

**Human rights violations in Burundi: A case study in post-conflict
reconciliation and transitional justice**

By

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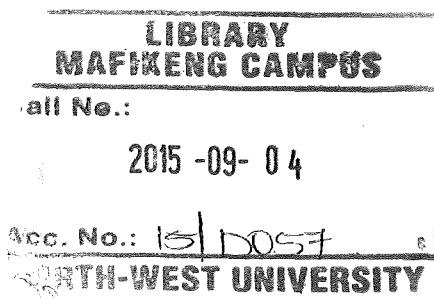


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CANDIDATE'S DECLARATION

I, Leah Alexis Ndimurwimo, declare that this thesis for the Degree of Doctor of Laws at the North-West University, Mafikeng Campus, hereby submitted, has not previously been submitted by me for a degree at this university or any other university and that, it is my own work in design and execution, and that all material contained herein has been duly acknowledged.

Signature _____

L. A. Ndimurwimo

SUPERVISOR'S DECLARATION

I Professor Melvin L.M. Mbao hereby declare that this thesis by Leah Alexis Ndimurwimo for the Degree of Doctor for Laws (LLD) be accepted for examination.

Signature _____

Prof MLM Mbao

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LIST OF ABBREVIATIONS AND ACRONYMS

ACCORD	African Center for the Constructive Resolution of Disputes
ADB	African Development Bank
AFRC	Armed Forces Revolutionary Council
AHRC	African Human Rights Commission
AI	Amnesty International
APRA	Arusha Peace and Reconciliation Agreement
AU	African Union
AUHLIP	AU High Level Implementation Panel
AUPSC	AU Peace and Security Council
BBC	British Broadcasting Corporation
BNUB	United Nations Office in Burundi (<i>Bureau intégré des Nations Unies au Burundi</i>)
BSR	Special Investigation Brigade
BTRC	Burundi Truth and Reconciliation Commission
CA	Constitutive Act
CCB	Constitutional Court of Burundi
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CENI	Independent National Electoral Commission
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CNDD-FDD	<i>Conseil National pour la Défense de la Démocratie - Forces pour la Défense de la Démocratie</i>
CNI	National Centre for Information
CNTB	<i>Commission Nationale des Terres et autres Biens</i>
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of the Child
CSFM	Centre for the Study of Forced Migration
CSMN	Military Committee for National Salvation
DCCA	Dar es Salaam Comprehensive Ceasefire Agreement

DHA	Department of Home Affairs
DINA	<i>Direction de Inteligencia Nacional</i>
DRC	Democratic Republic of Congo
EAC	East African Community
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
FIDH	International Federation of Human Rights Leagues
FNL	<i>Forces National de Libération</i>
FRODEBU	<i>Front pour le Démocratie au Burundi</i> (Front for Democracy in Burundi)
FRY	Federal Republic of Yugoslavia
FZESA	Free-tariff Zone of Eastern and Southern Africa
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICI	International Commission of Inquiry
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IDMC	Internal Displacement Monitoring Centre
IDPs	Internally Displaced Persons
IFCR	International Federation of Red Cross and Red Crescent Societies
IMT	International Military Tribunal
IRB	Immigration and Refugee Board
IRRI	International Refugee Rights Initiative
LHR	Lawyers for Human Rights
NATO	North Atlantic Treaty Organization

NCRR	National Corporation for Reparations and Reconciliation
NGOs	Non-Governmental Organizations
NIHRC	National Independent Human Rights Commission
NMU	National Councils and National Monitoring Unit
NMMU	Nelson Mandela Metropolitan University
OCHA	Office of Co-ordination of Humanitarian Affairs
OHCHR	United Nations Office of the High Commissioner for Human Rights
PALIPEHUTU	<i>Parti pour la libération du peuple Hutu</i>
PDC	Christian Democratic Party
PCIJ	Permanent Court of International Justice
RSDO	Refugee Status Determination Officer
RUF	Revolutionary United Front
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SACTJ	South African Coalition for Transitional Justice
SATRC	South African Truth and Reconciliation Commission
SCA	Supreme Court of Appeal
SCSL	Special Court for Sierra Leone
SCT	Special Criminal Tribunal
SSRC	Social Sciences Research Council
TANU	Tanganyika African National Union
TNA	Transitional National Assembly
TRCs	Truth and Reconciliation Commissions
VTF	Victims Trust Fund
WTO	World Trade Organization
WW I	World War I
WW II	World War II
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNTAET	UN Transitional Administration in East Timor
UPRONA	<i>Union pour le Progrès National</i>
USA	United States of America

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ABSTRACT

Human rights issues in Africa in general and in the Great Lakes Region in particular have grown exponentially in the last two decades. Using Burundi as a case study, this thesis examines the issues of gross human rights violations in post-conflict Burundi and the lack of an effective transitional justice model. In doing so, this thesis traces the roots of Burundi's sullied human rights record over 51 years since independence from Belgium in 1962, the role of the military in human rights violations, including mass killings of civilians, extra-judicial executions of political opponents and the failure of a post-conflict constitutional architecture to establish accountability and responsibility for these violations. This same post-conflict architecture has failed to provide truth, justice and reparations to the victims and in putting an end to a culture of impunity which has become entrenched in Burundian society.

As a necessary corollary, this thesis discusses the role of the United Nations (UN) and that of the international community in resolving Burundi's conflicts. For example, the UN Office of the High Commissioner for Human Rights has been raising concerns over systemic mass killings and lack of judicial and legislative transformation in Burundi. On the other hand, case law and the African Commission for Human Rights' decisions reveal the prevalence of gross human rights violations in Burundi. Regrettably, researchers on the human rights situation in Burundi are not *id idem* as to whether in law the systematic killings of hundreds of thousands of *Hutus* by the minority *Tutsis* amount to genocide. Thus, the need for informed research on the situation in Burundi as a part of an ongoing search for a comprehensive and just solution to Burundi's painful post- conflict settlement provided a strong impetus for this study.

Although human rights are enshrined in the Constitution of Burundi of 2005, gross violations of human rights continue unabated and state practice demonstrates a blatant disregard for human rights norms enshrined in the Constitution and in international human rights instruments to which Burundi is a State Party. The thesis argues that there will be no political stability and no enduring peace without addressing the roots of these human rights violations in a comprehensive manner. The inescapable conclusions that are drawn from the findings suggest that revealing the truth about past mass killings and paying reparation to the victims are indispensable to peace and national healing in Burundi. There is a general consensus on national healing and concerted determination to end impunity through establishing effective transitional justice mechanisms. This thesis recommends practical strategies that should be put in place to establish accountability and responsibility for gross violations of human rights. The law is stated as at July 2014.

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND TO THE STUDY

Violations of human rights and genocide in Burundi are among the most contentious issues which continue to attract the attention of academic discourse. It is common cause that the genocide in the Great Lakes Region of Africa¹ ranks alongside the extermination of the Jews in Nazi Germany as one of the worst human rights outrages of the last century. At the same time, it is remarkable that while the international community, through the United Nations, responded with the necessary resolve to address gross human rights violations in Yugoslavia, Rwanda, Sierra Leone, Cambodia and others, the same has not been the case with Burundi.²

In the aftermath of the horror, devastation and appalling carnage of the Second World War (WWII), member states of the United Nations undertook a number of radical steps to transform the international legal order, *inter alia*, "to save succeeding generations from the scourge of war; and 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".³

At the forefront of this shift in paradigm were the establishment of a centralized system for the maintenance of international peace and security in the Security Council and the establishment

¹ The countries of Burundi, Democratic Republic of Congo, Rwanda and Uganda in a broader sense it includes Tanzania and Kenya.

² See the Statute of the International Tribunal for the Prosecution of Persons Responsible for serious violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991, UN Security Council Resolution 827/1993 of 25 May 1993, as amended by Resolutions 1166/1998 of 13 May 1998, Resolution 1329/2000 of 30 November 2000, Resolution 1411/2002 of 17 May 2002 and Resolution 1431/2002 of 14 August 2002; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994, the UN Security Council Resolution 955/ 1994 of 8 November 1994 as amended by Resolutions 1165 of 30 April 1998; 1329 of 30 November 2000; Resolution 1411/2002 of 17 May 2002 and 1431 of 14 August 2002. The Special Court for Sierra Leone established in 2002 pursuant to UN Security Council Resolution 1315 of 10 August 2000 to try those who bear the greatest responsibility for the war crimes and crimes against humanity committed in Sierra Leone after 30 November 1996, Resolution adopted by the General Assembly on 27 February 2003, Khmer Rouge Trials (A/RES/57/228) which was adopted on 6 June 2003 after four years of tough negotiations between the UN and the Royal Government of Cambodia, entered into force the 29 April 2005 and established the Extraordinary Chambers in the Courts of Cambodia to prosecute the crimes committed during the period of Democratic Kampuchea between 1975 and 1979. Resolution 1261 (1999) of 25 August 1999, as amended by Resolutions 1314/ 2000, 1379 /2001 of 20 November 2001, 1460 /2003 of 30 January 2003, and 1539 /2004 of 22 April 2004 and S/RES/1612 (2005) on comprehensive framework for addressing the protection of children affected by armed conflicts.

³ See the Preamble to the UN Charter, 1945.

of *ad hoc* military tribunals to prosecute German and Japanese war criminals.⁴ The proclamation of the Universal Declaration of Human Rights (UDHR), 1948; the adoption of the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (ICCPR and ICESCR), 1966 and of the Genocide Convention, 1948, the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 were all designed, in greater measure, to lay down international human rights norms and standards to regulate the future conduct of states, including that of state functionaries.

The attainment of independence by the majority of African countries in the 1960s unleashed a torrent of great expectations, including the conviction that it was the inalienable right of all peoples to control their own destinies and that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate expectations of African peoples.⁵ However it did not take long for these loft ideals to implode into military coups and the establishment of one-party state regimes. In the Great Lakes Region, the people of the former Germany possession of Burundi, euphemistically referred to as a “sacred trust of civilization” in the Covenant of the League of Nations,⁶ were ushered into independence in inauspicious circumstances, as will be adumbrated herein. Worse still, the post-colonial history of Burundi is an epic tale of untold human suffering and misery as a result of gross human rights violations, mostly of the *Hutu* majority and *Twa* minorities at the hands of successive military regimes and roaming bands of insurgents.

What is even more depressing about Burundi’s sullied human rights record is that unlike neighbouring Rwanda where the international community moved with resolve to deal with allegations of genocide, the victims of gross human rights violations in Burundi are still crying out for justice. For example, despite several UN Security Council Resolutions⁷ and peace agreements aimed at national reconciliation and democratic governance, grave human rights violations remain unaddressed and in some cases have taken a turn for the worse.⁸

⁴ See the London Charter (Nuremberg) and the Tokyo War Crime Trials, 1945.

⁵ See the Preamble to the Charter of the OAU, 1963.

⁶ Article 22 of the Covenant of the League of Nations, 1919.

⁷ See the UN Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009) and 1960 (2010) on women, peace and security, Resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflicts, Resolutions 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012) on children and armed conflicts and Resolution 2090 (2013) on extension of mandate of the UN Office in Burundi until 15 February 2014.

⁸ See the Integrated Regional Information Networks, (IRIN) Report, **Irish Refugee Documentation Centre**, available at: <http://unhcr.org/refworld/docid/49FO12bb> [accessed on 20 May 2009.] See further, The UN Office of the High Commissioner for Human Rights in Burundi of Report 2010-2011, available at: <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/BISummary20102011.aspx>, and **Human Right Watch Report, 2012** Available at:

Included in this litany of human misery are crimes such as: extra-judicial executions, arbitrary detentions, torture, rape and other forms of sexual violence, the ill-treatment of minorities such as Burundians (hereinafter Burundi) belonging to the *Twa* ethnic group and people with albinism, returnees from exile who are prejudiced and regarded as “foreigners” and discrimination based on grounds of ethnicity,⁹ gender and sexual orientation.¹⁰ Other challenges facing post-conflict Burundi include the absence of institutions critical to transitional democracy such as an effective legislature, an independent judiciary, a free press, an ombudsperson to deal with cases of maladministration, an unresolved refugee question, land disputes, the use of children as combatants and other gross violations of human rights that are committed with impunity.¹¹

As underlined in the landmark case of *Ngirincuti v Secretary of State for the Home Department*,¹² Burundi’s criminal justice system is plagued by weak investigative and prosecutorial agencies. That case involved an asylum seeker in the United Kingdom who had been gang-raped in Burundi and infested with HIV. The Court observed that despite the prevalence of cases of rape, sexual assault and other serious crimes, such cases were rarely investigated and the perpetrators were hardly brought to justice.¹³ Thus, the flaws in Burundi’s criminal justice system are among the failures of a post-conflict governance architecture.

http://www.hrw.org/sites/default/files/reports/burundi0512ForUpload_1.pdf [accessed on 30/10/2012].

