A JURISPRUDENTIAL ANALYSIS OF LAW, MORALITY, AND GENOCIDE: LAW IN A POST GENOCIDE SOCIETY

Case study: Rwanda (1994)
By Ms. Nelly G. kamunde*
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Abstract:
The quest for justice has led to remarkable steps in the fight against impunity and has indeed showed the International community that perpetrators of the worst violations of humanitarian law such as Genocide cannot escape with impunity.

This achievement cannot however be lauded as perfect in light of the lack of commensurate developments and support for situation-oriented reconciliation systems such as truth commissions and other reconciliatory mechanisms. This is so especially when a conflict is caused by a factor such as ethnicity, which is quite peculiar to a specific society and in this case Rwanda. Post conflict societies have not fully enjoyed the triumphs of International Criminal Justice systems. It goes without saying that an inquiry into the laws and the legal structures against genocide from a point of jurisprudence is imperative towards the improvement of the relevant legal systems relating to Genocide and the overall achievement of peace and co-existence among different groups.

Introduction
The massacre of the Jews during the holocaust, the Armenian Genocide, and not so long ago, the Rwandan genocide were shocking events to all who believe in the sanctity of life. These despicable occurrences did not only send the international community drafting and developing all manner of laws relating to Genocide, but also filled the pockets of writers with wealth as they eagerly pounced on the juicy analysis of the existing laws through endless writings.

International lawyers have sometimes been unfortunately equated with undertakers or grave diggers who cherish the benefits of scrutinizing legal lacunae in law in situations of mass killings, such as genocide, without necessarily coming up with a tangible, certain, agreeable and systematic solution of a situation friendly legal system.

Respectfully, this paper seeks not to lessen the merit of the already existing works and the legal developments in the line of Genocide. On the contrary, this is an

* Nelly Gacheri Kamunde, LL.B, (University of Nairobi (2006), Kenya). Author is currently an intern at the Institute of Education in Democracy, (IED). She has previously Interned with the United Nations International Criminal Tribunal for Rwanda, (UNICTR), the National Council for Law Reporting, NCLR and the International Committee of the Red Cross (ICRC), Nairobi Delegation. Previous writing includes her final year under-graduate dissertation titled: Terrorism and the War on Terror: A Critical Analysis of the Legal Challenges of Interpretation and Implementation of Contemporary Humanitarian Law, and is currently working on a Commentary on the continuing Election related case of Alice Waithera and ors V The Electoral Commission of Kenya and the Hon. Attorney General.
expression of a deeper lying sentiment and pain caused by the hatred that lies within the hearts of men and that which inspires them to kill just for the mere reason that co-existence must only be with those of their own kind. As the title suggests, there is a deep lying moral duty that underlies the laws of Genocide, in that these laws are rules that go beyond prohibiting offending the tenets of criminal law and obliges people to abstain from murdering the members of another group and to accommodate them in order to co-exist.

This is the moral aspect of a post genocide society that this paper seeks to explore. This, as will be seen, leads to an inevitable contradiction of the precepts of positivism, as expressed by one professor Hart. In furthering these concepts, this paper will then cite quite substantively the works on Lon Fuller, of law being intimately related with morality.

This familiarity of the law and morality is not in vain, as it seeks to govern behavior, not just through a command written in a sacred legal code, nor one backed by orders as the Justinian\textsuperscript{1} theory would put it, but through man’s own conceptual reasoning as to what can be done and what cannot be done. The purpose of looking at the laws of genocide from the point of view of Lon Fuller, is to ensure adherence of the law in an instance where those laws are inadequate or unclear. This adherence is achieved through the abstinence of certain acts, not as a matter of a legal obligation, but through a moral conviction and prudence, which is beyond the fear of criminal sanctions.

Transcending through all the parts of this paper is the acknowledgement of the most recent case of genocide in Rwanda, which left over 800,000 people dead in a span of one hundred days. This case for Rwanda is used not as a bias against all other situations, but the most certain example owing to its contemporaneousness and global appraisal in the development of the various aspects of genocide.

The paper proceeds first by a background on the 1994 Rwandan genocide and pays close attention to the ‘inspiration’ behind the massacre.

The other issue addressed herein is the question of whether the laws and international jurisprudence of the post-genocide Rwanda are effective laws and/or good laws according the juridical thinkers such as Lon Fuller and Professor Hart among others. This part will also tackle the possible value of utilitarianism in a post-genocide society. Special focus is on these two thinkers due to the fact that the aim of this paper will be specially connected on whether it is better to have Genocide laws based and explained by the precepts of either Fuller’s theory or by Hart’s theory.

