ICTR: ETERNALISING THE JUDICIAL GENOCIDE OF THE HUTU.

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Introduction.

Writing in the Virginia Journal of International Law, Jenia Iontcheva Turner states that:

> "The "Legal" and "Political" conceptions of international criminal trials are ideal types. To some degree all law is political.
> As mentioned earlier, when trials move further along the political spectrum, defendants' rights suffer. To the extent that we are concerned about preserving space for individual rights in the face of larger political social goals, we should be careful to distinguish between political and legal elements in criminal trials. The frequent use of show trials by oppressive regimes reminds us of this very real and relevant distinction.
> Even trials which are exclusively political, there are instances in which political and adjudicative purposes clash, and one must prioritize above the other".[2]

This statement aptly depicts the challenges faced in the administration of justice at Ad Hoc Tribunals and hybrid Courts created by the International Community in the wake of serious international crimes and violations perpetrated during the senseless wars that afflicted countries in Africa, Europe and Asia.

Resentment of political, ideological, religious and other influences on international courts and tribunals, has been widely expressed and debated since the idea to create a standing international court was first suggested at the First Hague World Peace Conference in 1899. Due to these fears and resentment, the need to conceive and implement credible criteria for the nomination and appointment of independent judges to sit in judgment over alleged perpetrators of international crimes that shocked the conscience of humanity has been of primary concern to the international community, civilized nations of the world and the legal fraternity.

Absent an International Criminal Court at the beginning of the 1990's when serious violations of international humanitarian law and the Geneva Conventions challenged yet again the conscience of the civilized world; in the process making a mockery of the collective vow "never again" made by the international community after the slaughter of millions of Jews in concentration camps in the heart of Europe, there was a compelling need to establish Ad Hoc Tribunals, one of which is the International Criminal Tribunal for Rwanda, to try and punish the perpetrators of such heinous crimes. This model has proved too costly for the International Community leading to

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[2] Virginia Journal of International Law: Volume 48, Number 3,„Spril 2008 p.543.Defence Perspectives on Law and Politics in International Criminal Trials.

a trial of another model namely that of internalized or hybrid courts, one of which is the Special Court for Sierra Leone.

If one were to judge the performance of both courts by the degree of independence and impartiality they were expected to exhibit in the execution of their mandates and the credibility of some their judgments, then both courts have failed woefully. A cursory assessment of the proceedings before both courts establishes that the administration of justice has been hampered by political considerations that have consistently superseded the requirement to do justice. And this practice violates the provisions of article 14 of the International Covenant on Civil Rights[3].

POLITICAL, IDEOLOGICAL, RELGIOUS AND OTHER INFLUENCES IN INTERNATIONAL CRIMINAL TRIALS BEFORE THE ICTR AND THE SPECIAL COURT FOR SIERRA LEONE.

The Special Court for Sierra Leone for example, is a hybrid or internationalized court. Some of the Judges of that court are appointed by the United Nations and others by the State of Sierra Leone.

From day one of the proceedings, in the RUF case the Prosecutor Mr David Crane in his opening statement laid out the ideological, religious and political basis for the prosecution of the accused; an agenda that was adopted and implemented during Judgment by some of the Judges of the Court as established hereunder.

> " These were the leaders after 1996, the Commanders of an army of evil" Mr Crane intoned, " a corps of destroyers and a brigade of executioners bent on the criminal takeover of Sierra Leone, one the Athens of West Africa", he emphasized.[4]
> "In situations, in some ways, we shall have to dance with the devil to put into context the complete picture".[5] And with the devil, the Prosecution danced. And the Hon. Judges applauded in agreement as established hereunder.

Considering the above, it was imperative for independent, impartial and credible men and women to conduct the trial in a manner that conformed to international standards. Unfortunately, the requirement that the State of Sierra Leone appoint some of the Judges to the bench of the Special Court seemed controversial and fraught with the risk that the said Judges might not be independent.

The fear that some or all Sierra Leonean Judges might be victims of the conflict in which the crimes for which the accused were prosecuted were committed was proved right in the cause of the proceedings. In this regard, it may not be a mere co-incidence that their findings at the end of the case were couched in similar language and terms like the opening statement of Mr David Crane the Prosecutor.

In effect, some of the Judges were victims of the conflict that afflicted that country from 1991 to 2001. This fact is discernible from the joint "**godly"** versus "**sinners"** dissent in the RUF appeals judgment, in which, Justice Galega King and Justice Kamanda provided a religious, political and personal motivation that influenced and

[3] Appeals transcript of September 2, 2009 pp97-98.
[4] Transcript of 5 July 2004 p 22.
[55] Transcript of July 5, 2004 p 28.

informed their opinion in the case. Citing from Psalm 1 of the Holy Bible, both Judges construed the case in terms of **"the godly"** versus **"sinners**".

Furthermore both Judges were very close to the **"common purpose"** of the most extensive joint criminal enterprise in judicial history retained by the court in the conviction of the appellant, haven been appointed to the court by President Ahmed Tejan Kabbah a party to the conflict, whose government, the accused were convicted for attempting to take over, using criminal means in a joint criminal enterprise.

It may be compelling to set out hereunder the opinion of the Judges(the godly) in which they set out their most eloquent expression of bias and disdain for the Appellants (the sinners) to enable the reader to have an informed opinion about the independence and integrity of the Court in which both Judges sit in Judgment over others..