⁹ Ndarubagye, L.; (1995) **The Origin of the Hutu-Tutsi Conflict**, Nairobi at p. 20, See also See Human Rights Watch Report of 2011, available at: <http://www.hrw.org/world-report-2011/burundi>.

¹⁰ See Ruzindana, N. (2011) “The Great Lakes of Africa: Rwanda, Uganda, Burundi and their Position Towards LGBTI Rights” **International Lesbian, Gay, Bisexual, Trans and Intersex Association**, available at: <http://ilga.org/ilga/en/article/n1Sciwo1us> [accessed on 23/12/2013], Human Rights Watch “Institutionalizing Discrimination Against Gays and Lesbians in Burundi, 30 July, 2009. available at: <http://www.hrw.org>

¹¹ See the UN Security Council Resolution 2090 (2013) *op cit* n.6 , Report of the Secretary-General on the United Nations Office in Burundi (S/2013/36) available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_p_v_6909.pdf, [accessed on 23/12/ 2013].

Human Rights Watch Report, 2013, available at: <http://www.hrw.org/world-report/2013/country-chapters/burundi>, Amnesty International “Burundi: Freedom of Expression under Threat from New Press Law”, 30 April 2013, available at: <http://www.amnesty.org/en/for-media/press-releases/burundi-freedom-expression-under-threat-new-press-law-2013-04-30>

¹² [2008] EWHC 1952 (Admin), See further, Legalbrief Today “Treating the Scars of Burundi Rape Victims” 14 May 2012, available at: <http://www.legalbrief.co.za/article.php?story=2012051408190342>.

¹³ See further, Fifth Report of the UN Integrated Office in Burundi; 22 May 2009; Seckinelgin; H; Bigirimwami, J.; and Morris, J.; “Securitization of HIV/AIDS in Context: Gendered Vulnerability in Burundi,” **SAGE Journals Online**, <http://sdi.sagepub.com/content/41/5/515.file.pdf.html> [accessed on 10 August 2011].

Admittedly, there is an incomplete transitional justice framework in post-conflict Burundi that calls for constitutional reform. This study stresses that transitional justice must operate within a sound legal framework where the right to amnesty is provided for in the Constitution which can be enjoyed only under the terms and conditions established by law. Burundi's case is an example of a protracted conflict with politicised armed groups in competition for the control of state power and resources. Consequently, accountability for past wrongs in Burundi has not been dealt with the necessary rigour. For instance, non-compliance with International Humanitarian and Human Rights Laws, Peace and Ceasefire Agreements, the Constitution, Penal Code and lack of transitional justice mechanisms in post-transition arrangements have all encouraged a culture of impunity for crimes amounting to genocide committed during Burundi's armed conflicts.

The Arusha Peace and Reconciliation Agreement (APRA), 2000, the 2005 Constitution and the Penal Code all provide for, among others, prosecution, monitoring, prevention and eradication of genocide, war crimes and crimes against humanity.¹⁴ Yet, the application of the genocide provisions in post-conflict Burundi and prosecution of the perpetrators of mass killings remain elusive. This thesis refers to the principles of individual and collective criminal responsibilities underpinning customary international law and case law as confirmed in the decisions of Municipal Courts, Special Chambers, *ad hoc* International Tribunals, the International Criminal Court (ICC) and International Court of Justice (ICJ) and stresses that criminal responsibility as a part transitional justice mechanisms in Burundi is uncertain when compared with other countries. Thus, the Nuremberg and Tokyo Tribunals, ICC, International Criminal Tribunal for Yugoslavia, International Criminal Tribunal for Rwanda, Extra-ordinary Chambers in the Courts of Cambodia, Court for Sierra Leone, Pinochet and other cases are used as authoritative instances to demonstrate that there can be no immunity for genocide and other serious international crimes.

There have been instructive debates relating to the nature of transitions from war to peace or from dictatorship to democracy in post-conflict countries.¹⁵ The central argument has been based on how past human rights violations can be addressed without undermining the crumbling transitional arrangements. In Burundi's context, political and legal measures have been taken and adopted in order to bring about political transition while ignoring the important

¹⁴ Articles 274 - 276 of the Burundi Constitution of 2005.

¹⁵ See Sooka, Y.; remarks in Pete, S.; and Du Plessis, M.; (eds) (2007) **Repairing the Past? International Perspectives on Reparations of Gross Human Rights Abuses**. Antwerpen-Oxford: Intersentia.

issue of accountability and appropriate remedies for victims of human rights abuses.¹⁶ Some views have suggested that law does not limit the politics of transition, but rather, it can be used as an instrument to complement transitional justice initiatives.¹⁷

Internationally, there has been a paradigm shift towards recognition of reparations as a fundamental right as evidenced in the United Nations' adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law (the Basic Principles) since 2005.¹⁸ However, the right to reparations in transitional justice is often negotiated by political elites who determine what type of transitional justice model to put in place. Equally, the implementation strategies or policies relating to reparations for the victims of human rights violations have to be adopted under national jurisdictions where the elite negotiation team has greater leverage than the victims.¹⁹

It is common knowledge that the military has dominated Burundi's political landscape since independence in 1962. Except for a short interlude between 1993 and 1996,²⁰ successive military regimes have ruled Burundi under the barrel of the gun: Michel Micombero, 1966-1976; Jean Baptiste Bagaza, 1976-1987 and Pierre' Buyoya, 1987-1993 and 1996-2003. Following the departure of the military in 2003, Domitien Ndayizeye from the *Front pour la démocratie du Burundi* (FRODEBU, Front for Democracy in Burundi) became the leader of an interim government. However, pursuant to the Peace and Ceasefire Agreements, in particular, the Pretoria Protocol of 2003 and subsequent elections in 2005, Pierre' Nkurunziza, leader of the *Conseil National pour le Défense de la Démocratie - Forces pour la Défense de la Démocratie* (CNDD-FDD), became President.

¹⁶ See Nibogora, B.; D. ;(2011) "The Right to Reparations in the Context of Transitional Justice: Lessons for Burundi from South Africa, Chile, Peru and Colombia", **LLM Dissertation**, Centre for Human Rights: University of Pretoria at p. 1.

¹⁷ Nibogora, *ibid* n. 16 at p.1.

¹⁸ UN/General Assembly Resolution A/RES/60/147, adopted on 16 December 2005.

¹⁹ In Burundi case, the APRA was considered as a legal basis for Burundi victims' right to reparations, this right was somehow disregarded by the parties because the central focus was to stop political and military killings and pursued for the *Hutu-Tutsi* co-existence rather than making reparations to victims a priority. Accordingly, the APRA and the subsequent peace and ceasefire agreements focused mostly on power-sharing with no provision for accountability in terms of prosecutions for mass and politically motivated killings.

²⁰ After Ndadaye's assassination in 1993, another *Hutu* President Cyprien Ntaryamira was killed in Rwanda when the plane carrying the Rwandan President, Habyarimana was shot down in 1994; Sylvestre Ntibantunganya, another *Hutu* who became President after Ntaryamira's death was prevented by the army from taking over and was overthrown by the army in the Second Pierre' Buyoya's coup of 1996.

It must be pointed out here that the three military regimes from 1966 to 2003 were all led by *Tutsi*-army officers, all hailing from one *Tutsi* clan, the Hima and all from one Province in Burundi, Bururi.²¹ Apart from this mono-ethnic domination of Burundian society by the military, it is axiomatic that the most egregious human rights violations took place before or during the periods of military rule.²² The most shocking of these mass killings include:

- The execution of Jean Nduwabike and three other trade union leaders in Kamenge, Bujumbura, on 19 January 1961.
- The assassination of Pierre' Ngendandumwe, a *Hutu* Prime Minister elected in 1963, dismissed by King Mwambutsa in 1964, re-appointed in 1965 and assassinated on 15 January 1965.
- The murders of Paul Mirerekano, President of *Union pour le Progrès National* (UPRONA) and Vice-Speaker of the Parliament with many other *Hutu* leaders like Gervais Nyangoma, Paul Nibirantiza, Pierre' Burarambe and Leonard Ncahoruri in 1965 with approximately 14, 000 *Hutu* civilians in Muramvya.
- The 1972 massacre of 300,000 *Hutu* civilians.
- The 1988 Ntenga and Marangara massacres where the army killed more than 50,000 *Hutu* civilians.
- The massacre of 20,000 *Hutus* in 1991 in Cibitoke.
- The thousands of *Hutu* civilians killed immediately after the assassination of President Melchior Ndadaye, a *Hutu* in 1993.²³

²¹ See Gahutu, R.; (2000) **Persecution of the Hutu of Burundi**, Great Lakes Higher Education Coy. Ltd. Dar-Es-Salaam.

²² Ndarubagiye, *op cit* n. 9 at pp. 27-38; Gahutu, *ibid* n. 21 at pp.17-56, Krueger, R.; and Krueger, K; (2007) **From Bloodshed to Hope in Burundi: Our Embassy Years During Genocide**, Austin, University of Texas Press at p. at p. 41.

²³ For more details of these killings see: Krueger and Krueger, *ibid* n. 21 at pp. 28-29, Bentley, K. A.; and Southall, R.; (2005) **An African Peace Process: Mandela, South Africa and Burundi**; Nelson Mandela Foundation, HRSC Press, Cape Town at p. 43 and Daley, P.; (2008); **Gender and Genocide in Burundi: The Search for Spaces of Peace in the Great Lakes Region**; Bloomington, Indiana: Indiana University Press at p. 69, *Le Collectif des Survivants & Victimes du génocide Hutu de 1972* (Survivors and Victims of Collective Genocide of *Hutu* of Burundi from 1972) "Global Organization for Fighting for Justice for the Victims of Burundi Genocide Before 1972 and After, available at:

These figures do not tell the whole story of the summary or extra-judicial executions and other monstrous human rights violations in post-colonial Burundi. The consternation resides in the fact that writers on the human rights situation in Burundi are not *id idem* as to whether in law these killings amount to genocide, as conventionally defined.²⁴ For instance, Jean-Pierre Chrétien has referred to these killings as “selective genocide” or a “veritable genocide of the Hutu elites.”²⁵ Another troubling aspect of the gross violations of human rights in Burundi, whether termed “particular or selective genocide” or “selective massacres” is that such characterisations generally refer to the mass killings of *Hutus* by *Tutsis*. This approach glosses over the *Tutsi*-dominated army’s insatiable appetite to cling on to power as a major cause of the mass killings. In that respect, it is incontrovertible that the mass killings of 1965, 1972, 1988 and 1993 were all associated with military coups.²⁶ At the same time, it must be pointed out that *Hutu* rebels and insurgents have also committed human rights atrocities although these outrages have seldom been characterised as genocide.²⁷

At the international level, as demonstrated in Ruhashyankiko Report of 1978²⁸ and the Whitaker Report of 1985,²⁹ there is no agreed definition of the term “genocide.” This

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- ²⁴ <http://genocidehutu1972.org/the-genocide/>
See Article 2 of the Genocide Convention, 1948 which defines genocide to mean any of the following acts committed with intent to destroy, in whole, or in part, a national, ethnic, racial or religious group, as such:
- (a) killing members of the group;
 - (b) causing serious bodily harm or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) imposing measures intended to prevent births within the group; and
 - (e) forcibly transferring children of the group to another group.
- ²⁵ Chrétien, J.P.; (2003) **The Great Lakes of Africa: Two Thousand Years of History**, New York: Zone Books, see also Melady, T. P.; (1974) **Burundi: The Tragic Years**. Maryknoll, New York: Orbis Books. Thomas Patrick Melady was a former American Ambassador to Burundi in 1969-1972, Lemarchand, R. and Martin D.; (1974) **Selective Genocide in Burundi**. London: Minority Rights Group, Lemarchand, R.; (2008) “The Burundi killings of 1972”, Online Encyclopaedia of Mass Violence, available at: <http://migs.concordia.ca/documents/TheBurundi-killings-of-1972Lemarchand.pdf>, [accessed on 02/04/2012]. See further, Leonard, D.K.; and Strauss, S.; (2003) **Africa’s Stalled Development: International Causes and Cures**. Boulder, CO, US: Lynne Rienner Lynne Publishers. See the controversy in the Benjamin Whitaker Report of 1985, “Revised and Updated UN Report on the Question of the Prevention and Punishment of the Crime of Genocide” (E/CN.4/Sub. 2/416/1985/6, 2 July 1985). Available at: <http://www.preventgenocide.org/prevent/UNdocs/whitaker/>, at par. 24.
- ²⁶ Ndarubagiye, *op cit* n.9, pp. 27-48; Gahutu, *op cit* n. 21 at pp.17-56 and Krueger and Krueger, *op cit* n. 22 at p. 41.
- ²⁷ See Chrétien, Melady, Lemarchand and Martin, Leonard and Strauss, *op cit* n. 25 at pp. 78-80 and Bentley and Southall, *op cit* n. 23 at p. 31.
- ²⁸ Nicodène Ruhashyankiko Report of 4, July 1978 (Report to the UN Sub-Commission on Prevention of Discrimination and Protection of National Minorities: Study of the Question of the Prevention and Punishment of the Crime of Genocide- E/CN.4/Sub. 2/416).
- ²⁹ Benjamin Whitaker Report, *op cit* n. 25.

underscores the dilemma in dealing with cases of mass killings which may constitute the crime of genocide if the case of Burundi can be used an example.³⁰ The UN Commission of Inquiry Report 1993 on Burundi refers to the “genocide” of *Tutsi* civilians³¹ but fails to acknowledge the genocide of *Hutus* in 1972 as described in the Ruhashyankiko Report.