The conclusion looks at the success of the laws suppressing genocide and their efficiency in a post-genocidal society. The role of international criminal institutions is also analyzed in an attempt to see the contributions that these institutions have

\textsuperscript{1} The Austinian theory is predicated on the fact that law is law because it is a rule backed by the Threat of Sanctions. See, N.E. Simmonds, \textit{Central Issues in Jurisprudence: Justice, Law and Rights}, Sweet & Maxwell, (1986) p. 77-95
had in the achievement of a genocide free society within the African Context. In this regard, this paper also expresses the sad reality of learning lessons written with the blood of the innocent who will never be brought back even with perfectly established institutions which come after the fact. For instance, the Cambodian special court was established after twenty-one percent of its population had perished in Genocide. The Question that begs here is whether the laws relating to genocide should only come in to punish the genocidaires or whether they have a role in bringing some aspect of social order through the establishment of more coherent relations amongst the rival groups in that post-traumatic genocide society. Finally, the paper finalizes by imagining a possible ideal situation through which the laws as they are would be embraced and supplemented by a more social friendly system.

**Rwanda, Prior and during 1994**  
**Genocide and ethical differences.**

Before going into the situation in Rwanda, it is important to note a few things right from the outset. Despite the vast literature of what constitutes genocide, there are certain striking similarities of what constitutes genocide. Genocide as defined in the Genocide Convention, involves the elimination of one group from the society as a result of failed co-existence or/and other motivations. The consequences of this failed co-existence is that one of these rival groups, normally know as the aggressor group, resorts to mass killings all geared towards the elimination of the victim group. Consequently, social institutions and ideologies are reconfigured to accommodate the absence of the subjected group, not necessarily due to the reasons, which have been thought out in the reconfigured social institutions but mostly because there are deeper feelings between the victim group and the aggressor group.

The consequences of these give rise to certain features in a post-genocidal society whereby the victim group is totally eliminated, negated or marginalized. Instances

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4 Genocide Convention, Art 2

5 The phrase ‘victim group’ is intended to refer to those particular national, ‘racial, ethnic or political groups’ which are subject to intentional extermination. Within a specific context, the designation, however, may not be stable or capable of being stabilized; the boundary defining the category may shift and the group who was the victim may become the aggressor and the aggressor may become the victim.

of situations where people are merely marginalized include the aboriginal peoples of Canada, while that where the victims are almost completely eliminated is that of Rwanda, where by the time the war was over, most Twas, who were originally one percent were killed, besides the Tutsi.

Prior to looking at the Rwandan situation along with the motivations behind the massacres, it is also important to note from the beginning one very amusing phenomena with respect to the communities that perpetrate genocide and ethnic cleansing. These communities are composed of a group of people who do not differ distinctively. For instance, there are several similarities between the Hutu and Tutsi. Cultural historians and ethnographers have even challenged the proposition that the Hutu and the Tutsi constitute a distinctive ethnic group capable of being clearly demarcated from one another. Historically, both Hutu and Tutsi exhibited none of the markers commonly used to distinguish ethnic groups. Both groups identified themselves as Banyarwanda, or the People of Rwandan extraction, they spoke the same language, Kinyarwanda, without differences in vocabulary, they were members of the same religion and institutions, they shared a common public sphere and participated in the same cultural and social rituals. What is striking about the Banyarwanda is that their historical background has been dominated more by political, power and resources struggles as opposed to ethnic co-existence. The point here is to dispel any ideas that the intention of the aggressor group is motivated by any special physical or inner differences of the victim group. In other words the ‘differences’ that may exist such as that of belonging to one group and not the other are inspired by some ideological notions and mentalities which the communities have had historically. The lack of connection between