> " At this juncture, one is impelled to reflect on these words in Psalm 1 of the Holy Bible:-
> Blessed is the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteh in the seat of the scornful. But his delight is in the law of the Lord; and in his law doth he meditate day and night. And shall be like the tree planted by the river of water, that bringeth forth his fruit in the due session; his leaf shall also not wither, and whatsoever he doeth shall prosper. The ungodly are not so, but are like chaff which the wind driveth away. Therefore the ungodly shall not stand in the judgment, nor sinners in the congregation of the righteous. For the Lord knoweth the way of the righteous; but the way of the ungodly shall perish"[6]

By casting the proceedings in terms of the "**godly"** versus "**sinners"**, the two Judges displayed a lack of independence, compromised the integrity of the entire proceedings, the independence of the court and displayed the vengeful motivations that informed their vote for a conviction and sentence. Justice Galega King failed to exercise judicial restraint in angrily halting Learned Counsel during the oral arguments of the appeals when he submitted that the 40 years sentence imposed on Morris Kallon was excessive considering his largely accepted by ignored remorse at the trial by saying that " they could have given him 100 years".

Another Sierra Leone Judge whom the accused had applied unsuccessfully to be removed from the trial panel due to adverse political statements against them in another trial, in a concurring opinion to the trial judgment stated what may be construed as the political motivation for his opinion, even though it was emphasized during judgment that the accused were not convicted because of their participation in the war that took place in Sierra Leone from 1991 to 2001.
Justice Bankole Thompson never the less wrote inter alia that:

[6] Appeals Judgment, Prosecutor Vs Isa Sesay, Morris Kallon and Augustine Gbao.Case No. SCSL-04-15-A, 26 Oct. 2009, p491. Joint dissenting opinion of Justice Galega King and Justice Kamanda.

"1) A war can only be waged as a last resort. All non-violent options must be exhausted before the use of force can be justified.
2) A war is just if it is waged by a legitimate authority.
3) A just war can only be fought to redeem a wrong suffered.
4) A war can only be just if it is fought with reasonable chance of success.
5) The ultimate goal of a just war is to redeem peace.
6) The violence used in war must be proportional to the injury suffered.
7) The weapons used in war must discriminate between *combatants and non-*combatants."[7]

The impugned judicial opinions underscore the importance of appointing to the bench of International Criminal Tribunals and Courts through a transparent procedure, only those Judges who meet the conditions contained in article 14 of the International Covenant on Political and Civil Rights. That way, persons who sit in judgment over others will not be seen to be tainted with political, religious or biased predispositions as those cited herein. Appointments that fail to meet these minimum standards undermine the integrity of the judicial process and constitute a serious affront to the very notion of fundamental fairness that is and must be seen to be the cornerstone of the rule of law.

As far as the Special Court for Sierra Leone is concerned, these standards seem to be farfetched. Reason why Charles Taylor whose case is ongoing, needs to be on guard on what awaits him.

With regard to the International Criminal Tribunal for Rwanda, it was created against a backdrop of a war during which some of the most vicious crimes that shock the conscience of humanity were perpetrated by the protagonists in the conflict.
Unfortunately, contrary to the rationale for which the Tribunal was established, the integrity and credibility of the judicial process has been irredeemably compromised due to the selective and discriminatory nature of the prosecution in which the Hutu ethnic group is criminalized as opposed to criminalizing individual responsibility in the perpetration of crimes that fall within the jurisdiction of the Tribunal.

In so doing, therefore, one of the protagonists in the conflict the Rwandan Patriotic Front that won the war , took control of the government of Rwanda and opted for the creation of an International Tribunal to try those it alleged were responsible for the perpetration of International Crimes within the territory of Rwanda and neighbouring states is presented as the victims of Hutu crimes.

Although the RPF requested the establishment of the ICTR, it eventually voted against its establishment because the Tribunal proposed by the Security Council did not respond to its ambition to control the process as it had hoped.

According to Victor Perskin, in requesting the creation of the Tribunal, the Rwandan Ambassador to the United Nations Manzi Bakuramutsa had hoped on behalf of his

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[7] Trial Judgment. Prosecutor Vs Isa Sesay,Morris Kallon and Augustine Gbao.SCSL-04-15 –T 2 March 2009 p 32802 para.79.

government that the Security Council would permit prosecution of alleged crimes from October 1, 1990 to July 17, 1994.
That way, alleged Hutu suspects would be prosecuted for alleged planning of the genocide for a number of years leading up to the massacres in April 1994 . The new Rwandan authorities argued without success that the temporal jurisdiction of the Tribunal should end on the 17 July 1994, the date it proclaimed the end of the conflict. That way, RPF atrocities against Hutu would never be prosecuted since most of the massacres allegedly took place on a widespread and systematic scale after July 1994, when the then Rwandan Government forces had fled the country.[8]

As we shall illustrate herein after, subsequent developments proved that the RPF sought to use the judicial process both at the ICTR and within Rwanda and elsewhere to achieve political objectives. And this, it has done with admirable success. The major casualty in this is the credibility of the judicial process that was put in place at great expense by the international community to try perpetrators of the crimes that were committed in Rwanda without distinction.

Worse still, the Hutu ethnic group, has not only be left without a redress for the egregious international violations inflicted on it due to its Hutu ethnic identity but also because it has been criminalized for genocide on ethnocentric basis.

This policy has been sustained through several ploys, acts and omissions which I will point out herein.
First I must emphasize that from the onset the use of the judicial process for purely political objectives was foreseeable and more effort should have been deployed to prevent it from occurring.

Rather, the Security Council in creating the Tribunal under Chapter V11 (Resolution 955) 1994 laid the very foundation on which political interference would be used as a springboard to intimidate , control and dominate the Hutu population in Rwanda and in neighbouring countries.

The international community without reasonable oversight continues to fund or support policies that criminalize Hutu. In so doing, it has sowed the seeds of hatred, division and strife within and out of Rwanda among the ethnic groups as well as within the countries in the sub region.
This situation will persist as long as the Judicial processes in Rwanda and the ICTR which are supported and funded by the international community, persist in criminalizing and prosecuting only Hutu alleged perpetrators of crimes while considering Tutsi and even the RPF as victims of Hutu criminality. It is this discriminatory and selective anti Hutu policy that I have called a policy of a "**Judicial Genocide of the Hutu**", because it targets Hutu on the basis of their Hutu ethnic identity.