Lemarchand has lamented: “nowhere in Africa have human rights been violated on a massive scale and with such brutal consistency than in Burundi.”³² Although the Whitaker Report suggests that there is the possibility of broadening the Genocide Convention’s definition of genocide which has to be endorsed in judicial decisions,³³ there is uncertainty in case law as found in the ICJ, ICC and International Tribunals’ decisions.³⁴ In the case of *Bosnia and Herzegovina v Serbia*,³⁵ the ICJ emphasised the specific nature of the crime of genocide or specific intent (*dolus specialis*) that targets and destroys an identifiable group in whole or in part. This requirement distinguishes genocide from other violations under International Human Rights and Humanitarian Laws and places a heavy burden of proof on the party alleging the commission of the crime of genocide.³⁶ The courts and tribunals have been using different tests

³⁰ Ruhashyankiko Report of 1978 and the Whitaker Report of 1985 have been viewed as the UN Commission on Human Rights’ major documents on genocide. Both reports focus on studies of genocide from the viewpoint of the Sub-Commission on Promotion and Protection of Human Rights and Prevention of Discrimination and Protection of Minorities. The Whitaker Report was intended to correct the Ruhashyankiko Report. The Ruhashyankiko Report was construed under political pressure to omit Armenian genocide, but later on the Whitaker Report confirmed that the Armenian massacres amounted to genocide.

³¹ The UN Commission of Inquiry Report, 1993 para. 496 and 498.

³² Rene Lemarchand’s assertion in a testimony to the United States Congress in 1988 on the scale of human rights violations and enduring nature of the cycle of violence in Burundi, see Krueger and Krueger, *op cit* n.22 at p.27 quoting Lemarchand.

³³ Whitaker Report elaborates further that, Nazi ethnic cleansing has not been the only case of genocide in the twentieth century. There are other examples which can be cited as amounting to genocide. For instance, the German massacre of Hereros in 1904, the Ottoman massacre of Armenians in 1915-1916, the Ukrainian extermination of Jews in 1919, the *Tutsi* army massacre of *Hutus* in Burundi in 1965, 1972, 1988 and 1993, the Paraguayan massacre of Ache Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978, and the contemporary Iranian killings of Baha’is at par. 24. Available at: [http://www.teachgenocide.org/files/DocsMaps/UN%20Report%20on%20Genocide%20\(excerpts\).pdf](http://www.teachgenocide.org/files/DocsMaps/UN%20Report%20on%20Genocide%20(excerpts).pdf). [accessed on 19/08/2012].

³⁴ Cassesse, A.; (2007) “The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia” *The European Journal of International Law* Vol. 18 no 4 available at <http://ejil.oxfordjournals.org/content/18/4/649.abstract> [accessed on 19/08/2012].

³⁵ See Gill, T.D.; (2007) “The Genocide Case: Reflections on the ICJ’s Decision in *Bosnia and Herzegovina v Serbia*” *Hague Justice Journal* Vol 2 at p. 45. Available at: [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2\(1\)/The_Genocide_Case.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2(1)/The_Genocide_Case.pdf) [accessed on 19/08/2012].

³⁶ Gill, *ibid* n. 35 at p.45.

such as: “effective control test”³⁷ and “overall control test”³⁸ which tend to bring contradictory judicial verdicts.³⁹

Given the brutal nature of the crime, genocide must not be limited to a numerically substantial portion of the victims when interpreting the destruction of a group “in whole” or “in part,” rather the group may extend to the targeted groups’ intellectual, political or religious and cultural leadership in the case of Burundi.

This thesis is concerned with ongoing human rights violations in Burundi. In order to appreciate the context within which the study is set, this chapter gives an overview of human rights violations in an historical perspective, in particular focusing on the roots of *Hutu-Tutsi* ethnic rivalry, which is at the centre of Burundi’s much troubled history. Although the thesis focuses on human rights issues in Burundi, other jurisdictions have been considered and cited as persuasive authorities in order to support the arguments in this study for comprehensive transitional justice mechanisms as discussed in chapter three of this thesis.

This study is positioned within the two broad paradigms of nation-building and reconciliation and the discourse of transitional justice. The study uses Latin American jurisprudence with specific reference to countries such as Argentina, Chile and Guatemala on issues pertaining to the punishment of perpetrators or forgiving past wrongs. Similarly, the Republic of South Africa and Chile are used as transitional justice models in terms of truth-telling, reconciliation, national-building and reparation for victims of gross violations of human rights. This study pinpoints the role of the military in Burundi’s political landscape, with particular reference to human rights violations. Therefore, it is against this background that the researcher opts for a holistic approach by employing mixed research methodologies that link the aims and objectives of the study to investigate the challenges of ongoing human rights violations in Burundi.

³⁷ Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) (merits) ICJ Judgment of 27 June 1986.

³⁸ ICTY in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*, Yugoslavia’s responsibility was limited to its failure to try to prevent the massacre but the tribunal did not include direct responsibility for either the commission of genocide or complicity in the commission of genocide. The ICJ’s “effective control” test in relation to the imputation of state responsibility for acts carried out by armed forces and groups to a government which assists and supports such forces, but does not exercise operational control over them, differs from the ICTY’s “overall control test” in relation to imputation of criminal responsibility which the ICTY applied in the case of *The Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999.

³⁹ Gill, *op cit* n. 35.

1.1 STATEMENT OF THE PROBLEM

In the context of the above background, this thesis critically analyses the root causes of systematic violations of human rights and of the failure to implement an effective transitional justice model in post-conflict Burundi. As discussed and elaborated further in chapters two, four and five of this thesis, the predominant problem has been, among others, lack of political will to address human rights issues with the necessary rigour.

Undeniably, for more than 51 years since independence, Burundi are still struggling to overcome the legacy of institutionalized violence, disappearances and systematic mass killings. Even the post-transition arrangements which were designed to consolidate the rule of law and good governance have failed to deal with these violations in a comprehensive manner. To - date, nine years after the adoption of the post-transition Constitution of 2005, arbitrary detentions, extra judicial killings, torture and ill-treatment of minorities continue unabated.⁴⁰ The UN Mission in Burundi has systematically documented cases of gross violations of human rights such as torture, rape, arbitrary arrests and extra-judicial executions and has urged the government of Burundi to end these practices.⁴¹ Human Rights Watch, for example, has reported that throughout the 2010 elections in Burundi, political parties used intimidation, including violence, which resulted in politically motivated killings,⁴² which are also demonstrated in the Gatumba massacres of 18 September 2011.⁴³ These practices violate international human rights norms and respect for the rule of law.

Burundi adopted a post-transition Constitution which enshrines basic human rights. Importantly, the post-transition Constitution was adopted in the aftermath of armed conflicts which had ravaged Burundi for many decades. Likewise, at the international level, UN Security Council Resolutions were adopted to bring about peace and human security in Burundi.⁴⁴

⁴⁰ Fifth Report of the Secretary-General of the UN Integrated Office in Burundi, 22 May 2009; Human Rights Watch, "Burundi: Stop Harassing Lawyers and Journalists," 11/8/2011, available at: <http://www.cenhcr.org/refworld/docid/4e4a60720.html>, accessed [accessed on 19/9/2011]; Amnesty International, "Burundi Provisional Immunity Does Nothing to End Impunity." AL Index, APR/6/001/2006 of 10 February 2006, available at: <http://www.amnesty.org/en/library>. [accessed on 19/9/2011].

⁴¹ <http://www.hrw.org/en/world-report-2011/burundi>. [accessed on 25/04/2011].

⁴² Burundi Report on Human Rights Practices of 2010. Available at: <http://www.unhcr.org/refworld/docid/4da56ddec.html>. [accessed 25 /04/ 2011].

⁴³ See <http://www.voanews.com/english/news/africa/Gunmen-Kill-36-in-Burundi-Bar-Attack-130121023.html>. [accessed on 25/10/2011]. Gatumba massacre demonstrate unresolved problems that derail attempts to consolidate peace and implementation of transitional justice.

⁴⁴ UN Security Council Resolutions, *op cit* n. 7.

However, the UN Office of the High Commissioner for Human Rights has raised concerns over systematic human rights violations in post-conflict Burundi.⁴⁵

Human rights violations in post-colonial Burundi and *Tutsi*-led military regimes have continued in the post-conflict Burundi as examined in chapter two of this thesis. Furthermore, the post-conflict governments of 2005 and 2010 have failed to comply with human rights norms and to uphold the letter of constitutionalism. For example, the series of mass killings and other grave human rights violations which have been committed in the post-conflict do not uphold the spirit of constitutionalism and international human rights norms. Surprisingly, no accountability for these violations has been guaranteed because the perpetrators of serious human rights violations have not been brought to justice as part of transitional justice in post-conflict Burundi.

The Constitution of Burundi provides for the appointment of an Ombudsman and empowers the same to receive complaints and conduct inquiries relating to the violations of human rights by government officials.⁴⁶ Although successive Ombudsmen such as Sylvestre Ntibantunganya and Mohammed Rukara were appointed to this effect in Burundi, their powers were limited because of executive interference.⁴⁷

Unlike the approaches which were adopted at the Nuremburg Trials, Chile, South Africa, Argentina, Guatemala, Cambodia, Rwanda and Sierra Leone, transitional justice in Burundi has left a "complex documentary trail."⁴⁸ Given the significance of respecting and promoting human rights norms in contemporary Burundi, this thesis emphasises that the establishment of a Truth and Reconciliation Commission and of a Criminal Court pending the Commission's findings is indispensable should Burundi resolve to follow examples from other jurisdictions.

⁴⁵ the UN Office of the High Commissioner for Human Rights **Burundi 2012 Human Rights Report**, available at: http://photos.state.gov/libraries/burundi/231771/PDFs/2012_human_rights_report_burundi_en.pdf

⁴⁶ Articles 237- 239 of the Burundi Constitution of 2005.

⁴⁷ **African Ombudsman Today**, "AOMA Receives AU Accreditation: Burundi Joins OAMA" Issue 3 December 2011/January 2012 at. p. 15, available at: www.theioi.org/.../Final%20English%20Newsletter%20Issue%203.pdf. See also Burundi Ombudsman Mohamed Rukara Finds Plot to Kill Him , available at: <http://www.bbc.co.uk/news/world-africa-18017909> [accessed on 10/05/ 2012].

⁴⁸ Vandeginste, S.; (2007) "Transitional Justice for Burundi: A Long and Winding Road Study": A paper presented at the International Conference on Building a Future on Peace and Justice, Nuremberg, 25-27, June 2007, at p. 20. Available at: <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf>. [accessed on 15/08/2012.

It must be pointed out that the quest for national healing and reconciliation lay at the heart of the peace accords and ceasefire agreements leading to the adoption of the Constitution in 2005.⁴⁹ However, the following building blocks are not yet in place:

- The Truth and Reconciliation Commission and the Special Tribunal which should have been established pursuant to the UN Security Council Resolution 1606 of 2005 have not been established, with the result that there has been no mechanism to secure truth and accountability and to ensure that those responsible for crimes committed during the country's turbulent history are prosecuted. Although the Military Court of Burundi was established under the 1992 Constitution to deal with military officers involved in criminal activities, that Court has failed to prosecute government and army officials, "the big fish" accused of killing President Ndadaye and many civilians in 1993, in the process ossifying the culture of impunity.⁵⁰
- The granting of "provisional immunity" or "temporary immunity" in respect of "politically motivated crimes" committed during the armed conflict and excluding the crimes of genocide, war crimes and crimes against humanity did not advance the cause of those calling for the investigation, prosecution and punishment of the perpetrators of gross human rights violations.⁵¹ The participation of suspected perpetrators of human rights violations in these agreements has had the unintended consequence of shielding them from prosecution, thereby perpetuating the culture of impunity. As agreed in peace and ceasefire agreements, legislation was passed to integrate the crimes of genocide,

⁴⁹ See the Arusha Peace and Reconciliation Agreement, 2000; the Pretoria Protocol on Political, Defence, Security and Power-Sharing in Burundi, 2003 (the Pretoria Protocol) and the Dar es-Salaam Comprehensive Ceasefire and Peace Agreement, 2006, Magaliesburg Agreement, 2008 and Bujumbura Agreement, 2009.

⁵⁰ Anonymous comments during interviews, see *Ngirincuti v Secretary of State for the Home Department*, *op cit* n.12 and *Ndarubagiye*, *op cit* n.9 at p.89.

