they have from the ICTY and ICTR coupled with the fact that the Rome Statute 1998 remains silent on the subject. However, only time will tell as to whether the ICC will seek to learn from the mistakes of the ad-hoc tribunals and assert a comprehensive body of case law with consistent and proportionate sentencing at its centre, so that the national courts may if they choose to, opt to follow the sentencing practice of the ICC so as to ‘... result [in] the squeezing out of local approaches that are extralegal in nature, as well as those that depart from the methods and modalities dominant internationally.’⁹⁵²

6.1 The Death Penalty Paradox

Ban-Ki Moon, the UN Secretary-General in his report to the UN Human Rights Council, of July 2012 stated:

Over the past few decades, the balance has shifted between a substantial majority of States that maintained the death penalty to these States becoming minority. Furthermore, it may be noted that states that have abolished the death penalty or are moving towards abolition represent different legal systems, traditions, cultures and religious backgrounds.⁹⁵³

This statement implies that it is no longer just the European or Westernised States that are abolitionist, but makes reference to the growing number of African States that have joined the abolition cause; of which sixteen had become abolitionist by 2011.⁹⁵⁴ However, an Amnesty International report in 2013 Stated that in 2012 ‘At least 40 executions were

⁹⁵¹ *Prosecutor v Germain Katanga* (Trial Chamber II – Sentencing) ICC-01/04-01/07 (23 May 2014) 3

⁹⁵² Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 122

⁹⁵³ Amnesty International Report ‘Executions and Death Sentences During 2012’ (April 2013) 6
<http://www.amnesty.org.uk/content.asp?CategoryID=78&gclid=CMq7vs_Y_LgCFYpcpQod3R0ABA>
(Accessed on 13/08/13)

⁹⁵⁴ Death Penalty News – Blogspot Report, ‘16 African Countries Abolish Capital Punishment’ (11 June 2011)
<<http://deathpenaltynews.blogspot.com.au/2011/06/16-african-countries-abolish-capital.html>> (Accessed on 01/03/2013)

carried out in five countries in sub-Saharan Africa ...⁹⁵⁵ which is disconcerting because all of the current nine States that the ICC is currently investigating,⁹⁵⁶ all are within Africa and the State of Sudan where the ICC has ongoing investigations, it was reported that at least 19 executions in 2012 and at least 199 death sentences⁹⁵⁷ were issued. Which means that many national contributions to justice in the current situations where the ICC is investigating, may involve the death penalty at the national level of prosecution, meaning that there is potential for large inconsistencies in the justice attained by the national courts and the ICC as well as not being a positive signal for the global quest for abolition of the death penalty. Furthermore, because the ICC is a complementary court rather than one that asserts primacy over the national courts as the ICTR did,⁹⁵⁸ then in order to try and implant the international rule of law and norms of sentencing practice at the national level, then it will have to rely solely upon education and by taking the opportunity to get involved with NGO's and other States capacity building to facilitate better links and more consistent approaches to sentencing from the ground up.

6.2 Outreach as a Means to Implant the Rule of Law and ICC Sentencing Practices into the National Courts

As illustrated by the Strategic Plan for Outreach of 2006,⁹⁵⁹ the ICC certainly has been far more organised and dedicated to ensuring the dissemination of information about the ICC's work and investigations to the people within the affected States. This could possibly be due to having a bigger budget, more staff and resources, thus facilitating the ICC to be able provide

⁹⁵⁵ Netsanet Belay, 'The Death Penalty in Africa: Progress and Setbacks' (Livewire, Amnesty International Global Human Rights Blog, 10 April 2013) Para 10 <<http://livewire.amnesty.org/2013/04/10/the-death-penalty-in-africa-progress-and-setbacks/>> (Accessed 01/06/2013)

⁹⁵⁶ ICC Website, 'Situations and Cases' <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> (Accessed on 20/02/2013)