Fearing the occurrence of the situation similar to that which I have stated above, at the ICTY, James O'Brien, warned:

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[8] Victor Peskin, in "International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Co-operation", Cambridge University Press 2008 P162.

"It is important that states create a political climate in which the Tribunal will have a chance to succeed. States should speak out clearly and resolutely against violations of international humanitarian law. In addition, they should explain repeatedly that the Tribunal lacks the mandate and ability to consider the responsibility of racial, ethnic or religious groups for the conflict in the former Yugoslavia. It is instead, a means to determine individual responsibility and both state and Tribunal must be careful to keep it separate from efforts to allocate responsibility for or, rewards from, the broader conflict. Simply put, the Tribunal is aimed at bad soldiers (and those who control them), not bad sides or groups". [9]

Considering the situation that prevails at the ICTR and Rwanda, the Security Council from inception had ample opportunity to ascertain from the reasons given by Rwanda for voting against the resolution establishing the Court, that once established, Rwanda would use every available manoeuvre at its disposal to obtain through the Tribunal what it failed to get through the Security Council Resolution.
The Security Council would therefore have taken pre-emptive measures to ensure from inception that both sides to the conflict were investigated and prosecuted. And that Rwanda should fully co-operate in the investigation and prosecution of all suspects including the RPF suspects.

Absent such a specific resolution, Rwanda felt at liberty to take full advantage of the vehemence of its opposition to the resolution to evince every effort to shield its officers from prosecution, politicise the process and criminalize the Hutu who formed the majority of the population. Its Interest in taking this course was to use the process to ensure that never again should the Hutu imagine taking power along the lines of the social revolution of 1958 which it (The RPF) criminalized as the rallying point of the genocide against the Tutsis.

SECURITY COUNCIL RESOLUATION 955 AS THE VERY BASIS OF THE CRIMINALIZATION OF THE HUTU.

By resolution 935,(1994) the Security Council established an **"Impartial commission of Experts"** with a mandate to provide it with evidence of International Violations, Crimes against Humanity and Genocide perpetrated in the territory of Rwanda and neighbouring states.
The Commission produced a preliminary report which formed the basis of the establishment of the ICTR through resolution 955 under Chapter VII of the UN Charter (8 November 1994).

In conferring jurisdiction ratione materiae on the Tribunal to prosecute and try the perpetrators of crimes against humanity, genocide, article 3 common to the Geneva Convention (nos. 49-52) and additional protocol II (No. 57) , the Security Council perpetrated a fundamental injustice by stating in the resolution that the armed conflict

[9] James O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia .87.Am.639 (1993) Published in International Human Rights Law in Context, Law, Politics, Morals by Henry Steiner and Philip Alston .Oxford University Press 1996. P1069.

in Rwanda during the period of the temporal jurisdiction of the court was an **internal arms conflict.** Regrettably and most unfair to the accused, this constituted a predetermination of a crucial element of article 3 common to the Geneva Convention and additional protocol II punishable under the statute.

It became obvious from the resolution that the fundamental premise on which the basis of jurisdiction in respect of war crimes could be challenged had been taken away and that the armed aggression of Rwanda by Ugandan troops and its RPF surrogate will never be punished or used as a defence in the trial of alleged Hutu perpetrators of the alleged crimes.

The resolution in this regard rendered trials conducted pursuant to it, unfair; in particular when only one party to the conflict, largely Hutu are prosecuted and the others, largely Tutsi are considered as victims or survivors. The wording of this resolution coupled with the Prosecutor's decisions not to prosecute the RPF thus, portray the RPF perpetrators as victims, survivors or rescuers of endangered Tutsi as opposed to Hutu who are "genocidiares".

It is therefore not surprising that this prevailing state of affairs formed on the fundamental basis of a powerful Memorandum addressed to the Security Council in February 2008 by a group calling itself "**Partenariat –Intwari**" in while not denying the fact that genocide took place in Rwanda in 1994, protests vehemently why till date not a single Tutsi member of the RPF had been indicted in Rwanda, at the ICTR or elsewhere for horrendous crimes perpetrated by RPF members against the civilian population of Rwanda comprising, Hutus, Tutsis and Twas. The writers of that memorandum describe this type of justice as **"one way justice"** due to the fact that it is selective and operate as if there was only one belligerent , Hutu who committed crimes against Tutsi victims. [10]

THE POLICY OF "JUDICIAL GENOCIDE OF THE HUTU".

There is no express provision on the **"genocide of the Tutsi"** in the United Nations Security Council Resolution 955 that established the International Criminal Tribunal for Rwanda, the Rwandan Organic Law No. 08/96 of August 30, 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990 or Organic Law No.5/2005 of 14 April 2005 establishing an independent national commission responsible for collecting of evidence indicating the role of the French state in the Genocide that was perpetrated in Rwanda in 1994. There are no provisions as well, identifying or criminalising the Hutus as the perpetrators of Genocide.

The question therefore that may be asked is, how come it that a resolution and laws which did not define crimes, criminals and victims in ethnic terms have been so interpreted and applied to produce just the opposite? And how come it that the entire

[10] Genocide Rwandais: Le Peuple Crie Justice! Memorandum addresse'au Conseil de Securite'des Nations Unies. Plaidoyee pour une enquete globale, objective et impartiale sur le genocide et ses consequence: Resultat d'investigations menee par la cellule de la documentation et securite'du Partenariat-Intewari. February 2008 p 3.

judicial process commencing from prosecutions and judicial decisions arrived from the interpretation of these laws produce such alarmist results with disturbing legal and political ramifications?