⁵¹ In 2003 when CNDD-FDD was still a rebel movement, it entered into an agreement with the government providing that both CNDD-FDD combatants and members of the state security forces would have temporary immunity from prosecution in respect of politically-motivated crimes. The out-going President Buyoya personally made the passing of the genocide law a condition of his handing over of power to the then transitional President Ndayizeye on 1 May 2003. See Further Protocol 11 to the Arusha Peace and Reconciliation Agreement of 2000. <http://news.bbc.co.uk/2/hi/africa/2952881.stm>. [Accessed on 15/08/2012]. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes of 2001 (the Draft Law on Genocide) defines intentional attacks against civilians who are not taking a direct part in hostilities to constitute a war crime in both international and non-international armed conflicts. The Draft Law on Genocide, provides further that rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence constitute grave breach of the 1949 Geneva Conventions.

crimes against humanity and war crimes in Burundi's criminal law⁵² with specific reference to the ICC Rome Statute⁵³ and other international human rights conventions and treaties to which Burundi is a State Party. However, the law was not intended to operate retrospectively in order to deal with past human rights violations, but was created to prosecute international law crimes which would have been committed after its promulgation. Vandeginste while referring to transitional justice points out that there is a remarkably sinister discrepancy between Burundi's policies and practice.⁵⁴

- Although the Pretoria Protocol of 2003 led to the holding of elections under the 2005 Post-Transitional Constitution and a civilian government under Pierre' Nkurunziza was inaugurated, constitutional democracy and the rule of law remain fragile, accentuated by incessant struggles for political and economic power among Burundi's fractious political elites and ongoing conflicts among Burundi's neighbours in Rwanda, DRC and Uganda.⁵⁵

As underlined in the UN Security Council Resolution 2090 of 2013, government has been reminded again to establish an effective Truth and Reconciliation Commission (BTRC) in accordance with the APRA, UN Security Council Resolution 1606, 2005, the National Consultations Report, 2010 and findings of the UN Technical Committee of 2011 on the establishment of the BTRC, including amendments to the BTRC law of 2004.⁵⁶ Although the BTRC legislation was revised in 2011 and amended in December 2012, to - date the proposed BTRC has not been established.⁵⁷

⁵² *Loi N°1/004 du 8 mai 2003 portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre.* (The Genocide Law of 8 May 2003) defines international crimes as criminal offences under Burundi criminal law, it provides for the sentences applicable to those found guilty in terms of Articles 2-4 and Articles 8-18.

⁵³ Burundi ratified the ICC Rome Statute on 21 September 2004.

⁵⁴ Vandeginste, *op cit* n. 48 at p. 20.

⁵⁵ See *DRC v Burundi, Rwanda and Uganda*, 2004, ACHPR 19.

⁵⁶ See Vandeginste, S.; (2012) "Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past while Standing in the Dark Shadow of Politics?" **The International Journal of Transitional Justice**, available at: <http://ijtj.oxfordjournals.org/content/early/2012/04/18/ijtj.ijs009.abstract> [accessed on 11/06/2013].

⁵⁷ See the BNUB Report "Secretary-General's Report Says that Burundi Continued to Make Progress in Consolidating Peace," 24 January 2013. Available a <http://bnub.unmissions.org/Default.aspx?ctl=Details&tabid=2961&mid=5312&ItemID=918203>. The BNUB has suggested that Burundi government must ensure that the BTRC is established that conforms to the national and international standards in terms of its independency, legitimacy and credibility. See generally, Rubli, S.; (2013) "Remaking the Social World: The Politics of Transitional Justice in Burundi" **Africa Spectrum**, 3-24: German Institute of Global and Areas Studies, Institute of African affairs in Co-operation with Dag Hammarskjold Foundation Uppsala and Hamburg University Press, available at: <http://journals.sub.uni-hamburg.de/giga/afsp/article/viewFile/597/595>. [accessed on 10/110/2013].

Vandeginste has raised concerns and noted that for more than a decade since the conclusion of the APRA which proclaimed the establishment of transitional justice mechanisms, there are factors that have hindered the transitional justice initiatives in Post-conflict Burundi which would have minimised the current state of terror and atrocities against civilians.⁵⁸ These include, but are not limited to: lack of effective transitional justice mechanisms such as a credible and independent BTRC in terms of its functioning and monitoring, structural challenges relating to truth-seeking in a broader context, lack of political will and accountability for the past wrongs, lack of participatory democracy, ongoing human insecurity while balancing of local ownership of the proposed BTRC and compromising of international standards remain the most contentious issues.⁵⁹

This thesis critically evaluates two important issues. First is an investigation pertaining to the ongoing and systematic violations of human rights in post-conflict Burundi. Second, this thesis investigates the failure of transitional justice arrangements envisaged in the peace agreements, the Constitution and the UN Security Council Resolution of 2005.

In this study the main central research question is:

Why have the perpetrators of serious human rights violations not been prosecuted? What constitutional processes and mechanisms should address adequately and comprehensively the question of impunity in post-conflict Burundi? There are a number of sub-questions: Can Burundi learn something from other countries such as South Africa and Chile in terms of transitional justice mechanisms? What practical guidelines could be designed in order to stop mass killings and gross violations of human rights in post-conflict Burundi?

⁵⁸ Vandeginste, *op cit* n.48 at p. 20.

⁵⁹ See Brother Emmanuel Ntakirutimana's views on "Setting up Mechanisms for Transitional Justice in Burundi: Between Hope and Fear" **Tenth Anniversary of the International Criminal Court**, December, 2012, Swiss Federal Department of Foreign Affairs (FDFA) available at: <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=155155>, [accessed on 29/07/2013]. The APRA provides for the establishment of two bodies; the BTRC and a Special Tribunal to establish responsibilities on serious acts of violence that devastated the country from independence to 2000. Although the law was adopted in December 2004 in that regards, the Commission is yet to be established while the government's desire to establish a Special Criminal Tribunal based on the findings of the BTRC remains elusive. The civil society has expressed concern over the absence of effective transitional mechanisms and argued that nothing had been planned for the victims, the absence of a court and a general amnesty could be granted to even those suspected of unforgivable crimes.

1.2 AIMS AND OBJECTIVES OF THE STUDY

1.2.1 Aims

This study aims to making a modest contribution to the existing literature and research on Burundi's post-conflict situation. The existing literature is limited; for example, it does not address issues of human rights violations and failure of transitional justice in post-conflict Burundi. By comparing transitional justice models in other countries, this study seeks to draw lessons from selected case studies of transitional justice models of post-conflict societies that could inform processes in Burundi.

1.2.2 Objectives

This study seeks to investigate why there has been no accountability for the ongoing human rights violations in Burundi. This question deserves attention because there is a *lacuna* in the application of international and regional human rights instruments in Burundi. Mindful of the above, the specific aims of this study are:

- To investigate why perpetrators of serious human rights violations have not been brought to justice as part of transitional justice in post-conflict Burundi;
- To investigate why the post-conflict government in Burundi has failed to implement transitional justice mechanisms proposed and agreed to in the peace and reconciliation agreements established since 2000;
- As a corollary, to investigate the extent to which Burundi abides by international and regional human rights and humanitarian norms.
- To recommend practical guidelines that could be adopted in order to stop mass killings and gross violations of human rights in post-conflict Burundi.

1.2.3 Hypothesis/ Assumptions

It is hypothesised that one of the repercussions of ongoing human rights violations in Burundi is to engender the culture of impunity and the hinderance of national healing and reconciliation. Furthermore, systematic violations of human rights undermine Burundi's position in sub-regional, regional and international organisations. This study assumes that the establishment of an effective transition model would ensure accountability for crimes committed and reparations for the victims. Such transitional justice would bring justice to victims, deter and prevent future human rights violations through accountability protocols and be viewed as a *sine qua non* of transition justice.

1.3 SIGNIFICANCE AND JUSTIFICATION OF THE STUDY

The ongoing violation of human rights in Burundi is an indication of the enormous challenges facing Burundi. The failure by successive governments to deliver according to their promises undermines the letter and spirit of constitutionalism in modern Burundi. The pride of any government depends on how successful it is in fulfilling its constitutional mandate as an agent of service delivery and development. That pride means a government's ability to render basic services to its citizens. This accrued ability and pride cannot be realised in Burundi unless the problems stated above are critically analysed and effective solutions are proposed and prioritised. The government of Burundi has a vital and unique role to play, primarily based on its constitutional obligations to its citizens. The focus of the current government and others to come is to transform this system so that it becomes more responsive to the needs of the country and fulfils its democratic and developmental mandate. It is only through ongoing research that human rights violations can be identified, stemmed and addressed. This study is but one of such interventions.

By way of qualitative analysis, empirical study and comparative research, this study aims to draw lessons from other countries such as South Africa, Chile, Guatemala and others. This study seeks to contribute to the debate around reparations in Burundi where prosecution of suspected perpetrators is still lethargically inadequate and also to benefit architects of public policy and law-makers in Burundi.

The following section proceeds with literature review.

1.4 LITERATURE REVIEW

This section reviews selected literature on Burundi human rights issues. It identifies the gaps in the literature while at the same time elucidating the research's significant strengths. Previous studies by researchers such as Lemarchand,⁶⁰Ndarubagiye,⁶¹Gahutu,⁶²Tita,⁶³Sullivan,⁶⁴

⁶⁰ Lemarchand, R.; (2002) *Le génocide de 1972 au Burundi: Les silences de l'histoire*: Available at: www.massviolence.org/The-Burundi-Killings-of-1972?artpage= [accessed on 13/08/2012].

⁶¹ Ndarubagiye, *op cit* n. 9.

⁶² Gahutu, *op cit* n. 21.

⁶³ Tita, A.; (2003) *Burundi People's Struggle for a Social Order*: Dar-es Salaam : Inter Press of Tanzania Ltd.

⁶⁴ Sullivan, D. P.; (2005) "The Missing Pillars: A look at the Failure of Peace in Burundi Through the the Lens of Arend Lijphart's Theory of Consociational Democracy" *Journal of Modern African Studies* 75-95.

Mbazumutima,⁶⁵ Krueger and Krueger,⁶⁶ Vandeginste⁶⁷ and others on the subject of human rights violations in Burundi have not been able to elucidate, in a sustained manner, possible solutions to the scourge of gross violations of human rights in post-conflict Burundi. These are issues which the cited authors have failed to address properly and this calls for further research to be conducted.

Despite the importance of observing human rights culture in modern democratic societies, relatively little attention has been paid to the need to stop gross human rights violations in Burundi.⁶⁸ **From Bloodshed to Hope in Burundi** is a compelling eyewitness account of both a horrific and persistent pattern and the ongoing efforts of many courageous individuals to build a more just society. Krueger and Krueger have documented the slaughter of human beings as it occurred around them as well as their repeated efforts to get the US government and the international community to take notice and action. The authors reconstructed the events of a military coup that precipitated mass killings and described the efforts to uncover the truth by digging up graves and interviewing survivors.⁶⁹ Their work shines as a revealing beam on an outrageous act that has gone largely unreported. Their work identifies those responsible for violations of human rights and related atrocities. It also offers hope that, as the truth emerges and the perpetrators are brought to account, the people of Burundi would at last reach closure, achieve peace and reconciliation.

Apart from Krueger and Krueger, other authors have made their contributions on gross violations of human rights. This thesis examines the work of authors like Lemarchand, Ndarubagiye, Gahutu, Ould- Abdallah, Sullivan, Bentley and Southall, Tita, Mbazumutima and Vandeginste because their works are regarded as stepping stones towards the ongoing search for national reconciliation and healing, human security and political stability in Burundi.

My literature review starts with examining diverse viewpoints on gross violations of human rights in Burundi. For example, some authors have associated human rights violations in Burundi with ethnicity, colonial legacy, divisive politics and military regimes or a combination of all.⁷⁰ Ndarubagiye's book, **The Origin of the Hutu-Tutsi Conflict**, summarises the origin of

⁶⁵ Mbazumutima, T.; (2007) "The Role of the Anglican Church in Ministry to Burundian Refugees", **UNISA** (Unpublished Master's Thesis).

⁶⁶ Krueger and Krueger, *op cit* n. 22.

⁶⁷ Vandeginste, S.; (2011) "Bypassing the Prohibition of Amnesty for Human Rights Crimes Under International Law: Lessons Learned from the Burundi Process", **Netherlands Quarterly of Human Rights** at pp. 189-211.

⁶⁸ Krueger and Krueger, *op cit* n.22

⁶⁹ Krueger and Krueger, *op cit* n.22 at p. 125.