⁹⁵⁷ Netsanet Belay, 'The Death Penalty in Africa: Progress and Setbacks' (Livewire, Amnesty International Global Human Rights Blog, 10 April 2013) Para 14 <<http://livewire.amnesty.org/2013/04/10/the-death-penalty-in-africa-progress-and-setbacks/>> (Accessed 01/06/2013)

⁹⁵⁸ Statute of the International Criminal Tribunal for Rwanda SC Res 955 (8 November 1994) UN Doc S/Res/955 (1994), 33 ILM 1598 (1994) (last amended 31 January 2010) Art 8(2)

⁹⁵⁹ International Criminal Court, Assembly of States Parties, 'Strategic Plan for Outreach of the International Criminal Court' ICC-ASP/5/12 (29 September 2006)

translations of documents into the many native languages, but it must be remembered that the ICC can be involved in investigations in multiple States at any one time, whilst its predecessors only had to provide outreach to only one State, so the ICC's resources are still overreached. The 2006 Strategic Plan for Outreach report explains the efforts that have been made to provide outreach to the States in which ICC was then investigating, via a variety of means and many of which have been used by the ad-hoc tribunals, such as radio, televisions, newspapers, workshops and seminars for current or future legal professionals, simplified pamphlets and cartoons, discussions in schools and at community meetings, amongst many other forms of communication.⁹⁶⁰ However, as was highlighted by the Rwandan case study, outreach is indeed a very important part of an international court as not only does it provide access to a wealth of free legal information, which is readily available from the ICC via the online Legal Tools⁹⁶¹ (which contains over 44,000 documents) and the software platform known as the Case Matrix Network, which provides case law to the legal professionals in the affected States, an invaluable tool when looking to undertake national prosecutions.

The 2010 Review Conference of the ICC held at Kampala, established that in order for the ICC to achieve its mandate, particularly in relation to acting as a court that is complementary to the national courts, the ICC would need more than just the legal tools and the case matrix network that had existed since 2003,⁹⁶² to build help these conflict torn States to re-establish their legal systems and as Jane Stromseth⁹⁶³ and Mark Drumbl⁹⁶⁴ have indicated, if the ICC could at the same time help impart their own sentencing practices and

⁹⁶⁰ International Criminal Court, Assembly of States Parties, 'Strategic Plan for Outreach of the International Criminal Court' ICC-ASP/5/12 (29 September 2006) 11-14

⁹⁶¹ ICC Legal Tools

http://www.legaltools.org/fileadmin/user_upload/Legal_Tools_Brochure_ENG_FRA_V.2010.pdf (Accessed on 27/03/2013)

⁹⁶² Morten Bergsmo (eds), 'Active Complementarity: Legal Information Transfer' (Torkel Opsahl Academic EPublisher 2011) iii

http://www.academia.edu/1974157/Establishing_the_Legal_Basis_for_Capacity_Building_by_the_ICC (Accessed on 02/03/2013)

⁹⁶³ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87

⁹⁶⁴ Drumbl MA, *Atrocity, Punishment, and International Law* (CUP 2007) 6 & 69

establish due process⁹⁶⁵ as standard practice within the national legal systems that they play a role in rebuilding by means of providing training and education for legal professionals. Then by being a transparent role model, it is hoped that the national courts will be inspired and encouraged to follow the ICC's example. In summary what this thesis proposes that the ICC seek to achieve through outreach was cited at the Kampala Review Conference (2010) when 'positive complementarity' was described as encapsulating:

... [A]ll activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis⁹⁶⁶

Thus what the Association of States Parties was saying here, is that the ICC needed to take a more '... systematic approach to empowering national legal orders ...'⁹⁶⁷ but at the same time they make it unequivocally clear that this additional task is not one that the ICC would or should be undertaking and that is a view that this thesis also concludes as no single entity has the manpower or resources to take this level of responsibility on.