How come it that international justice administered at the ICTR, the Rwandan Court system and the Gacaca justice system have from inception selectively earmarked and prosecuted Hutu as alleged perpetrators of genocide and other crimes within their mandate without in the process prosecuting any known significant Tutsi; let alone RPF Officer, even though it is not reasonably disputed that the RPF perpetrated egregious crimes against Hutu civilians and some Tutsi who resided within the country during the war?
Could this state of affairs be mere co-incidence or a deliberate policy of selective and discriminatory justice?

The answers to these queries lay in examining prosecutorial policies, competence, potential and the ability of each of the courts in administrating justice fairly and without discrimination.

THE ICTR.

The ICTR faces tremendous challenges and difficulties in conducting trials within the strict ambit of its statute and the Security Council resolution 955 which mandated it to prosecute all persons who committed crimes that fell within its mandate and jurisdiction without distinction on the basis of ethnicity, race, religion or other discriminatory factors.

One of the most controversial policies that has undermined the impartiality, independence and integrity of the Tribunal is a prosecutorial policy adopted over the years, in which the Prosecutor has abandoned the original mission of the Tribunal stated in article 1 of its Statute for one that criminalizes the Hutus as "**genocidiares"** and perpetrators of the underlining crimes in the statute, against Tutsis and RPF victims and/ or survivors.

This policy eternalizes the "**Judicial Genocide of the Hutus" on the basis of their Hutu ethnic identity.** By using the Tribunal as a forum for shaming and humiliating the Hutus, rather than one whose stated mission is to banish impunity through a dispassionate, free, fair, independent and credible judicial process, the Prosecutor with the tacit approval of the International Community has set a dangerous precedent of discriminatory Justice which brutal dictators on the African Continent and elsewhere will surely call on to settle political scores on ethnic, racial and other criminal considerations.
As a consequence of this policy, Hutus victims of the RPF crimes are left with no remedy and have no where to turn to for such redress. This policy violates several international Human rights conventions as well as the very basis for the existence of the UN.[11]

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[11] Article 26 (1) of the International Covenant on Civil and Political Rights states: " All persons are equal before the law and are entitled to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion,

There is no doubt, therefore, that Rwanda has relied on ICTR policy of selective ethnic based justice as a precedent to justify its current ethno-centric policy of prosecuting Hutus for the crimes that took place in Rwanda from 1 October 1990 when the RPF attacked Rwanda to the 17 July 1994 when the RPF took over power and declared an end to the war; a policy it articulated from inception without success, from the floor of the Security Council.

Through the conception and implementation of this policy, the Prosecutor acquiesced to the Rwandan government, the use of the ICTR to shield RPF perpetrators of International crimes, perpetuate selective and discriminatory justice, politicise the trial process, paint and shame the Hutu ethnic group as "genocidaires"; a policy the said government had sought without success during the debate that preceded the passing of Resolution 955 at the Security Council.

In this regard, Victor Perskin cites an interview he had with a Mr Joseph Mutaboba Rwanda's deputy Foreign Minister and former Ambassador to the UN in Kigali in 2002 in which he said**, "**We asked for a Tribunal but we never got what we asked for… We would still have asked for a Tribunal but a Tribunal set up and structured as we wished".[12]

There can be no doubt, therefore, that having failed to get the type of Tribunal it asked for, Rwanda set out to do every thing to ensure that if the Tribunal were to function, it should do so in fulfilment of its wish. The evolution of events establishes that it has succeeded in that mission admirably well.

The ICTR was established with inherent fundamental institutional flaws and this has to an extent facilitated the ease with which Rwanda obtained its objectives. One of these flaws is evident in the provisions of the statute concerning the selection of Judges and the Prosecutor.

Article 11 of the statute provides for the election of supposedly independent Judges and article 12 stipulates that the Judges and Ad Litem Judges shall be persons of high moral character, impartiality possessing the qualification required in their respective countries for appointment to the highest judicial office. By the operation of article 15 of the statute, the Prosecutor is deemed to possess the same qualification as the Judges appointed to the Tribunal. The Prosecutor with his office is required to be independent as well.

But the events that have unfolded at the ICTR over the years have called into question the independence of the Prosecutor and some of the Judges.

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national or social origin, property, birth or other status"; See the Preamble of the UN Charter: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions, under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained….", articles 1 (3) , 55(c) of the UN Charter.

[12] Victor Perskin: International Justice in Rwanda and the Balkans p.159.

The first constraint that is evident is that the Procedure for nomination as well as qualification for highest judicial office in the member states of the UN from which these men and women are appointed to serve in these important organs of the Tribunal is neither uniform, defined or even transparent. There is a real possibility of many finding themselves nominated and appointed as a result of a political rather than a credible judicial process. It is doubted if brutal dictatorships from where some of the appointees come could ever forward for nomination independent, credible men and women of high moral integrity for appointment.

The next constraint is that, by depriving the Tribunal of adequate resources as the case has often been, the so-called independence of the Tribunal is called into question in the sense that operating under serious financial constraints; the supposedly independent institution operates at the whims and caprices of politicians and political organs of the UN.

The last and most embarrassing is evident in the fact that since its inception; the Tribunal has operated as a victor's court, set up to prosecute Hutu considered the villains who perpetrated genocide against Tutsi victims.
The Prosecutor set the tone from inception by characterising the crimes committed into two categories, namely Hutu crimes and RPF crimes. Since RPF meant Tutsi as the Prosecutor laboured to establish in the Media Case, there was no need to establish a separate category crimes for Tutsis since the mere mention of the RPF was enough.

Thus from inception the Prosecutor ipso facto characterized genocide, crime against humanity and war crimes as Hutu crimes and perhaps isolated crimes of vengeance perpetrated largely after July 17 1994 when the RPF declared the end of the war as RPF, meaning Tutsi crimes.
This objective was intended to and did shield the RPF and Tutsi from crimes perpetrated against Hutu and some Tutsi perceived to be Hutu collaborators. It is the conception and implementation of this objective that gave rise to what I have called in this article "**Judicial Genocide of the Hutu".**

To the Prosecutor, it does not matter that his own investigations and witness testimony turned up widespread evidence of the use of terror as a tool of warfare by the RPF against civilians and a civilian population not taking part in the conflict. The activities of RPF infiltrators so-called **"technicians"** and RPF soldiers who laid mines and bombs in markets places, schools and hospitals, to make the country ungovernable have been consistently elicited by Prosecution and Defence evidence at the ICTR.