⁷⁰ Ndarubagiye, Gahutu, Lemarchand, Krueger and Krueger.

the *Hutu-Tutsi* conflict in Burundi and views human rights problems of Burundi as both ethnic and political in nature.⁷¹ He contends that the *Tutsis* have enjoyed socio-political and economic dominance since pre-colonial, colonial and post-colonial periods.⁷² Being a *Tutsi* himself, he uses his personal experience as a civil servant who served during Buyoya's military regime, as a Governor of the Province of Muramvya and exposes injustices done to non-*Tutsi* ethnic groups. He concludes that the problem of marginalisation of Hutus by *Tutsis* is the root cause of gross violations of human rights in Burundi. He justifies the existence of liberation movements and insurgent groups like CNDD-FDD as instrumental in the fight against the *Tutsi* supremacy.⁷³

Ndarubagiye is in agreement with Gahutu, a founder of the *Forces Nationales de Liberation-PALIPEHUTU* who maintains that the *Tutsi* minority domination over the majority *Hutus* calls for *Hutus* to fight for their rights and dignity which have been taken away by the *Tutsis*.⁷⁴ Although Ndarubagiye and Gahutu see insurgency as a solution to Burundi problems, the authors have failed to recognise the atrocities committed by insurgent groups which cannot be condoned.

Lemarchand argues a contrary view.⁷⁵ In his book, **Ethnic Conflict and Genocide**, he contends that during pre-colonial Burundi there was a clear distinction of political and economic power between *Ganwa* (monarch) and other *Tutsi* clans and *Hutus* who were herders and cultivators.⁷⁶ The *Ganwa* clan had what Mbazumutima refers to as an "absolute divine power."⁷⁷ Lemarchand has claimed that political rivalries in pre-colonial Burundi were between the royal sub-clans (*Bezi* and *Batare*).⁷⁸ Yet Lemarchand has failed to conceptualise the causal linkage between the pre-colonial and colonial legacies of discrimination by *Tutsis* against *Hutus* and *Twas*. It must be pointed out that the pressing problem in Burundi is not conflicts among

⁷¹ Ndarubagiye, *op cit* n. 9 at p. ix.

⁷² Ndarubagiye, *ibid* at p. ix.

⁷³ Ndarubagiye, *ibid* at p.95.

⁷⁴ Gahutu, *op cit* n. 21 at p. 73.

⁷⁵ Lemarchand, R.; (1995) **Ethnic Conflict and Genocide**: Cambridge, Woodrow Wilson Center Press at pp. 1-16.

⁷⁶ Mbazumutima, *op cit* n. 65 at pp. 13-14.

⁷⁷ Mbazumutima, *ibid* at pp. 13-14. See also Hamitic theory on the origins of *Tutsis* as advocated by Jean-Pierre Chretien in his work entitled "Les deux visages de Che" in Guiral, P.; and Temime, E.; (1977) (eds) **L'idée de race dans la pensée politique Française contemporaine** Paris: Ed. du C.N.R.S and cf. Prunier, G. (2002) **The Rwanda Crisis: History of Genocide**, at p. 8. <http://www.amazon.com/The-Rwanda-Crisis-History-Genocide/dp/023110409X>. Anthropologists' such as Paulitschke, and Seligman claim that *Tutsis* were part of the red race originating from India, See Taratara, G. "A Response to the Presentation of the Main Speaker Fr. Robert Schreiter, C.P.P.S on the Theme of Justice and Reconciliation", Rome 30 November 2009, at http://ipicformation.wikispaces.com/EN_Justice [accessed on 07/11/2012.]

⁷⁸ Lemarchand, *op cit* n 75.

members of the *Tutsi* ethnic group, rather the ongoing patterns of human rights violations characterised by mass killings of *Hutus* by the *Tutsi*-dominated army which insurgent groups have capitalised on in order to justify their actions. Subsequent violations of freedom of expression and suppression of dissent which continue to force Burundi to flee their country even in the post-conflict Burundi from 2005 are matters of serious concern.⁷⁹

In a contradictory statement, Lemarchand ignores the royal sub-clan rivalry contention and points towards ethnicity by stating that the *Tutsis* had been favoured and privileged by the colonialists while *Hutus* and *Twas* remained sources of cheap labour.⁸⁰ Ould-Abdallah sees some defects in that argument and asserts that post-colonial governments in Burundi, including Nkurunziza's government, have inherited divisive policies which the governments never tried to correct.⁸¹ Tita, an academic who has taught in Burundi and outside Burundi, supports this view when he states that:

[I]n the field of education *Hutus* continued to be barred from secondary and higher education. The famous codes "i" and "u" were successfully used by the unjust and oppressive Bagaza regime in curtailing the number of *Hutu* students while increasing the number of *Tutsi* students in secondary and higher education. For similar motives few *Hutu* university students were allowed to opt for some fields of studies except law, economics and other fields which were considered as administrative studies exclusively reserved for *Tutsi* students.⁸²

Tita is in agreement with Krueger and Krueger who maintain that by using the codes "i" and "u", *Hutus* were excluded from both secondary and tertiary education.⁸³ Based on pre-colonial, colonial and post-colonial set-ups, there has been a systematic violation of basic human rights of *Hutus* and mass killings since independence in 1962 which provoked *Hutus* to agitate for the formation of insurgent groups in order to fight against discrimination imposed by a *Tutsi* aristocracy.⁸⁴

⁷⁹ See **The Amnesty International Annual Report, 2012** " The State of the World's Human Rights" available at: <http://www.amnesty.org/en/region/burundi/report-2012>. [accessed on 07/11/2012].

⁸⁰ Lemarchand, *op cit* n.75 at pp. 1-16.

⁸¹ Ould-Abdallah, A.; (2000) **Burundi on the Brink 1993-1995: A UN Special Envoy Reflects on Preventive Diplomacy**: United States Institute of Peace Press, Washington D.C., at p. 22. Ahmedou Ould- Abdallah was the UN Envoy to Burundi 1993 – 1995 who was sent to stabilise the political situation immediately after the assassination of President Ndadaye.

⁸² Tita, *op cit* n. 63 at p. 48.

⁸³ Krueger and Krueger, *op cit* n. 22 at p. 30 and Ndarubagiye, *op cit* n. 9 at p. 44.

⁸⁴ See Ndarubagiye *op cit* n. 9 and Gahutu *op cit* n.21.

It is submitted that Burundi's post-independence history is replete with *coup d'états* and inter-communal violence. A sequence of massacres of *Hutu* civilians by the *Tutsi*-led army and armed groups has plunged Burundi into a culture of lawlessness and impunity. Watson approves this view by stating that the Belgians rigidified inequalities by elevating the indigenous rulers who went beyond their colonial masters and massacred civilians,⁸⁵ mostly women, children, old people and the disabled in order to maintain their positions of power. The divisive character of the colonial legacy notably, social inequalities, has engendered political turbulence and ethnic strife associated with gross violations of human rights.⁸⁶

Taking an example of children's rights, Bentley and Southall⁸⁷ have pointed out that children's rights in Burundi have been violated because they were forced, directly or indirectly, to become child combatants.⁸⁸ The Burundian army, for instance, has acknowledged that hundreds of minors, known as *doriya*, were used to gather information, serve as guides and were recruited by the government to run paramilitary forces without pay.⁸⁹ This is contrary to Articles 39 of the Convention on the Rights of the Child, 1989 (CRC),⁹⁰ which provides that States Parties must take appropriate measures to promote physical and psychological recovery, including social reintegration of child victims. Child victims ought to be protected against neglect, exploitation, abuse, torture or any other forms of cruelty, inhuman, degrading treatment or punishment.

⁸⁵ Watson, C.; (1989) "After Massacre" **African Report** 34 Vol 1 at pp. 51-55. See also Krueger and Krueger, *op cit* n.22 at p 27.

⁸⁶ See Jeng, A.; (2012) **Peace Building in the African Union: Law, Philosophy and Practice**, Cambridge University Press at pp. 208-209.

⁸⁷ Bentley and Southall, *op cit* n. 23 at p. 26.

⁸⁸ Bentley and Southall, *ibid* at p. 26

⁸⁹ Bentley and Southall, *ibid* at p. 26.

⁹⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990. Prior to the adoption of the CRC in 1989 both the League of Nations in 1924 and the United Nations in 1959 adopted declarations on the rights of the child. These declarations called on states to recognise certain principles regarding children's rights by taking legislative and other measures to enforce these rights. Initially the declarations were not legally binding as they were constituted as statements of general applications. In the late 1970s Poland and its allies began to advocate for the creation of a new instrument on children's rights that would not only set guiding principles but also binding on the State Parties under international law. In 1978 during its 34th session, the UN Commission on Human Rights (UNCHR) raised its concern that children continue to suffer around the world under colonial rule and Apartheid regimes as well as through racism, war, and other forms of aggression and agreed to strengthen international instruments for protecting the rights of children. In 1978, to commemorate the 20th anniversary of the 1959 Declaration on the Rights of the Child, the UN General Assembly declared 1979 as the International Year of the Child and the UNCHR established a working group to draft a convention on children's rights. See also Vandenhoe, W., "The Convention on the Rights of the Child" in De Feyter, K. and Gomez I. F.; (eds) (2009) **International Human Rights Law in a Global Context**: University of Deusto: Bilbao pp. 451-472.

Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.⁹¹

Article 38 of the CRC obliges State Parties to:

- ensure respect for rules of international humanitarian law applicable to them in armed conflicts,⁹²
- take all reasonable measures to ensure that children under the age of fifteen years do not take direct part in hostilities,⁹³
- refrain from recruiting any person who has not attained the age of fifteen years into the armed forces,⁹⁴ and,
- take all reasonable measures to ensure protection and care of children who are affected by armed conflicts.⁹⁵

This thesis accepts that there are studies which have been conducted previously in a quest to develop methods of dealing with gross violations of human rights in Burundi. Bentley and Southall, while comparing South Africa and Burundi, have asserted that for a long time Burundi has been characterised by minority rule supported by a powerful repressive security apparatus that has been able to operate with impunity. This security apparatus has been regularly accused of violating the human rights of political opponents.⁹⁶ The authors have gone further and submitted that political tensions fuelled by deep divisions along ethnic lines, unequal distribution of wealth and job and education reservations for the ruling *Tutsi* minority has contributed, in a great measure, to the violations of human rights in Burundi. This thesis acknowledges that there are other challenges such as lack of national unity and democratic participation, corruption, unfair discrimination, including the absence of appropriate mechanisms to investigate and prosecute elites who abuse power and perpetrate acts of violence and terror for political gain.

This thesis deals with human rights violations in post-conflict Burundi because most available literature covers the pre-peace agreement period but nothing much has been done with respect to the accountability for human rights violations. It is submitted that there is a need for

⁹¹ See also the Optional Protocol to the CRC on prohibition of the use of children as combatants, adopted by the UN General Assembly on 25 May, 2000. After receiving the first 10 ratifications needed for its entry into force, the Optional Protocol became legally binding on 12 February 2002.

⁹² Article 38 (1) of the CRC.

⁹³ Article 38 (2) of the CRC.

⁹⁴ Article 38 (3) of the CRC.

⁹⁵ Article 38 (4) of the CRC.

⁹⁶ See Bentley and Southall, *op cit* n. 23 at p. xiv.

further studies on human rights violations in Burundi as part of the ongoing search for a comprehensive and just solution to Burundi's current unresolved human rights issues. This thesis takes this gap in the literature as a point of departure. It uses a combination of methodological approaches to argue that previous authors have dealt with violations of human rights in Burundi in the pre-peace agreements era without much that has been done in post-conflict Burundi to - date.

While some authors have asserted that military regimes have committed gross violations of human rights in Burundi in the pre-peace era,⁹⁷ it is worth noting that little research has been conducted that connects the *Tutsi*-led army with human rights violations in terms of responsibility and accountability. The subsequent human rights violations that have continued in post-conflict Burundi from 2005 to - date have not been subjected to scientific analysis. For example, the Human Rights Watch Report of 2012, while referring to universal human rights periodic review, confirms that human rights violations in Burundi remain pervasive because Nkurunziza's government has not taken sufficiently appropriate measures to address the issue of impunity for monstrous killings and other gross human rights violations.⁹⁸

In contrast with Rwanda, the sister country to Burundi where authors have made significant contributions to the literature on gross violations of human rights and the genocide that took place in 1994, little has been written on Burundi's gross violations of human rights. For example, this thesis assumes that there has been genocide committed in Burundi beyond the Genocide Convention's definition. The term "genocide" has been used in the Whitaker Report to refer to the massacre of *Hutu* civilians in 1972⁹⁹ and mass killings of *Tutsi* civilians in 1993.¹⁰⁰

In the existing literature, there has been no suggestion to bring the perpetrators before the courts of law. The contributions which have been made before have not offered practical guidelines on how to end the cycle of impunity in Burundi. The authors have underlined an important issue that gross violations of human rights have been perpetrated by elites who are

⁹⁷ Krueger and Krueger, Ndarubagiye, see also **Human Rights Watch** (2012) "Burundi: Universal Periodic Review Submission July 2012", at: <http://www.hrw.org/news/2012/07/10/burundi-universal-periodic-review-submission-july-2012> [accessed on 10/07/2012.]

⁹⁸ **Human Rights Watch Report** (2012), *ibid*.

⁹⁹ Whitaker Report, *op cit* n.25 paras.24 and 36, see also *Le Collectif des Survivants & Victimes du génocide Hutu de 1972*, *op cit* n. 32.