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7 P.D. Elias, Development of Aboriginal People’s Communities, North York, 1991; T.S. Abler, ‘Colonizing a people: Mennonite settlement in Waterloo, aboriginal sovereignty and Ontario aboriginal law, 1790-1860’
9 P. Gourevitch, We wish to inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda, New York, 1998, 48; Prosecutor V. Akayesu, Case No. ICTR-96-4 Par 81 (1998)
12 A. Des Forges, “Leave No One To Tell The Story”. Genocide in Rwanda, New York, 31
13 Des Forges, n.36 above at 4, (noting that the Tutsi attended the same schools and churches, worked in the same offices, and drank in the same bars...They even celebrated the same heroes)
14 Infra Note(Un And Rwanda)
ethnic differences and ethnic conflicts has elaborately found expression in the reigning debates of cultural relativism versus universalism of human rights. Those who oppose universalism concepts in favor of cultural relativism say that relativism is a better basis for ensuring better enforcement of human rights. The opponents of this kind of rather caustic thinking argue that the ideas of cultural relativists are founded on a degree of ignorance of certain pragmatic foundations. Firstly, they assume that culture is general and common to a society and that it is constant. The point of departure finds resonance in that it is indeed the lack of hegemony in a society of many cultures that breeds power struggles and ethnic tensions. Secondly, the lack of consistency in cultures over time brings in an element of un-uniform dynamism which inevitably leaves some groups lagging behind others in the same cultural setting. Simply put, what surrounds the hatred and the subsequent failed co-existence in multi-ethnic communities is something beyond their cultural or physical differences, it is a mélange of many other factors such as politics and materialism, which are more often than not coined in the guise of tribal or ethnic differences.

Let us now, as a case study, examine the background of the Rwanda conflict which after many years of unnoticed expression, took up a most shocking crescendo that verified over 800,000 deaths in a span of one hundred days. This will be with the aim of examining the inspiration of the rather uncommon insanity, that changed the goal of the conflict from a struggle for power to a chain of animosity that led the soft hearted pregnant mothers slitting the bellies of fellow pregnant women, and more explicitly, a scale of madness that sent children as young as twelve years old raising machetes fearlessly to pave way right through the brains of their fellow youngsters. This analysis will be done side by side with the above-mentioned arguments.

**The Rwandan Situation**
The country consists of Hutu (who make up roughly 85 per cent of the population), the Tutsi (14 per cent), and the Twas (1 per cent). Rwanda is a country that is predominantly agricultural, with a generally good climate, manifested by the smoky, green-carpeted hills and the naturally manicured forests, which have felt the periodical change of scents and smells; from the sweet smell of wet ground on rainy days and beautiful morning dew, to the smell of death, and blood stained grass. This due to the periodic conflicts that have existed since the pre-colonial days, post-colonial days and of-course, the period of political tensions before and during the 1994 massacre.

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16 See Information Office Of The State Council, Human Rights In China (1991)
Prior to the colonial era, the Tutsi occupied higher strata in the social system, and the Hutu the lower class. The history of the country can be notably recalled from as far back as the 1890s, when the two neighboring kingdoms of Ruanda to the North, and Urundi to the south were incorporated into German East Africa. The Germans put in a system of ruling that heavily relied on that which was that was already there. That means that the Germans indirectly ruled using the Tutsi. When German lost the territory during the First World War, Belgium took over. The Belgium rule with regard to the ethnic relationship of the two major ethnic groups was characterized by increased ethnic tensions through the introduction of a system where each and every person would have to indicate their ethnic group on their identity cards. The tensions and subsequent violence heightened in the 1950s during the period of decolonization when most states were propounding concepts of democratization such as majority rule.

Inevitably, the Tutsi would lose the opportunities of authority and would subsequently lose their privileges because they were the minority. The subsequence of these social metamorphosis led to the 1959 conflict in which hundreds of Tutsi were killed and moved to the neighboring countries. These tensions escalated even after Rwanda gained independence in 1962, due to almost 120,000 Tutsi who had become refugees in neighboring states, and who in an attempt to regain their position began organizing themselves into armed groups and perpetrating attacks against Hutu targets. Generally, the period of 1962 onwards witnessed a period of genuine ethnic violence. This labeled the Tutsi as ‘inyenzi’ or cockroaches and described them as invaders identical to a household situation of pest invasion.

This however, did not mark the end of the conflicts as yet another conflict occurred in 1973, following a series of particularly brutal attacks by Tutsi against the Hutu Communities and the equally viscous counter-assaults by Hutu students against their Hutu classmates. At this time, General Juvenal Habyarimana, a senior later on in 1990, staged a military coup, overthrowing the then president Juvenal Kayibanda and promising to end the ethnic conflicts. The process of liberalization that was going on in Rwanda was disrupted when the RPF launched a major attack on Rwanda with a force of some 7,000 fighters. The RPF attack prompted the Government to undertake a significant build-up of its military forces. Despite his promise and attempts to end the tensions, faith and hope all dwindled when after 21 years of ruling saw blood-shed that had not been witnessed before.