General Dallaire describes a gory incident that happened in his presence on the 9th May 1994 at the Kigali Hospital during the struggle for the soul of Kigali. According to General Dallaire;

> "The RPF fired three to four artillery rounds into the hospital compound. Fumes and smoke still hung over the site, filtering the brightness of the sun and turning everything into a dreamlike image of atrocity. One bomb had landed into the middle of a large tent erected as shelter for about 30 injured persons. Staff were cleaning up pieces of charred bodies and trying to put the tents that had surrounded it back up.

> Inside the nearby wall, stood the pharmacy and dispensary. It had a wired service counter in a doorway. People would line up along the front wall waiting for their prescriptions to be filled. The yellow painted, one storey building was still standing although all the widows were smashed. On the walls there were outlines of people, of women, of children, made of blood and earth. It was like a scene out of Hiroshima. There had been over forty people standing against the wall, caught between the shell blasts and the solid building. A medical person said some people just exploded in the air. None survived.
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> I could not absorb the carnage. As an artillery officer, I had seen the effect of explosions on all sorts of targets, but never could I have imagined the impact of such hits on human beings. The age of abstract exercise was over for me. Hundreds of people of all ages were crying and screaming, and staff ran every which way trying to attend to all the wounded. With tears and crazed gestures, the minister of social welfare screamed at me that UNAMIR and I were accomplices to this savagery and that he hoped I would never be able to erase this scene from my mind".[13]

These women, children, men, sick and wounded who were killed under these circumstances belonged to all ethnic groups, Hutu, Tutsi and Twa.
And this is just one of several pieces evidence available to the Prosecutor from his own key witnesses indicating that the RPF did not distinguish between civilian and military, civilians and civilian population and combatants in its quest to take power by every means with total disregard for the mandatory provisions of the Geneva Conventions it was required to abide with.

The Prosecutor turned a blind eye to this and other atrocities, instead indicting three senior military officers of the Rwandan Armed Forces for attacking and killing Tutsi refugees at the location and on the very day despite this first hand account by General Dallaire placing the responsibility of the attack on the RPF.

The Prosecutor has also displayed total lack of independence in failing to prosecute those alleged to have shot down the plane of President Habyarimana in the night of 6th April 1994, rather charging the late Habyarimana and an infinite group of Hutu leaders with planning the genocide that took away his own life.[14]

Writing about the reasons proffered by some the Prosecutors for deciding not to prosecute RPF crimes, Victor Perskin states the following:: **"**with the Tribunal's increasing awareness of the crimes committed by the RPF, also came an awareness of the political dangers of investigating these abuses. Louise Arbour Goldstone's successor spelt out the risks in an interview with the Canadian Journalist Carol Off. "How could we investigate and prosecute the RPF while we are based in that country? It was never going to happen. They would shut us down. We were infiltrated. The Rwandan Government was reading my mails**". ** Senior ICTR investigators whom the

[13] Dallaire: Shake hands with the Devil,p361.
[14] See the indictment in Prosecutor Vs Augustin Ndilindiyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahtu, ICTR -00-56-T. Para.21.

writer interviewed expressed the fear of being physically harmed or killed by the RPF if investigations and prosecution continued.[15]

This reason appears pedestrian and simplistic considering the fact that the Prosecutor had the option to report to the Security Council under article 28 of the ICTR statute any threat or obstruction to the execution or fulfilment of her mission but there no indication that this procedure was ever set in motion[16].

And to protect and guarantee her independence and security article 29 granted her and her staff the immunities and privileges afforded under the convention on the privileges and immunities of 13 February 1946.[17] Her decision not to prosecute RPF perpetrators must be for reasons other than the fear of threats to life and limb of the Prosecutor and her investigators by the RPF.

After Carla Del Ponte who promised firmly to pursue the Prosecution of the RPF and lost her positions in the process, Mr Hassan Jallow took over with a similar promise to pursue the Investigations and prosecutions. According to Perskin, Mr Jallow not only failed to even consider the prosecution of the RPF crimes a priority but made fundamentally inconsistent reports to the Security Council on the matter.[18]

According to the writer, Mr Jallow's approach to the massive crimes committed by the RPF against Hutu civilians has been marked by ambiguity.
On the one hand, he insists and still officially insists that he will pursue the matter.
In a June 2005 speech to the Security Council he stated that he could issue the indictments well beyond the dateline imposed by the Security Council for the Tribunal to fold up.

On the other hand he claims that his inability to pursue the matter was due to constraints placed on him by the completion strategy. Absent from his strategy has been a request for an extension of time to pursue the RPF crimes after the dateline imposed by the Security Council.

Yet the Security Council in a 2004 resolution prioritized the investigation and prosecution of the RPF crimes which it placed on the same pedestal and importance as the capture and prosecution of Mr Felicien Kabuga[19].

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[15] *Victor Perskin, P 190.*

[16] Article 28 of the ICTR statute stipulate as follows: 28 (1): States shall cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

[17] Article 29 (2) The Judges, Prosecutor and Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. Under Rule 11 of the rules of procedure and evidence the Prosecutor could also report to the Security Council any denial of cooperation by Rwanda in complying with requests for deferrals. There is no indication this was ever done.

[18] Victor Perskin pp 225-231.