¹⁰⁰ See Report of the International Commission of Inquiry for Burundi which was established in accordance with UN Security Council Resolution 1012 of 28 August 1995 attached to U N Security Council's Letter of 25 July 1996 from the Secretary-General addressed to the President of the Security Council, 22 August 1996, UN Doc. S/1996/682 para. 483 and 496.

economically and politically powerful and are protected through executive or diplomatic immunities which exonerate them from prosecution.¹⁰¹ This is a problem that needs further investigation in order to consolidate the rule of law and constitutionalism in Burundi.

Previous contributions have emphasised the prevalence of Hutu mass killings and other heinous human rights violations committed by the *Tutsi*-led army and armed groups against civilians. However, a *lacuna* in the literature is still evident because the authors have not been in agreement on the root causes of human rights violations and whether or not the systematic mass killings of *Hutus* and *Twas* in Burundi amount to genocide. Although this study limits itself to issues pertaining to human rights violations and the failure of transitional justice model in post-conflict Burundi, the narrative underpinning "genocide" claims in Burundi should be subjected to further scholarly inquiry.

As Chapman and Ball have rightly affirmed, Burundi's ethnic cleansing is an example of genocide where collective brutalities of authoritarian regimes, disappearances and torture inflicted on a majority number of *Hutu* civilians during armed conflicts are recalled.¹⁰² For example, the failure to characterise the mass killings in Burundi as genocide has implications not only for reparations to the victims but also to national healing, reconciliation, reconstruction and prevention of future recurrences of gross human rights violations.

Clearly, the sequence of assassinations and military dictatorship in Burundi has attracted little international attention.¹⁰³ For example, Jeng has pointed out that the passiveness of the UN and the then OAU (now AU) to resolve Burundian conflicts has amounted to an abdication of their collective responsibility under public international law and this abdication has unwittingly encouraged a culture of impunity.¹⁰⁴ The indifference of international and regional organisations in Burundi's case amounts to the relinquishment of collective legal obligations under the International Bill of Rights.

This thesis discusses Burundi's mass killings within the context of the principles of international law, case law and Burundi law. The international community, on one hand, has demonstrated

¹⁰¹ A Special Rapporteur on the situation of human rights in Burundi was appointed by the UN Economic and Social Council in July 1995 (Decision 1995/291). The Special Rapporteur was replaced by an Independent Expert on the situation of human rights in Burundi in 2004. In 2008, the UN Human Rights Council extended the mandate of an Independent Expert until an Independent National Human Rights Commission (the Commission) has been established, see UN Doc.A/HRC/RES/9/19 at para. 8. Legislation on the establishment of the Commission was adopted in December 2010, to date the proposed Commission has not been established.

¹⁰² Chapman, A.R. and Ball, P.; (2001) "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala" *Human Rights Quarterly*, 23 (1) at p. 1.

¹⁰³ See Jeng, *op cit* n. 86 at p. 213.

¹⁰⁴ Jeng, *ibid* at pp. 213-215.

its willingness to prosecute international crimes, but, on the other hand, it has been using selective morality by turning a blind eye to the perpetrators of gross human rights violations in Burundi. In this fluid milieu, the main issue in this study is not to define the crime of genocide per se: the study is concerned with the ongoing human rights violations and why the perpetrators have never been brought to justice.

Authors on transitional justice like Mbazumutima focuses on Burundi refugees in Tanzania but have failed to address, properly, the root causes of refugee problems and internal displacement and therefore what could be done to stop the influx of refugees into other countries. Krueger and Krueger, who were ambassadors in Burundi during the assassination of President Ndadaye, apart from understanding the nature of Burundian conflict, have identified the issue of clinging to power by political elites as a cause and they propose accountability in order to deal with impunity.¹⁰⁵ This issue had also been raised earlier by Ndarubagiye who accuses Buyoya and the *Tutsi*-led army of assassinating President Ndadaye and his associates.¹⁰⁶ Ndarubagiye, for example, argues that Buyoya's second *coup d'état* was orchestrated in order to prevent further criminal investigation and prosecution.¹⁰⁷ Vandeginste has undertaken a study to explore the challenges that have been facing Nkurunziza's government such as non-compliance with peace and ceasefire agreements, including the application of temporary immunity legislation which has been shielding politico-military elites from prosecution.¹⁰⁸ As the UN Secretary-General Ban Ki-moon has emphasised, accountability is gradually replacing the old era of impunity so that the perpetrators of serious international crimes must be held responsible for the crimes they have committed.¹⁰⁹ It remains to be seen whether Burundi complies with these international requirements.

This thesis acknowledges that human rights issues must be treated as interconnected and interrelated. This connectivity manifests itself when the protection of human rights clashes with economic and political interests.¹¹⁰ Consequently, it is not an easy task for most conservative politicians, law-makers and judicial officers to comprehend human rights and theories of democracy. Academics find the theories intellectually provocative while politicians in particular doubt and are sceptical about them.¹¹¹ Furthermore case law and UN activities in Burundi

¹⁰⁵ See Krueger and Krueger, *op cit* n. 22 at pp. 288-289 and Ndarubagiye, *op cit* n.9 at p. 89.

¹⁰⁶ Ndarubagiye, *ibid* at p. 89.

¹⁰⁷ Ndarubagiye, *ibid* at p. 89.

¹⁰⁸ Vandeginste, *op cit* n. 67 at p. 194.

¹⁰⁹ UN Secretary-General, "An Age of Accountability: An Address to the Review Conference on the International Criminal Court", Kampala, 31 May 2010, at p. 2.

¹¹⁰ See the Vienna Declaration of 1993 on indivisibility of human rights.

¹¹¹ See AfricaFocus Bulletin "Burundi: Rising Threats to Democracy and Peace", 17 February 2014, available at <http://africafocus.org>

demonstrate the realities of ongoing human rights violations. Although the integration of written work, case law and UN reports seem to offer hypothetical solutions to Burundi's history of protracted violence, yet, there are still yawning gaps between declaration of intent and actual achievement. The major concern in post-conflict Burundi is the fact that the post-transition governments of 2005 and 2010 to - date have failed to address and bring the perpetrators of these gross violations of human rights to justice in order to comply with the requirements of the proposed transitional justice mechanisms.

This thesis has reviewed the literature available and offered criticism on the government of Burundi for the delays in making hard choices relating to an effective transitional justice model which is at the heart of all peace and ceasefire agreements. The key theories of any transitional justice models are embedded in truth-telling, reconciliation, peace-building, and reparations to the victims of gross violations of human rights.¹¹² Proposed remedies to the ethnic and political turmoil that have divided Burundi society over five decades are captured in the Arusha, Pretoria and Dar-es Salaam Peace and Ceasefire Agreements which propose the establishment of a Truth Commission and a Special Chamber within Burundi's judicial system. To - date these agreements are still far from being implemented because of the volatile security condition in the country and ongoing violations of human rights.

This study uses a qualitative approach complemented by a purposive sampling of 113 Burundi, 5 focus group discussions and 16 non-Burundi respondents who took part in a field study between 2010 and 2011 inside and outside Burundi. As the main purpose of the interviews was to offer the participants opportunity to raise their opinions freely pertaining to the violations of human rights in Burundi, the findings thereof suggest that there are still gross violations of human rights taking place in post-conflict Burundi similar to those committed in pre-peace agreements era. This thesis looks also at the emotional and psychological impact of human rights violations in the post-conflict period and suggests that revealing the truth about past human rights violations and observance of human rights by post-conflict governments is the only way to heal Burundi.

The analysis undertaken in this study demonstrates the conceptual and practical means through which a legal transformation paradigm might help to reconstruct a new Burundi. Currently, transitional justice in Burundi is not captured within the prevailing framework of balancing theoretical justice and political realities. The methodological approaches adopted in this study suggest that what is deemed true and just in post-conflict Burundi should be

¹¹² The Basic Principles, *op cit* n. 18.

understood in the context of a historical, political, administrative and legal setting inherited from previous regimes.

This thesis encourages executive, legislative and judicial officials, academics and civil society to ponder on transformative issues in Burundi and perceive them as collaborative measures contributing to an ongoing search for national healing and peace-building, reconciliation, reparation and transitional justice in order to build a just, democratic society based on the rule of law and constitutionalism.

The following section deals with the research methods employed in this study.

1.5 RESEARCH METHODS AND DATA COLLECTION

This study used mixed research methods. The main method employed was a qualitative one which was supplemented by a limited empirical study by way of a questionnaire survey and interviews. The researcher used a questionnaire survey and interviews in order to fill the gaps found in the theoretical analysis of the applicable literature on issues relating to human rights violations and transitional justice in Burundi. Additionally, a comparative research method, discussed in chapter three of this thesis, was used in order to gain an understanding of transitional justice models from other jurisdictions and lessons that Burundi could learn.

This chapter also elucidates the challenges encountered in collecting data. In addition to surveying existing literature on the topic, it was felt that an empirical study on a limited scale would augment and fortify the findings in this study. Thus 300 questionnaires were administered to potential participants but only 113 responses were obtained. There are number of reasons for these insufficient responses. First, Barundi are still scattered in different countries such as DRC, Tanzania, Rwanda, Kenya, South Africa and others which makes it difficult to conduct purposive sampling. Secondly, Barundi who are living inside the country are still traumatised because of ongoing gross violations of human rights. They are, therefore, very reluctant to take part in studies and empirical surveys about their very sad recent past.

During interviews it was noted that at least every family or household had been negatively affected by these ongoing human rights violations. Some Barundi felt that they were not ready yet to give their opinions as they were still in the process of healing. Thirdly, for a very long time, Barundi have experienced oppression, trauma, terror and denial of their freedom of expression which other citizens in other countries take for granted. Hence, Barundi inside and outside Burundi are still afraid of reprisals. Given that milieu, gathering data in Burundi is still very a daunting task.

Based on the foregoing reasons, the number of respondents actually surveyed fairly represents the views of Barundi population in post- conflict Burundi because of the diverse population sample which was used. For example, in this study issues of gender, political parties' affiliation, ethnicity, domicile, refugee status, internal displacement, economic and social standing of respondents were considered. The empirical research in this study supplemented theoretical analysis of applicable literature on issues relating to human rights violations and transitional justice in Burundi as well as a comparative research that involved other jurisdictions in some countries which emerged from conflict within Africa, South and Central America and Asia.

Qualitative research focuses primarily on the richness of the data and researchers generally select individuals and cases purposefully.¹¹³ Qualitative research is useful during the early stages of this study. It helps the researcher to collect rich data in the form of written descriptions and visual evidence.¹¹⁴ However, this method gives the researcher a chance to be subjective on the data obtained according to their own bias which may twist meanings.¹¹⁵

Quantitative research, on the other hand, deals with numbers and concentrates on measuring phenomena.¹¹⁶ This method allows the researcher to measure and analyse the data gathered statistically. For example, the quantitative research method allows a broader context for the study by involving a greater number of subjects and enhancing the generalisation of the results. It has been confirmed that the quantitative method allows the research to summarize vast sources of information and facilitate comparisons across categories and over time.¹¹⁷

1.5.1 Data collection and method

In order to answer the questions referred to above, a qualitative method was used in this study. Creswell, in De Vos, defines research design in the qualitative context as the entire process of research from conceptualizing a problem to writing the narrative.¹¹⁸

¹¹³ Struwig, F.W.; and Stead, G.B.; (2001) **Planning, Designing and Reporting Research**. Cape Town: Maskew Miller at p.121.

¹¹⁴ Struwig, *ibid*.

¹¹⁵ Struwig, *ibid*.

¹¹⁶ Quantitative research refers to the systematic empirical investigation of social phenomena via statistical, mathematical or computational techniques. See Lisa M.; (2008) **The Sage Encyclopedia of Qualitative Research Methods**. Los Angeles: Sage Publications. See also Hussey, J.; and Hussey, R.; (1997) **Business Research: A Practical Guide for Undergraduate and Postgraduate Students**. London, Macmillan at p.115.

¹¹⁷ Lisa *ibid*.

¹¹⁸ De Vos, A.S., Strydom, H., Fouché, C.B.; and Delport, C.S.L.; (2002). **Research at Grass Roots: For the Social Sciences and Human Service Professions**; Pretoria: Van Schaik

On the other hand, Grinnell defines research design as the plans, structures, and strategies of investigations which seek to obtain answers to various research questions.¹¹⁹ Unlike quantitative research which deals with numbers and concentrates on measuring phenomena, the qualitative research method¹²⁰ was deemed the most appropriate for this study because it involves examining perceptions in order to gain an understanding of given social and human interactions. It includes grounded theory, ethnography, case studies, phenomenology and narrative research.¹²¹ This thesis primarily used a quantitative approach to collect data and statistical techniques to summarize this data while a rigorous qualitative investigation was used to interpret the data.