Beginning on 1st October 1990, an organized force known as the Rwanda Patriotic Front, (RPF) staged a series of trans-border invasions in Rwanda from Camp installations located in Uganda. The inevitable consequence of this is that the Rwanda Government had to re-enforce their position, as any other government

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17 www.survivors_fund.org.uk, Chronology Of Dates In Rwanda From 1885 To The Present; World Africa, A Rwanda History Lesson, April 07, 2004
18 www.historyplace.com/worldhistory/genocide/rwanda.htm
19 Prunier note 10 above at 8-59
20 Ibid at 57
21 Ibid p 90-100
would do when faced with invaders interested in weakening their positions. This was the germination of “Hutu Power”- a kind of assumed popular and social establishment that made Hutu domination more concrete.

The Tutsi thereon were portrayed as aliens, even by the fact that they had their military installations in Uganda. It was clear to everyone who bothered to read the situation that there was no turning back. The war was on. The period between 1990 and 1994 was flooded with many political negotiations, brokered by the OAU, and the UN. This period also saw the creation of the United Nations Assistance Mission in Rwanda, (UNAMIR)\(^22\). The negotiations and the peace process, through the Arusha Peace Accord was interrupted and virtually halted by a day that is recorded to have changed the course of the country’s history for all times.

On the evening of 16th April, 1994, the plane that was carrying President Juvenal Habyarimana of Rwanda and his Burundian counterpart, Cyprien Ntaryamira was shot down over Kigali\(^23\). Within hours, the presidential guard was out on the streets setting up roadblocks in Kigali and going house to house to find and attack prominent Rwandan opposition leaders and Tutsi\(^24\). In the days following the death of President Habyarimana, the Rwandan Armed Forces, (RAF), joined forces with the local civilian militias, (interahamwe) to implement a program for the systemic elimination of the Tutsi population in Rwanda\(^25\). The outcome was the big story that every one with a heart will pay never to read of ever again; the slaughter, the viscous killings of approximately 500,000-800,000 people in a span of almost three months. This ended when the RPF and the local resistance were able to seize control of the government and the country in Mid-July 1994\(^26\).

**The cycle of intent**

Having succinctly looked at the situation in Rwanda, prior to and during the Genocide in 1994, it is important now to resume to the argument of whether that conflicts was prompted more by the ethnic differences, lack of legal rules, lack of their adherence or actual inexplicable hatred for one particular victim group.

The situation in Rwanda was an escalation of tensions for a very long time, which were known by not only the international community, but also by the locals and their leaders. This is most ably shown through the efforts of the late president Juvenal Habyarimana who recognized these differences and worked during his 2 decades of leadership to ensure that there was unity in the country as much as possible. An examination of the cycle that led to the 1994 carnage is inevitable.

Prior to the colonialists, the Rwandese were ruled by the Tutsi, whose positions were re-enforced by the same colonialists, who thought that the Tutsi should continue to be in positions of power as they were more light skinned and hence

\(^{22}\) SC/R 872/1993  
\(^{23}\) "Burundi/Rwanda: Presidents Killed", Excerpt from U.S. Department of State, Bureau of Intelligence and Research, *Secretary’s Morning Summary*, April 7, 1994  
\(^{24}\) http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB119/index.htm  
\(^{25}\) Prunier, note 10 above p 229-237  
\(^{26}\) p. 212
closer in looks to the white people. Before proceeding, it is important to note that these physical differences were very faint and they diminished with time due to inter-marriages, and in fact, they had almost disappeared by the time the 1994 annihilation was perpetrated. The Hutu at this point and time, thought that the Tutsi were in privileged positions and this made them steam up with envy over time. A further reason is that the Hutu saw the Tutsi as oppressors that were shielding behind the cover of the foreigners and getting all the privileges at their expense. The Hutu, being more than eighty percent of the population knew and believed that their day would come. This day came during the wave of democratization, when the colonialists left the state to the whims of self-governance in the canons of democracy, the rule of law and to the Hutu delight, majority rule.

The Hutu being the majority took up power. The Tutsi sensed defeat and due to the oppression that they allegedly perpetrated, it was thought that the Hutu, on taking up power, would drink from the vines of sweat vengeance. As a defense mechanism, the Tutsi waged war against Hutu, they were sent as refugees to the neighboring countries. Courageously, they organized themselves in groups in preparation for a counter-attack in order to reclaim their positions of power. The Hutu in order to secure their positions, responded rather robustly, and to make the long story short there was a grand response in 1994 when in their ‘unity’, ‘brotherhood’ and ‘desire for political stability’, or lack thereof, they gave a unanimous call to rid off Rwanda the ‘inyenzi’, the vermin or the predators. That vicious cycle led to the killing of so many people in an unimaginably short time.