[19] Resolution 1534(2004) in question states that the Security Council acting under chapter VII of its Charter article 2 : Reaffirms the necessity of the trial of persons indicted by the ICTR and reiterates its call on all states , especially Rwanda, Kenya, the Democratic Republic of Congo and the Republic of Congo to intensify co-operation with and render all necessary assistance to the ICTR, including on the investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on all at-large indictees of the ICTR to surrender to the ICTR".

Significantly, the Prosecutor has deployed significant energy and resources in the search and arrest of Kabuga who is illusive while turning a blind eye on the RPF perpetrators whom he meets and sees regularly.

The search for Hutu fugitives has in some cases been accompanied by methods and tactics including the inappropriate use of the judicial process that criminalize the family members of such fugitives.

The search for Kabuga for example, has been characterized by judicial methods which I may venture to say are scandalous. In an action filed by the Director of Prosecutions of Kenya before a Kenyan High Court to freeze the property of Felicien Kabuga in that country, the Court ruled inter alia as follows:

> "That the named property belongs jointly to the 1st and 2 rd Applicant who are legally married. They are husband and wife. No doubt.
> I therefore concur with the DPP that the title to the property is joint, indivisible, inseparable and unseverable from the first Respondent. I also do agree that her title and interest are interwoven with that of her dear husband.
> The only conclusion that the court can make is that the cause of action is against the entire property. With the benefit of hindsight, the 1 st respondent should have registered the property in the name of his dear wife……
> Earlier, when I granted the orders, I also acknowledged that Kenya also plays host to two key UN agencies UNEP and UN Habitat.[20]

The above decision is an example of, how family members of indicted Hutus before the Tribunal are themselves treated as criminals by association.
In all civilized legal systems the world over, joint family property may not be frozen when it is proved or shown to be a source of sustenance for the spouse who is not subject of prosecution.

Unfortunately, Justice Muga Apondi of the High Court of Kenya admitted in his ruling that he was influenced in assuming Jurisdiction and making the orders freezing the joint property despite the proven interest of the spouse, by considerations that were political rather than legal in nature, namely that Kenya hosted two UN organs. Politically expedient as that decision may be, it was legally deficient, unsound and violates the inalienable rights of Kabuga's wife protected by UN Conventions.[21].
This decision was a total mockery of the rule of law and a tacit criminalisation of an innocent hutu spouse for alleged transgressions of her husband.

Considering the efforts put the Prosecutor in the search and prosecution of alleged Hutu perpetrators, had he wanted to prosecute RPF crimes, he would have evinced

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Again, despite this resolution, there are no clear indications that the Prosecutor will ever prosecute even a single RPF or Tutsi perpetrator of the crimes against Hutus in Rwanda.

[20] High Court of Kenya Miscellaneous Criminal Application No.244 of 2008,The Attorney-General – Applicant Vs Felicien Kabuga, Mukazitoni Josephine and Kenya Trust Company. Decision on Preliminary objection of 2 Respondent pp 8 and 9. Mr Justice Muga Apondi.

[21] Article 23 (1) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. 23(4) State parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children".

little efforts and at little expense to the UN and the International Community in doing so, yet there is no indication that he will ever look in that direction.

It is precisely for the above and many other reasons that informed observers have come to construe justice in Arusha as "**victors' justice".** In this regard, Victor Perskin quoting some ICTR officials forewarns that "**Failure to indict and prosecute RPF suspects will spell failure for the Tribu**nal" And that "**if they close the door at the ICTR,"** If they lock it and turn the lights off without doing anything about the RPF then they haven't done their job. According to the writer, a veteran investigator told him in 2005 thus **: " We have only investigated the loser , the Hutu, the genocidiare. And the winner gets away with murder…There is no justice".** [22]

In addition to the above policies that have undermined the credibility of the ICTR, the RPF has consistently used to maximum effect propaganda to shame, blackmail and put the Tribunal on the defensive. This persistent onslaught on the integrity of the Tribunal, Perskin writes, paid off tremendously leading the Tribunal to see in collaborating with, and pandering to the RPF political calculations the only means of safeguarding its very existence.[23]

This policy received a major boast in an Appeals Chamber decision of judicial notice in which the Appeals Chamber took Judicial Notice of the Genocide of the Tutsis shutting the door for any Tutsi ever to be prosecuted for genocide since it would be absurd for a Tutsi to plan or perpetrated his/ her own genocide.[24]

To the ICTR, it did not matter that alleged investigations of crimes perpetrated in Rwanda was ongoing and the RPF crimes, according to the Prosecutor's assurances to the Security Council, could be prosecuted. It did not matter if several instances of genocide of the Hutu might have been perpetrated in Rwanda within the temporal jurisdiction of the Tribunal.

What mattered to give judicial cover to the prosecution's policy of prosecuting only Hutus for genocide, a policy that has developed to Hutu being called "geocidaires" through this process of judicial activism.

Apart from giving judicial cover to the policy of selective prosecutions the decision additionally strengthened the resolve of Rwanda like the ICTR Prosecutor, to go after Hutus world wide, where ever they may be found, for perpetrating the genocide of the Tutsis even though this was not clearly specified in their statute of the Tribunal nor even the organic laws of Rwanda. Hitherto, the genocide of the Tutsi existed in the main, in political discourse and like at the ICTR, in prosecutorial policy and practices. Inherent in this decision of judicial notice is a validation of the policy that the RPF and the Tutsi are victims or survivors and the Hutus, "genocidaires".

For me genocide is genocide whether it is genocide of the Hutus or genocide of the Tutsis. To the extent that this crime is no-prescriptive, evidence of the genocide of

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[22] Victor Peskin pp 230-231.
[23] Victor Perskin p 192.
[24] Decision of Judicial Notice handed down by the Appeals Chamber of the ICTR in the case of Prosecutor Vs Karemera and others dated 16 June 2006.

Hutus, Twas and Tutsis may turn up long after the Tribunal has closed its doors. It is therefore unjust to close the door to the prosecution of other forms of genocide no matter how described at any time in future.