Thomson describes¹²² qualitative research as documenting and interpreting as fully as possible the totality of whatever is being studied in a particular context from the research participants' viewpoints. This includes the identification, study and analysis of subjective and objective data, in order to understand participants' worlds. According to Marshall and Rossman,¹²³ qualitative research is pragmatic, interpretive and grounded in the lived experiences of people and has five characteristics: it

- takes place naturally;
- uses multiple methods that are interactive and humanistic;
- focuses on context;
- is emergent, rather than tightly prefigured; and
- is fundamentally interpretive.

This study is among others which have attempted to study Burundi's case holistically. Robson¹²⁴ and De Vaus¹²⁵ define a holistic study as a study where the concern remains at a

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- Publishers.
- 119 Grinnell, J. M.; (1981). **Social Work Research and Evaluation**. Illinois: F. E. Peacock Publishers, Inc at p. 198.
- 120 Quantitative research refers to the systematic empirical investigation of social phenomena via statistical, mathematical or computational techniques. See Lisa M.; (2008) **The Sage Encyclopedia of Qualitative Research Methods**. Los Angeles: Sage Publications. See also Hussey, J.; and Hussey, R.; (1997) **Business Research: A Practical Guide for Undergraduate and Postgraduate Students**. London, Macmillan at p.115.
- 121 Creswell, J. (2003) **Research Design: Quantitative, Qualitative and Mixed Methods**: Sage publications.
- 122 Thomson, S.; (1997) **Nurse Teachers as Researchers. A Reflective Approach** : London: Arnold at p. 156.
- 123 Marshall, C. and Rossman, G.B.; (2006) **Designing Qualitative Research**: 4th Edition. California: Sage Publications 127 at p.2.
- 124 Robson, C.; (2002) **Real World Research**. Blackwell Publishing at p.182.
- 125 De Vaus, D.; (2001) **Research Design in Social Research**. London: Sage Publications at p.220.

single, global level. Marshall and Rossman¹²⁶ maintain that a qualitative researcher views social phenomena holistically. Robson¹²⁷ explains holistic research as remaining at the level of the whole, rather than seeking to look at and analyse the different functioning of separate parts. According to Denzin and Lincoln¹²⁸ qualitative research has a holistic picture or design. De Vaus¹²⁹ explains this concept by stating that the whole is greater than the sum of its parts.

The case of Burundi holds a special interest for this study. The researcher intended to study systematic violations of human rights and transitional justice in post-conflict Burundi by using a qualitative research design. This aspect of the study was executed through an explorative, descriptive and contextual design in order to guide its implementation. The qualitative method was chosen because qualitative research is based on individual observation and critical analysis.¹³⁰ Therefore, the researcher, through participant observation, went directly to the Burundi community, explored and contextualised the participants' views. To avoid bias, these views were later analysed in the context of various legal sources such as legislation, case law, international conventions and treaties and academic writings.

1.5.2 Literature delimitation

A general literature review including academic books, articles, conference papers, human rights instruments and media reports, and other relevant literature were analysed in order to determine the nature of the conflict in Burundi, current debates relating to ongoing human rights abuses, the issues of restoration of the rule of law, good governance, peace, economic and social developments in a post- peace agreement era were consulted.

Electronic searches were conducted on the internet using key words such as democracy, human rights, genocide, peace agreements and transitional justice. The data from the literature review was grouped and classified into themes employed in the study, including various concepts such as:

- Respect for human rights;
- disarmament and restructuring of the army;
- dealing with discrimination issues ;
- fighting corruption in government institutions;

¹²⁶ Marshall and Rossman, *op cit* n. 123 at p. 3.

¹²⁷ Robson, *ibid* n. 124.

¹²⁸ Denzin, N.K.; and Lincoln, Y.S (2003) **Strategies of Qualitative Inquiry**: California: Sage Publications, at p. 57.

¹²⁹ De Vaus, *ibid* n. 125 at p. 221.

¹³⁰ See Davies, M.; and Mosdell, N.; (2006) **Practical Research Methods for Media and Cultural Studies: Making People Count**: Edinburgh: Edinburgh University Press Ltd at p.12.

- arresting, prosecuting and punishing perpetrators of gross violations of human rights or “genocide”, war crimes and crimes against humanity;
- international community intervention;
- resolving land disputes and land reform policies;
- restitution;
- promoting permanent peace, security and national reconciliation; promoting the rule of law, good governance and democracy in order to stop political intimidation;
- creating a conducive environment for returnees;
- establishing a Commission of Inquiry or an Ombudsperson to investigate allegations relating to human rights abuses as a way of dealing with impunity; and
- legal and judicial transformation.

The meanings presented in the data were determined in order to create trends and defining indicators in respect of the situation of human rights and genocide in Burundi. This was synthesised by proposing principles that apply to democratic societies such as transparency, rule of law, good governance, ending of impunity and policies to be implemented, especially those relating to socio-economic issues and reconciliation.

In order to have a complete picture, it was imperative to supplement this qualitative aspect with empirical data. Accordingly, a survey was undertaken to establish the perceptions of the respondents, that is, Barundi and non-Barundi from different African countries that share the same challenges with Burundi. The logic was to assess their attitudes towards violations of human rights and “genocide” in Burundi. This chapter presents the rationale of the research design, tabulates the results of this study and discusses the findings in a statistically descriptive approach while a critical discussion of the research findings is offered in chapters four and five.

This section deals with Barundi and non-Barundi respondents’ assessment and their attitudes towards ongoing violations of human rights in Burundi as obtained from the empirical study. This section presents the rationale of the research design and findings by using figures and tables¹³¹ and, where necessary, it discusses the findings.

1.6 A SURVEY

The study aims at quantifying the variables, factors and indicators of human rights violations and attitudes towards genocide amongst Barundi and non-Barundi. A questionnaire was developed and tested in a pilot study and then approved by the NWU Ethics Committee

¹³¹ Figures and tables are used in chapters four, five and six which deal with the interpretation of research findings.

(Mafikeng Campus). Thereafter the questionnaires were distributed to Barundi refugees in exile, IDPs, returnees, politicians, administrators and land commissioners (in Burundi) in order to collect the quantitative data. Another questionnaire was designed for non-Barundi with a similar contextual quest. The data was collected under the assurance of strict anonymity.

1.7 POPULATION

Babbie and Mouton¹³² define a population as the theoretically specified sum of elements or entities that are researched. For the purposes of this study, the population consisted of Barundi refugees, IDP's and returnees and politicians from different political parties in Burundi such as CNDD-FDD (the ruling party), FRODEBU, PALIPE-HUTU, FROLINA, UPRONA, administrators, members of civic societies, land commissioners and non-Barundi. McBurney¹³³ refers to the target population as the totality of persons with whom the research problem is concerned. It is also referred to as the entire group of persons that the researcher intends to study.¹³⁴

In this study, the target population comprised all Barundi and non-Barundi. As noted in Bless and Higson-Smith,¹³⁵ the sample is a set of elements that the researcher focuses on and from which the results will be generalized. This implies that the results of the study were generalized to the target population based on the results obtained from the sample. According to Marlow, population is the sum of all possible cases that the researcher is ultimately interested in studying.¹³⁶ In this thesis, the researcher was interested in a sample that consisted of Barundi living inside and outside the country. It is submitted that the sample chosen was broadly representative of Barundi. As Tongco has contended, purposive sampling is the most effective research method when a researcher needs to study a certain cultural domain with knowledgeable expertise.¹³⁷ Thus, choosing a purposive sample in this study was fundamental to the quality of data gathered in terms of reliability and validity.

¹³² Babbie, E.; and Mouton, J.; (2006) **The Practice of Social Research South Africa**. Oxford: Oxford University Press at p. 173.

¹³³ McBurney, D. H.; (2001) **Research Methods**. London: Watsworth/Thomson Learning at p. 248.

¹³⁴ Gorard, S.; (2003) **Quantitative Methods in Social Science**. New York: Continuum, at p. 57.

¹³⁵ Bless, C. and Higson-Smith, C.; (2000) **Fundamentals of Social Research Methods**. Cape Town: Juta at p. 85.

¹³⁶ Marlow, C.; (1998) **Research Methods for Generalist Social Work**. Pacific Grove: Brooks/Cole at p.134.

¹³⁷ Tongco, M.D.C (2007) "Purposive Sampling as a Tool for Informant Selection". **Ethnobotany Research and Applications** vol. 5 at pp. 147-158.

1.8. SAMPLING METHOD

The researcher in this study employed the purposive sampling technique. This implies that the individuals selected for data gathering were those with first-hand knowledge and experience about the problems in Burundi.

De Vos *et al.*¹³⁸ state that a sample can be defined as a subset of measurements drawn from a population in which the researcher is interested. The population can thus be defined as the sampling frame. The researcher uses a form of non-probability sampling because the odds of selecting a particular individual are not known.¹³⁹ The approach used in this study was a random probability sampling. Probability sampling occurs when elements (in this case a nature specific group of people) in a population have a known chance of being chosen to participate in the sample. This type of sampling can take two forms. It can either be a simple random sample which is unrestricted, or a complex probability sample which is restricted. As such, a simple random sampling was seen as relevant for this study in order to minimise bias.

It would have been impossible to collect and test data from all elements when a population consists of a large number of people. A small but reasonable representative sample of the population makes it easier to study, becoming more convenient and potentially producing results that are more reliable, with a few errors in the results. Furthermore, gathering data from fewer sources enables the researcher to gather a more detailed, accurate collection of information. The ultimate test of any sample design though, is measured by how significant to the study the characteristics of the population it purports to represent are. Schwandt¹⁴⁰ argues that "the sample size depends entirely on the nature of the study, the research question and the concepts being investigated." It is not always feasible to collect data from every possible segment of the populace.

The researcher successfully administered 113 questionnaires to Barundi and 16 questionnaires to non-Barundi which were satisfactorily answered and returned. In addition, 20 interviews and 5 focus group discussions were held. Demographically, the respondents represented all groups: age, gender, ethnic, political party affiliation, refugees in exile,

¹³⁸ De Vos, A. S., Strydom, H., Fouche, C. B. and Delport, C. S. L.; (2005) **Research at Grassroots: For the Social Science and Human Service Professions**: Van Schaik Publishers: Pretoria at p. 194.

¹³⁹ Gravetter, F. J.; and Forzano, L. B.; (2003) **Research Methods for the Behavioural Sciences**. Belmont: Watsworth/Thomson Learning at. p.118.

¹⁴⁰ Schwartz, H.; (1995) "Lustration in Eastern Europe", in N.J. Kritz (ed.) **Transitional Justice** United States Institute of Peace Press: Washington DC at pp. 461-476: Available at: <http://ssi.sagepub.com/content/38/4/499.refs.html?patientinformlinks=yes&legid=spssi;38/4/499>

returnees, IDPs, religious groups, professionals, employed and unemployed, literate and illiterate and people living in urban and rural areas. This thesis acknowledges that although the sample in this study has provided meaningful data, a larger sample size would have guaranteed more generalisable results. But, Saunders *et al* have stressed that the premise regarding the conviction concerning the number of respondents is based on the assumption that size is a matter of judgment.¹⁴¹ Therefore, it was not necessary to sample the entire Barundi population which is too large as it would be practically impossible for the purposes of this thesis.

One of the most common qualitative research techniques is the focus group. In this study, the researcher led small groups of respondents (Barundi inside and outside Burundi and non-Barundi) in candid discussions on issues relating to human rights violations and mass killings in Burundi. As an approach, the researcher placed no constraints on participant responses and this technique did prompt subjectivity from the respondents. However, that in itself is an important factor because common terms about feelings are generally used by the layman to describe how they make sense of their own lived experiences.¹⁴²

1.9 QUESTIONNAIRE SURVEY AND INTERVIEWS

The data collection steps involved setting boundaries for the study, collecting information through observations, interviews, documents, visual material and establishing the protocol recording information.¹⁴³ This study used self-administered questionnaires, which consisted of structured and non-structured questions. The questionnaires were sent electronically or hand-delivered to the participants. The 113 questionnaire responses obtained from the respondents provided useful data for the purposes of this study because they fairly represented the general views on human rights violations in contemporary Burundi in line with the aims and objectives of the thesis.

The researcher initially proposed the size of the population to be 200 – 500, depending on the accessibility of the participants. Initially 300 questionnaires were administered. But due to financial and time constraints and other circumstances beyond the researcher's control, including security imperatives, only 113 questionnaires were successfully administered to Barundi respondents and 16 more to non- Barundi respondents. Additionally, five focus groups consisting of Barundi citizens inside and outside the country, refugees outside the country and

¹⁴¹ Saunders, M.; Lewis, P.; and Thornhill, A.; (1997) **Research Methods for Business Students**, London, Pitman Publishing at p. 155.

¹⁴² Cresswell, R. J.; (1994) **Discourse on Political Economy and Social Contract** : Oxford Universty press at p. 145.