In many societies, and predominantly African societies, the need to defend oneself is secreted in interstices of reality. In fact, manhood in a household is seen through the strength of one in defense operations to assist the community against invaders. The Swahili culture, to mention from so many others, includes within its rich language this African ideology27. Far be it from the interpretation of this paper that the African Culture promotes counter attacks. In fact, it is inclined more to reconciliation as compared to retribution. What this however means is that, in any reality the response of men in authority is not to lie back and wait for fate, but to defend themselves when attacked. The Tutsi and Hutu were defending what they actually believed was theirs; they were defending what in their own sense knew to belong to their inheritance. The problem hence is not the choice of whether to respond to a situation or not, but how to respond. Clearly, the ethnic violence and the tensions were characterized more by a power struggle than they were by any assumed differences. The puzzle however comes in that the escalation of the passion and desire to kill transcended any political ambitions. An instance of this is the fact that besides one of the parties to the conflict boycotting and avoiding the peace processes or the cease-fire agreements, for a long time, there was an urgency to extinguish and totally terminate the existence of the victim group. The end of the tension and the hatred is surely not marked by the acquisition of power by one of the parties. In other words, there is no known political ambition that is conceived in

27 This is expressed in a Swahili saying or proverb, ‘Ukishikwa shikamana,’ translated to mean that when one is clutched in attacked, they should clutch and attack back.
children killing children, women killing women, or spreading the inspiration of barbarism. This imports into the debate, the fact that there is more to the Rwandan situation than punishing the genocidaires in an international criminal tribunal. This analysis ushers in the concepts of what should have an ideal response been to a people struggling for power and peace when none of them wants to give in and compromise. What governing legal structure works more in this kind of a situation, before and after the breakdown of the law and legal systems? Is it one that is based in morality of justice and morality of law according to Fuller, or one that is solely based on a purely formal positivist approach according to Professor Hart?28

2. Genocide laws, Hart29 and Fuller30

According to Fuller, an approach of law and morals in jurisprudence is one in which the concepts of law and the legal system have certain moral dimensions. On this view, a body of rules counts as a legal system only if, inter alia, it is aimed at the common good or the enforcement of justice. This is as opposed to legal positivism, which offers an account of law and the legal system in a purely formal character. According Hart on the other hand, a legal system exists if there are officials who accept the rule of recognition and ensure that those rules are obeyed. However, a clear understanding of the purpose of legal systems indicates that it has an inherently moral purpose, and moral aspiration. This is an understanding of what law is and cannot be separated from what law ought to be.

Without lessening the triumphs of positivism as a legal theory, it is to be noted that there are mediums and situations, which it fits perfectly, and those situations that it cannot completely augur with in light the existent realities. Fuller draws a distinction between the morality of duty and the morality of aspiration. These, he says, differ from each other in a logical structure and in rationale. The morality of duty is a matter of rules or standards, which are regarded as obligatory. One either complies or does not. When it comes to the morality of aspiration, it is not structured in terms of rules but in terms of ideals, where acting morally is a matter of striving to approximate or to emulate certain ideals or aspirations.

According to Fuller, morality of law resembles morality of aspiration. What he means is that the principles upon which a legal system is constructed should not be thought of individually as moral principles compliance with which is a duty; rather they should be thought of collectively representing a moral aspiration for legal systems31.

Transposed and contextualized to Rwanda, this means that even with the breakdown of a legal system, there should have been at least that need for pursuit of originally laid down principles, strenuously and seriously. This is essentially based

30 Lon Fuller, Morality of Law, (Revised ed. 1959); Lon Fuller, Anatomy of Law, (1971);
31 Ibid p.115-119
on the fact that no structure is sure, certain or permanent. All of them are percolated with politics and an inevitable possibility of failure. At this point and time the only obligation left to act in a particular way and not to follow barbaric and wayward conducts, is or ought to be a deeper and inner sense of morality. The absence of this duty amongst the Tutsi and Hutu after the judicial system had broken down, demonstrates the fact that the obligations the Rwandese had, as a people, was far and above their social needs, or too formal such that when there was no command of the legal structure, there was no need to act morally any more. This goes to imply that what really is needed in a system is a society friendly structure that can stand, at least to some extent, with or without the command of a sovereign.