I do not think that a decision of a court that shuts the door to prosecution of persons who might have committed genocide in Rwanda or construed as criminalizing an ethnic group for the most heinous crime that shocked the conscience of humanity, like this decision on judicial notice has been construed to do, is consistent with the mandate of the Tribunal and the principles of fundamental fairness enunciated in International Human Rights Conventions. It therefore fails to appropriately demonstrate the resolve of the International Community to banish impunity from Rwanda, Africa and the world through a judicial process.[25]

What could be the motivation of such a decision which reversed fair trial guarantees contained in article 20 of the statute of the Tribunal and article 14 of the International Covenant on Civil and Political Rights in such a dramatic manner? For me the motivation could only have been political since the facts on which Judicial notice was taken are object of ongoing investigations and all the parties to the conflict had not been indicted.

That political context may readily be seen in the pressure exerted by the political organs of the UN to end the trials due in part to their slow pace and the high costs and incidence of such costs on the UN budget. This decision might have been intended to fast track the proceedings to comply with the completion strategy but it has worked tremendous injustice by shutting down litigation on the most contentious issues that has confronted each case from inception. As a consequence of this decision, the burden of proof has been shifted to each accused to prove his innocent through a showing that he did not participate in the genocide. This decision may satisfy proponents of the completion strategy but comes with a heavy toll on the quality of justice delivered at the Tribunal and principles of fundamental fairness.

Prior to this decision, ICTR had rendered two decisions widely perceived or construed to be actuated by political pressure.

The reversal of the acquittal of Jean Bosco Barayagwiza by the Appeals Chamber after the Government of Rwanda threatened to end cooperation with the Tribunal if the judgment were not reversed seriously eroded and compromised the independence and integrity of the Tribunal. The threshold for the admissibility of the “new facts” that the Appeals Chamber established to reverse the acquittal of Baragyagwiza laid down in the case and Prosecutor Vs Laurent Semanza in which the relevance and admissibility of the said evidence was in issue, was largely inconsistent with the established Jurisprudence of the Tribunal and has never and may never be applied by the Tribunal in any other case.

Finally the blackmail and intimidation of defence lawyers and defence witnesses in the Process by the Rwandan Government and others acting on its behalf has inhibited the ability of the Hutus accused before the Tribunal to have an effective defence.
A few examples will illustrate this point.

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[25] See articles 14 and 26 of the International Covenant on Civil and Political Rights 1948.

One Jean –Paul Gouteux writing in "**La Nuit Rwandaise Numero 1, 7 Avril 2007"** asserted that the extensive nature of the massacres in Rwanda in 1994 was enough to establish that most Hutu households in Rwanda consisted of perpetrators or even planners of the genocide. And that at the ICTR in Arusha, there exist wide ranging negation of the existence of the genocide.[26]

Under the heading, "Negation, as an element of the crime of Genocide" he writes: "On the other hand, the proponents of negation are more virulent than ever. They are within the ICTR charged with trying the organisers of the genocide. In a conference organized at the Champs – Elyses with the association of defence lawyers at the ICTR, Rety Hamuli, counsel for alleged genocide suspect Andre Ntagerura in complete agreement with Jean-Yves Degli and Raphael Constant explained to the audience that there has never been genocide"[27]

His construction of what defence counsel said at the alleged meeting at Champs Elyses may be excused as a misconception and total ignorance of the role of defence lawyers in cases before the Tribunal. But when the writer ventured to assert that most Hutu households in Rwanda were made up of perpetrators and organizers of the genocide against Tutsi, to me smacks of an unacceptable attempt to criminalize and construe in ethnic terms the unfortunate and horrendous crimes that were perpetrated in Rwanda; a course which even the Rwandan legislator has been reluctant to adopt.

Elsewhere, the position of Rwanda in its pursuit of the interpretation and application of the genocide convention that forms the very foundation on which the ICTR was established, as well as its own organic law on the prevention and punishment of the crime of genocide is intriguing, if not surprising, considering its persistent commitment to combat genocide, genocide ideology and establishing the alleged participation of the French state in the genocide.

One would have expected the RPF upon coming to power to withdraw its reservation to article 9 of the 1949 convention on the prevention and punishment of the crime of genocide as an indication of its commitment to fighting impunity, genocide and genocide ideology not only in Rwanda but world wide.

That has not been the case. And so in **the Case Concerning Armed Activities on the Territory of Congo, (Democratic Republic of Congo Vs Rwanda**)[28] , Rwanda invoked its reservation to article 9 of the genocide convention[29] as one of the grounds in urging the ICJ to decline jurisdiction in a case brought against it by The Democratic Republic of Congo. And so on the 30 June 2001 the matter was stroke off the list as a result thereof.

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[26] La Nuit Rwandese No.1, 7, Avril 2007, L'implication Francaise dans le denier genocide du XX eme Siecle, p14, IZUBA Editions..
[27] Nuit Rwandese p 100
[28] Democratic Republic of Congo Vs Rwanda, case concerning Armed Activities on the Territory of Congo, filed on the 23 rd June 1999,
[29] Article 9 of the Geneva Convention of the Prevention and Punishment of the crime of Genocide 1948 stipulates that any dispute between contracting parties to the interpretation of application of the said convention should be brought before the ICJ

But then, its Organic law no .5/2005 of 14 April 2005 creating an Independent Commission to investigate the participation of the French State in the genocide is premised on the genocide convention of December 9, 1948. The reservation of Rwanda to article 9 of the Convention precludes any recourse to the ICJ by Rwanda or France to litigate the interpretation and application of the convention and this includes the legality of the Commission as well as its findings.

That in effect inhibits the effectiveness of the commission and its findings absent a diplomatic settlement of the dispute between Rwanda and France.
For our purposes, the fact that Rwanda has left that reservation to stand might be construed as a lack of a serious commitment to fight against the crime of genocide and impunity.