Furthermore, as the report drafted by Denmark and South Africa⁹⁶⁸ in preparation for the Kampala conference illustrated, there were already many European and NGO's initiatives in place that have been seeking to educate or rebuild the legal systems of the affected

⁹⁶⁵ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 89

⁹⁶⁶ ICC Review Conference Resolution ICC-ASP/8/Res.9 (adopted at the 10th plenary meeting 25th March 2010)16, Para 16 <http://www.icccpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf>

⁹⁶⁷ ICC Review Conference Resolution ICC-ASP/8/Res.9 (adopted at the 10th plenary meeting 25th March 2010)796 <http://www.icccpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf> 796

⁹⁶⁸ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30th May 2010)

States.⁹⁶⁹ Some of the most notable detailed in this report, include the *Avocats Sans Frontieres* 'Integrated Project on Fighting Impunity and the Reconstruction of the Legal System in the DRC', which has received funding from the EU, The Belgian Government and The MacArthur Foundation and also the Danish government initiatives in Uganda.⁹⁷⁰ These projects have been running training sessions for the judiciary and legal professionals as well as providing capacity building, aid and ⁹⁷¹a continued presence on the ground in the affected States. All of these are the necessary groundwork that is required in these politically corrupt or war torn States, before the ICC can even begin to conceive of undertaking any complementary investigations of prosecutions. Therefore this thesis stresses that the ICC needs to ensure that it heavily influences the training provided by NGO's and States, because to do so would be a long-term investment that should ultimately repay itself wherein the ICC would begin to see more and more prosecutions occurring at the national level. Subsequently this thesis predicts that if more of the prosecutions occur at the national level, then the need for outreach should slowly decrease because if the majority of justice occurs at the national level then there will be less need for dissemination of information about the trials to the affected populations in order to facilitate reconciliation because justice will be visible to them. Similarly if more of the currently unstable States where the ICC investigations and prosecutions are currently taking place, have a stabilised legal system, then potentially there are likely to be less extraordinary crimes that occur, because as the Rwandan case study illustrated, these crimes often occur in unstable States where political corruption and other events coincide to create the ideal circumstances in which these crimes are most prevalent.

⁹⁶⁹ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30th May 2010) 8-11

⁹⁷⁰ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30th May 2010) 24-25

⁹⁷¹ Review Conference of the Rome Statute (ICC), 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2 (30th May 2010) 9 & 24-25

Finally as noted by the Supreme Court of Israel in the trial of Adolf Eichmann:

We know only too well how utterly inadequate the sentence of death is as compared with the millions of unnatural deaths he decreed for his victims. Even as there is no word in human speech to describe his deeds such as the deeds of [Eichmann], so there is no punishment under human law sufficiently grave to match his guilt...⁹⁷²

This acknowledgement that there is no punishment proportionate to these extraordinary crimes adds to the argument that the death penalty has no place in international criminal law. However, if the ICC can successfully encourage States through outreach to follow their sentencing jurisprudence then at least justice would be proportionate to a scale, transparent and consistent,⁹⁷³ but this very much relies upon the assumption that the ICC will begin to develop a more uniform approach to sentencing than its current two sentencing judgements have illustrated. And whilst more structured penalty guideline in the Rome Statute 1998, may seem a good way to achieve that consistency, this thesis concludes that given international law and customary norms are constantly evolving, to constrain the ICC judges by have a very restrictive sentencing policy would not be future proof. However, as many academics who have looked at the ICC and its potential for the future in relation to its outreach and sentencing practice have stated before, this is an unknown whereby, 'the success of these institutions and whether they can achieve their ambitious objectives ... will depend upon them being able to communicate their work to, and gain the support of the local communities concerned.'⁹⁷⁴

⁹⁷² *The State of Israel v Adolf Eichmann* (S Ct Israel, May 26 1962) 36 ILR 277 (1968) Para 341

⁹⁷³ Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 HJRL 87, 89 & Barbara Hola, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 23

⁹⁷⁴ Janine Natalya Clark, 'International War Crimes Tribunals and the Challenge of Outreach' (2009) 9 Int CLR 99, 116

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