When we speak of the vagueness and the unrealistic nature of having punishment of Genocidaires, as may be expressed by International Criminal Jurisprudence, through the perception of positivism, the following can be said for starters. Enacted Criminal law or positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that ideal medium of legal action and reaction disappears, then the governing positive law disappears with it. The laws that should apply in that kind of a situation should as a minimum be what ancient writers in Europe and America called the law of nature32.

What this means is that the Rwandan massacres had reached soaring levels that were not expected of a people who had rational aims to wage war. The imposition of international criminal sanctions after the majority of the Tutsi had already perished and conquered the war were not in consonance with any purported goals of bringing stability between two communities that had had ethnic tensions over several decades.

Let us examine what it means to have a minimum medium in which the structure of criminal law should apply. As stated above, there needs to be a certain assumption of co-existence of men before the application of positive law. Many are times when this assumption or this situation is gainsaid because it is so obvious that it goes without saying, and its existence is only realized through its permanent or temporary deprivation33. The assumed situation of application of laws, whether those of Genocide or those of criminal sanctions in Rwanda and precisely during the massacre was absent. The people who committed the crimes that took place then did not do it because they were born criminals, or they were just immoral characters who were too misbehaved to follow the law. Something else pervaded the society. There are some other ideas and notions that are used to explain the existence, value, and importance of law and justice.

32 The case of the Speluncian Explorers, By Lon Fuller, 62 Harv. L. Rev. 616 (1949), Copyrighted by The Harvard Law Review Association, A reprint of Lon L. Fuller's 1949

33 Ibid p. 1855
In discussing further moral issues, upon which most of the thoughts in this paper are based, I shall also predicate the arguments on the theory of utilitarianism, which emphasizes on a better off situation or improved welfare. Utilitarianism is an extension of moral theories of explaining the existence of laws. Classical utilitarianism theories take the fundamental basis of morality to be a requirement that happiness should be maximized. This means that the basic principle requires us to weigh up the consequences, in terms of happiness or unhappiness of various alternative actions, and choose an action, which would, on a balance, have the best consequences, in the sense of producing the largest net balance of happiness. Utilitarianism is a profoundly influential theory that reflects important features of our moral beliefs, or rather many aspects of our moral beliefs.

When juxtaposed to the situation of a post ethnic conflict, it is true to say that the laws and the legal structures that should be used to address any situations of breakdowns, should be based more on a moral explanations as compared to legalistic explanations. In other words, a situation of a breakdown of co-existence should be future focused, addressing the general welfare to be achieved by people according to utilitarianism, as compared to completely focusing on criminal justice. The whole idea behind the moral scrutiny of actions is to make the world a better place to live in. The reason why actions such as killing, causing pain or breaking promises are prohibited is simply that they make people worse off. This is another suggestion why the basis of morality is concerned with making people better off. As may have been mentioned earlier, one central focus on the theory of utilitarianism is that it focuses on the future. This means that all relevance is pointed to the consequences that will arise as opposed to vengeance and retribution. The theory is however not absolute in explaining to what theories laws need be inclined so as to remedy a pre-conflict and a post-conflict situation. The problem arises in that if the sum total of human welfare can be increased only by producing inadequacies in welfare, the utilitarian will go for maximization rather than equal distribution.

That said, it is now important to briefly look succinctly at the International Criminal Tribunal for Rwanda, ICTR, and its triumphs or lack thereof in addressing the Inter-ethnic rivalry of the Tutsi and Hutu.

**The ICTR: Triumphs and Failures**

When all was said and done, there were far too many people dead, mostly Tutsi and it goes without saying that majority of them were innocent. Far be it that that the ones who were not considered as innocent in this context were guilty by virtue of being Tutsi. Innocence or guilt within the context of an armed conflict between two groups as is the case for the Hutu and the Tutsi is based on written laws of how people should conduct themselves in their hostile engagements. In these codes of the laws of war, there is a limit as to how much, and against whom one can wage war. In other words, a war is not a barbaric killing spree, but a breakdown of

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34 *Ibid* p15
35 *ibid*
negotiations and dialogues, such that the parties have to talk the language of force to articulate their demands or rather in the language of war, their military objectives. Those who go beyond their intended military objectives are said to violate the laws of war.\textsuperscript{36}

The concept of waging war is simple and is predicated on the simple truth that a soldier wars those who are warring, and only those who pose a specific threat to his military objectives. If for instance the Tutsi wanted to take over the town of Kigali, then they should wage war for control and not bother maiming the women and children who are not in anyway engaging in the hostilities.\textsuperscript{37} The facts as stated above in the background show that there was so much more than power hunger and everyday conflicts in Rwanda. For the mere fact that there was a silent unanimity amongst those who witnessed the massacre to use the term genocide.