"JUDICIAL GENOCIDE" OF THE HUTU IN THE RWANDA JUSTICE SYSTEM.

Upon succeeding to intimidate, blackmail, manipulate or short change the procedure in Arusha the RPF felt compelled to put in place its own legal institutions to deal with the cases of over 130,000 Hutu suspects arrested indiscriminately all over the country and held under conditions adjudged by human rights organisations to amount to cruel and inhumane treatment.

Commenting about this system, prominent Photographer Robert Lyons who visited some Rwanda Prisons, interviewed and took the pictures of some of the detained as well as convicted persons writes that **"**Prison officials estimate that there were over twenty-one hundred detainees who were under the age of criminal responsibility (fourteen year of age, according to Rwandan law) during their involvement in the genocide. Some have no relatives any more, and many of those who have families have been abandoned for fear for possible consequences of harbouring criminals, their children".[30]

Highlighting the case of Amiable Rwigema aged 27 in 1998 and a Judge in the Butare Court of First Intance, where he met, interviewed and obtained his picture, Robert Lyons writes**: "** The majority of Judges in Rwanda are young men who have received six months of legal training to prepare them to adjudicate genocide cases. In some instances , <u>the judges are genocide survivals themselves".[31]</u>

This makes Rwanda together with the Special Court for Sierra Leone the only known judicial systems where victims sit in judgment over alleged perpetrators of some of the crimes for which they are victims.

Since the Gacaca courts have no rules of procedure and evidence and are not opened to lawyers, there can therefore be no guarantee of a fair and free trial nor due process before it..

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[30] Intimate Enemy : Images and Voices of the Rwandan Genocide. Robert Lyons and Scott Struas , IMITT Press Cambridge Massachusetts , 2006 p175.
[31] Robert Lyons p 160.

"JUDICIAL GENOCIDE" OF THE HUTU ACCUSED BEFORE THE GACACA COURTS.

The Gacaca system has emerged as predicted by Human rights Watch to be a dangerous political and vengeful tool to intimidate, humiliate and enslave the Hutu within Rwanda. Like in the ordinary courts, most of the judges are Tutsis and the accused are almost always Hutus.

Most writers, commentators and observers of Gacaca proceedings are worried about lay people trying and convicting mainly Hutu suspects to long prison sentences without any formal form of due process before competent independent judges consistent with article 14 of the International Covenant on Civil and Political Rights.

The resort by Rwanda to the Gacaca justice system was explained as a means of decongesting the Rwandan Prisons and rendering expeditious indigenous restorative justice. Human Rights Watch applauded this development when more than 200,000 Gacaca Judges were elected throughout Rwanda but cautioned that the process could be subject of political pressures.[32]

It was hoped from inception that;

> "the principles and processes of these courts would mitigate the failures of "Arusha Justice" at the Tribunal and will seek to punish or re-integrate over one hundred thousands genocide suspects. Its restorative foundations required that suspects will be tried and judged by neighbours in their community. However, the revelation that Gacaca is a reconciliatory justice does not preclude its potential for inciting ethnic tension if it purports to serve as an instrument of Tutsi Power. The state-imposed approached of command justice has politicised the identity of the participants of the Gacaca—perpetrators remain Hutus and Victims and Survivors remain Tutsis,. Additionally, the refusal of the Kagame government to allow for prosecution of RPF crimes to be tried by the Gacaca Courts empowers the notion that Tutsi survival is preconditioned by Tutsi power and impunity".[33]

This opinion is shared for good reason by informed observers as well as the authors of the Memorandum addressed to the Security Council dated April 2008 who cited examples of Hutus convicted at the Gacaca for purely political reasons.[34]

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[32] Dialogue: Revue D'information et de Reflection: Grand Lac: A quand la paix? Sept. to Oct. 2001 p29.
Partenariat –Intwari p 4 footnote 5.

[33] African Studies Quarterly: The Online Journal for African Studies Vol.8 Issue1 Fall 2004 p12

[34] Genocide Rwandais: Le Peuple Crie Justice! Memorandum addresse'au Conseil de Securite'des Nations Unies. Plaidoyee pour une enquete globale, objective et impartiale sur le genocide et ses consequence: Resultat d'investigations menee par la cellule de la documentation et securite'du Partenariat-Intewari. February 2008 p 3.

Conclusion:

THE HUTU VICTIMS CRY FOR JUSTICE BUT NOWHERE TO SEEK JUDICIAL REDRESS.

The government of Rwanda maintains a revisable list of alleged **“genocidaires**” comprising Hutu intellectuals many who were either too young to participate in the genocide or who profess their innocence by establishing that they were absent from Rwanda during the massacres in 1994. With the legislation on **“genocide ideology**” and **“negation”** whose definitions are fluid enough to place any one within the ambit of the law for any act or omission which could be construed to fall within that legislation, persons of Hutu ethnic origin, women, children and men need not have been present in Rwanda during the conflict, or to have been born then to be guilty of that crime.

This explains why since the enactment of that law, Hutu Children as young as five years have been arrested from primary schools and accused of propagating **“genocide ideology” or for being “negationist”**

It is unfortunate that the law and the Judicial processes put in place either at the international or national level has only one consideration for the Hutu, namely that of the perpetrators of genocide and one for the Tutsi, that of victims and survivors.
This Judicial apartheid or genocide, compromises the very essence of the efforts deployed by President Kagame in abolishing the identification of Rwandans in ethnic terms, Hutu, Tutsi, Twa. It sows the seeds of strife along ethnic lines.

In so far as the Hutus have nowhere to turn to, to seek justice having been betrayed by International Tribunal set up at great expense to render justice to all without distinction as to ethnic, racial , political, cultural and religious grounds, this may be a motivation for them and generations unborn to seek justice through other means. And this will be bad for humanity. Very bad indeed!.

Chief Charles Achaleke Taku.