The reaction of the international community and the United Nations was that someone had to pay for the wrongs that were done against the innocent civilians, men, women and children.

In the period immediately following the massacres in Rwanda, an independent tribunal to prosecute those who were responsible for the 1994 massacres was established, the International Criminal Tribunal for Rwanda, (ICTR)\textsuperscript{38}. The ICTR was immensely lauded as being one of the ways in which the culture of impunity can be terminated once and for all. In fact international criminal tribunals are seen as one of the most, if not the most, effective ways of remedying the past hurt and the ensuring justice against those who took the lives of others.\textsuperscript{39} The ICTR and any other international criminal Tribunal privileges a certain figure and integrity of a judicial structure over the individual victim and his or her social and cultural geography.\textsuperscript{40}

An expression of a post-traumatic society and the social demands for the co-existence between the victim group and the aggressor group shows that that specific society has a deeper social need than retributive justice in order to acquire social integration.\textsuperscript{41}

The crisis in Rwanda, despite the fact that there were many political motivations involved during the war, has a history of ethnicity that is difficult to ignore. What this means is simple, if basically, the conflict was one of political needs, then the oppressed groups would hold on to power and secure its position through other means, good or bad. The situation in Rwanda however saw a different turn of events, a passion, and a deep desire to completely exterminate one group. Simply put, there are two major grounds upon which I object that a completely retributive

\textsuperscript{36} The laws of war basically refer to the arm of law called Humanitarian Law, mostly contained in the Geneva Conventions of 1949 and their Additional Protocols 1977.

\textsuperscript{37} See for instance, Common Article 3 to the Four Geneva Conventions of 1949.


\textsuperscript{40} Ibid p 123

\textsuperscript{41} Ibid p 124
mechanism is the best solution to a post-genocide Rwanda. Firstly, had the conflict been short lived with no historical antecedents of ethnic violence, then it would mean that there was a break down in the laws at one point and time, which needed a legal redress to punish the violations. Secondly, the possible violations during war would not have included an intention to totally eliminate one group from the Rwandan social setting, but to regain control and authority.

**Conclusions and Recommendations**

The attempt here as stated earlier is to try and propose attention to any other supplementary measures which may be used in addition to the judicial international criminal jurisprudence to address the situations of ethnic tensions in a more societal friendly way.

The model restorative Justice, such as the one that Stephen Garvey has described as ‘atonement without punishment’ 42 has become an attractive alternative to deontological retributivism. There are certain features43 that are evident in these kinds of restorative models of social justice. These include; (1) repairing the social relationships between the victims and the aggressors44 (2) establishing a dialogic framework for communication through which all members of the community can feel free to express themselves45, (3) restoring to victims ‘their property loss, personal injury, sense of security, dignity, sense of empowerment, deliberative democracy, harmony, and social support where it has been lost46, (4) reintegrating the community of victims with the community of aggressors into a stable and peaceful civis47.

In these kinds of situations the issues that have to do with punishment are put aside and the focus is majored on conflict resolution and dialogues for peace.

Much as the following modes of restorative justice have been discussed to almost a point of Cliché, they could still be valuable in ensuring justice in conflict situations.

1. **Truth Commissions**

Before proceeding to see the value and functioning of Truth Commissions in a post-genocide society, it is imperative to look at the specific jurisprudential link that Truth Commissions have in the achievement of restorative justice and particularly, within the African setting. Briefly, an identification of the canons of African jurisprudence which will then usher in the resultant germinations of Truth Commissions and the Consequent Gacaca Courts.

As impliedly mentioned in the earlier stages of this paper, there are leading existing thoughts on jurisprudence. These include; legal positivism, legal naturalism, and legal realism. There are also pure theories of law such as sociological theory of law, the Marxist theory of law, the historical theory of law and so on. Of all this arrays of

43 J.Braithwaite, *Restorative Justice and Social justice*, (2000) 63 Sask, L.Re. 185
46 Garvey, note 37 above, 1841-1842
47 J.Braithwaite, *A Future Where Punishment is Marginalised:Realistic or Utopian?,* (1999) 46 UCLA L.Rev. 1727, 1743
jurisprudential basis of rules, none includes the Afro-centric approach in both international jurisprudence and mainstream general jurisprudence. International jurisprudence is essentially what the international Criminal Tribunals stand for, based on international concepts such as international human rights and globalization. The model of the ICTR is based on international jurisprudence, as opposed to an Afro-Centric approach.

Having observed that there are problems and challenges that this kind of approach poses in dispute and conflict resolution within the African setting the question that begs therefrom is this: what is the cause of the lack of blend between afro-centric jurisprudence and the international jurisprudence? Why is the setting of the ICTR not appreciably agreeable to the expected outcome of the African setting? With all the deserved respect to the international concepts of globalization and international jurisprudence, they all developed with a degree of obliviousness to the African concepts of law. In actual fact, at some point and time in their development there was a wholesome rejection of African Legal Values. African Legal jurisprudence is founded on basically three tenets: Firstly, African legal systems capstulate that laws are instruments of conciliation, compromise, consensus and reconciliation. Secondly, the understanding that law in an African situation transcends the realm of the individual and speaks of group personality, and thirdly, that laws are accepted because they are embodied in widely accepted usages and practices in forms of covenants and customs. This kind of reconciliatory character of African Law is evidently showcased in the international disputes between Nigeria and Cameroon over the Bakassi Peninsula for instance, and the everlasting model of the South Africa’s Truth and Reconciliation Commission.

The use of Truth Commissions as a model of societal reconciliation posits on the contextualist approach that the solution of post conflict situation in a place rests within the community itself and cannot be derived from without. This means that it is only through a recognition, acknowledgement and admission of what happened that a society can heal. Further Truth Commissions are known to have a therapeutic dimension which is not only healing to an individual but also to a nation as a whole. The unity and togetherness that are expressed in a public situation of a Truth Commission where the specific people who witnessed the events want to know what happened is far more effective than a universal approach which invites international legal scholars who are far removed from the situation. Simply put,

49 *Ibid* p 362
50 *Ibid*
51 Aside from giving judgment, the court was also inclined to reconcile the parties while maintaining general principle of law. Max Gluckman, *Natural Justice in Africa*, Natural Law Forum, Vol. 9 (1964), p.28
Truth Commissions function as a mechanism for empowerment and reconnection\(^{53}\). Social Psychologists have recognized truth-telling as a device for overcoming moments of individual trauma\(^{54}\). The reality of having a Truth Commission has not been totally ignored by Rwanda, much as it has not been given as much attention by the international community.

2. **Gacaca Courts**

This is a mode of restorative justice which employs a traditional system of shame sanctions for addressing the social injuries that were witnessed in 1994. This system has been used before in the Post-conflict Rwanda, where it was used to resolve clan disputes among clan members\(^{55}\). The individual who had committed a particular offence would be brought before the sages and the clan elders in which case they would mediate the aggrieved and the aggressor. The system brought a way in which the victims’ families and the aggressors families were able to come to a conciliatory level, agree and make peace\(^{56}\). Much as this may seem a very ancient way of dealing with offenders, it can be said that it is only a society’s people who know best an ideal remedy for any societal ills. Rwanda being a society that was highly wrecked by the tensions and the conflicts that have reigned in the country for a long time, it can be said truthfully that it is a society that is in need of a system that works more in agreement with establishing a society which is stable than punishing those who violate the criminal laws.

This is not to say however, that there should blanket amnesties and uncalled for pardon in trade for future peace. What this means is that much more effort and attention should be looked at in ensuring that the post-conflict Rwanda and any other country never goes back to 1994.

This is also not in any way to say that there should be no criminal sanctions, for violators who would take advantage of pardon or amnesty and commit crimes that are more grievous. The proposition here is that more attention needs to be paid to a Rwanda-friendly way of looking at a post-traumatic society. That is in addition to the fact that a legal system that cannot accommodate the ethos of a society is as good as none. As briefly expressed above there is a deeper lying duty in a community that can only be inculcated by a mechanism and a system that fits the needs of the society. The imposition of the command and positivism does not only foster coldness and tension amongst communities but also continues the cycle of vengeance. The role of any legal system and the laws therein, in a post-genocide situation should pay close attention to the value and integrity of the original society-


based reconciliation mechanisms in a higher or equal footing with international criminal jurisprudence.