¹⁴³ Cresswell, *ibid* at p.148.

returnees who used to be refugees were interviewed. These interviews were carried out in Bujumbura, the capital city, and in the immediate hinterland such as Gatumba, Gitaza and Rumonge in Burundi. Furthermore, Barundi in Ulyankulu Refugee Camp and other places in Tanzania together with Barundi community residing in South Africa participated in the study. Primary data was collected in 2010 and 2011 through aide-mémoires from key informants such as politicians, leaders of political parties, members of parliament, senators and technical officials involved in land allocation and resolution of land-related disputes in the country as well as those involved in receiving returning refugees in the country. This was complemented by administering questionnaire surveys to gather opinions from refugees still living in exile as well as those who have returned to Burundi.

Focused group discussions and in-depth semi-structured interviews were employed. Marshall and Rossman state that in-depth interviewing can be described as “conversation with a purpose.”¹⁴⁴ The researcher held conversations with the survey participants where specific questions were asked in an open-ended manner. When needed, note-taking served the purposive selection. This was based on purposive selection of key people who are knowledgeable or participated in the peace-negotiation process or had been involved in the allocation and settlement of land-related disputes in Burundi. In order to reduce bias, respondents were from both the current ruling party (CNDD-FDD) and other opposition parties in the country such as FRODEBU, UPRONA, and FNL. Some interviews were carried out by contact persons in Burundi who used a check-list in order to obtain comprehensive information which answered the research questions in this proposal. For authenticity, the researcher visited the respondents in order to clarify the respondents' versions or had personal communication by way of telephonic interviews which were recorded.

Structured questionnaires were used to collect data from Barundi refugees living in exile and those who had returned to Burundi recently. For the returnees, efforts were made to include representatives of those refugees who were still living in ‘transit camps’ during the initial stages of collecting data as well as those who had settled in their homeland and also those who were living in government allocated settlements in Burundi. The structured questionnaires were piloted before using them through the use of enumerators who were contacted before the data collection phase. Depending on feasibility, questionnaire administration was conducted either face to face (using enumerators) or by self-administered technique using internet-based communication with refugees living in exile.

¹⁴⁴ Marshall and Rossman, *op cit* 123 p. 108.

1.10 MEASURING INSTRUMENT

The measuring instrument for the qualitative dimensions of the study consisted of structured questionnaires with open and closed questions. The structured questions were based on the submissions, suggestions and indicators gleaned from the literature review.

1.11 PILOT STUDY

Before the study began, a pilot study was carried out in order to find out the shortcomings of the questionnaire. Galpin¹⁴⁵ has rightly asserted that pilot surveying allows the researcher to check if the procedure is working properly, and can pose positive challenges before the commencement of the research. Issues that arise as a result of the pilot surveys include: how long it takes to administer the questionnaire, ambiguous questions that need clarification, questions that cause provocation and resentment, questions yielding the right answers, and some questions that need to be added to the original in the pilot. Bearing this in mind, the researcher piloted 10 Barundi and 3 non-Barundi in order to check the suitability of the questionnaire. This assisted in clarifying some questions and allowed for the re-alignment of the research questions.

According to De Vos,¹⁴⁶ it is important to conduct a pilot study where a qualitative or a quantitative study is undertaken. In qualitative research, a pilot study is usually informal, and the participants must possess the same characteristics as those of the main investigation. Janesick in de Vos *et al* states that a pilot study in qualitative research allows the researcher to focus on specific areas that may have been unclear previously, or to test certain questions. The author adds that by testing the nature of questions in an interview schedule, the researcher is able to make modifications with a view to improving the quality of the in-depth interviews during the main investigation.

In the pilot study, draft questionnaires were distributed to 10 Barundi and 3 non-Barundi respondents in April 2010 who did not form part of the final sample. On the basis of this, the selected participants of the pilot study consisted of:

- three Barundi refugees resident in South Africa, DRC and Tanzania respectively,

¹⁴⁵ Galpin, J.S.; (2009). Course notes for Statistical Research Design and Analysis. Unpublished Syllabus, University of the Witwatersrand, Johannesburg.

¹⁴⁶ De Vos, A.S.; "Qualitative Data Analysis and Interpretation" in De Vos, A.S Strydom, H.; Fouche, C.B.; and Delpont, C.S.L.; (eds) (2002) **Research At Grassroots: For the Social Sciences and Human Service Professions**. .Pretoria: Van Schaik Publishers at. p. 337.

- three politicians in Burundi (from CNND-FDD, FRODEBU and UPRONA parties)
- three officials (land, technical and local administrator)
- one IDP.

The answers, queries and responses of the piloting participants were analysed and ambiguities, misinterpretation and mistakes were subsequently corrected. This exercise assisted the researcher in testing the questions and was able to modify some questions which seemed repetitive and ambiguous. Due to the fact that the initial piloting consisted of a small number, it was worthy conducting a second piloting which is explained in the following section.

1.11.1 Respondents' characteristics and results of piloting

In order to improve the questionnaire design, a second phase of the pilot study was undertaken after consulting with the supervisor. Consequently, a total of 67 questionnaires were successfully administered to 67 respondents between June and August 2010. Out of 67 respondents, 28 (41.8%) were females while 39 (58.2%) were males. The average age (mean $\pm$ stdev) of the respondents was 39.6 $\pm$ 16.0 with the age of the respondents ranging from 13 to 83 years. Most of the respondents (78%) were refugees who were still living in exile (Figure 1). The majority of the respondents (32.8%) had attained primary school as the highest level of education (Figure 3) which was followed by those with secondary school education (23.9%) and college education (20.9%). Some of the respondents had no formal education at all (16.4%) and only 6.0% of the respondents had attained university level education. The majority of the respondents depended on peasant farming as their main source of income (Figure 3). Other respondents were either self-employed, in salaried employment or in business.

Figure 1: Distribution of Respondents by their Categories

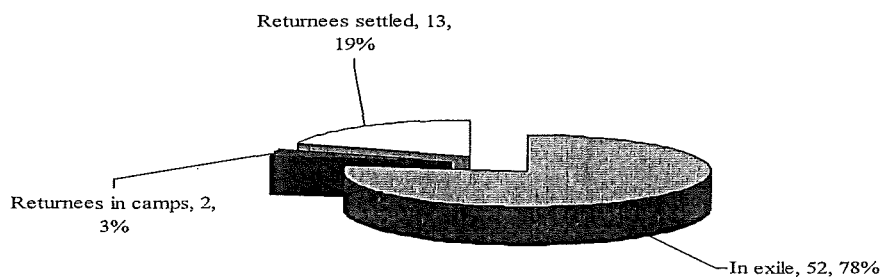


Figure 2: Distribution of the Levels of Education among Respondents

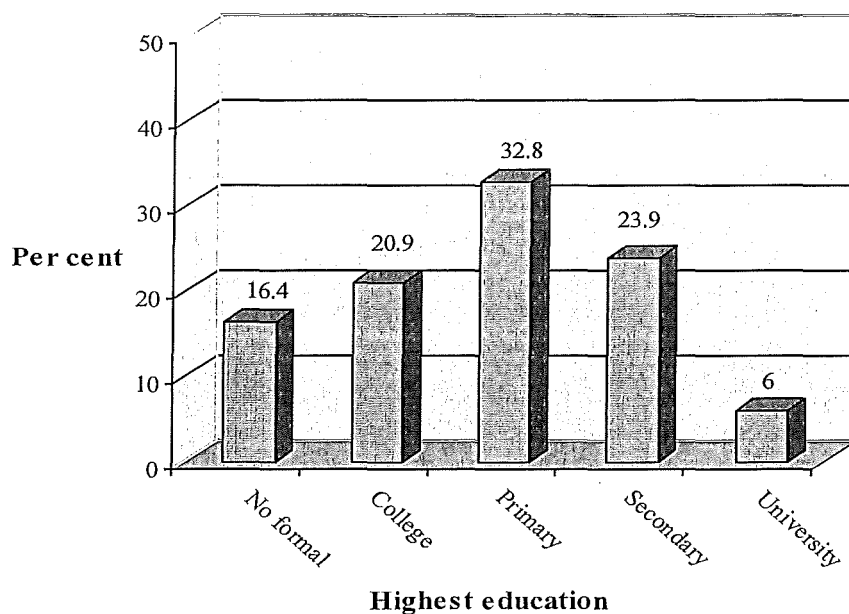
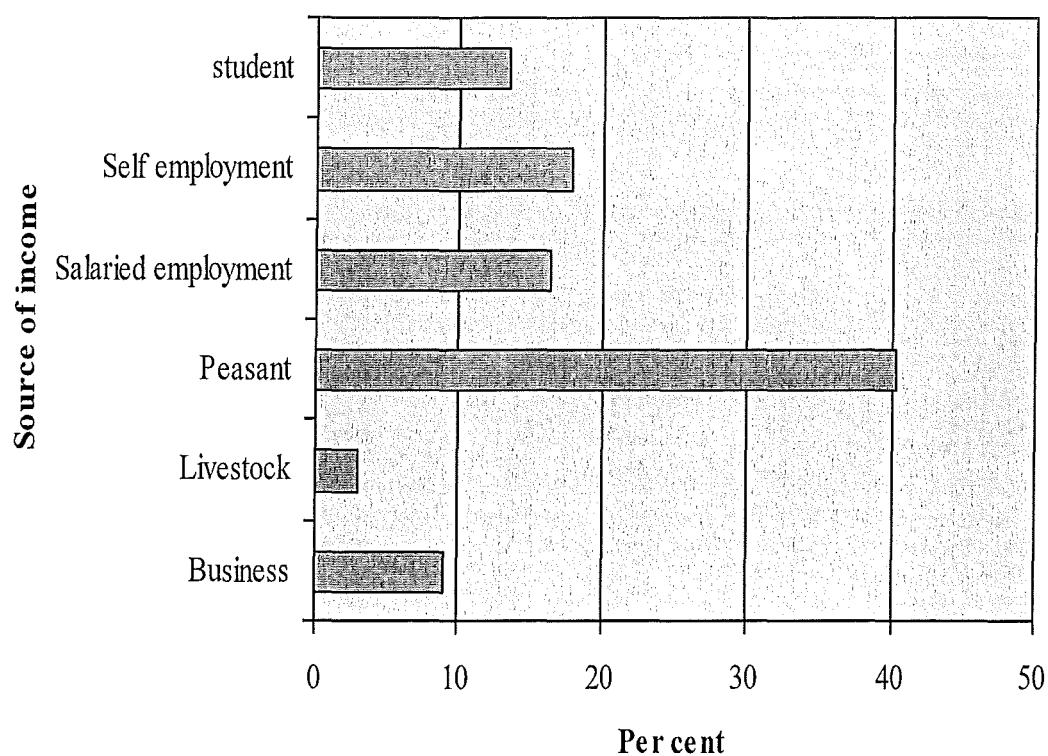


Figure 3: Main Source of Income of the Respondents



The measurement instrument was also scrutinised for elements contributing to possible bias. The responses were re-analysed for ambiguities, misinterpretation and mistakes. For example, in respect of section three which dealt with realisation of human rights in exile, the second pilot study revealed that it was ambiguous because realisation and enjoyment of those rights differed from country to country. Subsequently, the questionnaire was amended.

1.12 DESIGN OF THE QUESTIONNAIRE: BARUNDI

The amended and final questionnaire¹⁴⁷ consisted of six sections. Section one contained questions pertaining to the mode of administration of questionnaire, date of responding, respondents' particulars such as their age, gender, level of formal education, category of respondent such as a refugee in exile, a returnee or IDP and source of income. Section two requested the respondents to indicate whether they had ever fled their country, if yes which year they fled. Other questions asked to state whether the respondent was born in exile, fled more than once and which countries they went to.

Section three had two sub-sections, one dealt with awareness and violation of human rights in exile. Respondents were asked to state their awareness relating to the basic human rights listed like life, shelter, food, asylum, health care services, education freedom of trade, occupation and profession, subjection to slavery, servitude or forced labour, freedom of movement, expression, association, religion, belief and opinion, access to court, housing, ownership of property and environment. Sub-section two of section three of the questionnaire selected seven rights among the list above and asked whether the respondents had access to these rights while in exile in the following selected countries: Rwanda, DRC, Tanzania, Kenya, RSA, Zimbabwe and Cameroon. Section four had questions relating to the repatriation process, local integration and human rights. Question one of section four requested the category of the respondent in terms of status i.e. repatriated, applied for integration or other, when the respondent received the response and if the repatriation process was smooth or not by stating the reasons.

Section five dealt with returning and integration processes in Burundi. The respondents answered by means of checklists and a Likert rating scale¹⁴⁸ with number 1 signifying the least and 4 signifying the most accurate answer. In addition, the respondents had to state whether or not they faced land-related problems and if their disputes had been settled.

¹⁴⁷ Appendix B to the thesis.

¹⁴⁸ See Leedy, P.D.; and Ormrod, J.E.; (2005) **Practical Research: Planning and Design**. 8th edition. Upper Saddle River, NJ: Merrill Prentice Hall, at. p.185.

The last section dealt with general comments. Three open-ended questions were posed to respondents by requesting them to give their views on what could be done to stop violations of human rights, genocide in Burundi and aspects which they thought needed improvement in order to restore peace, good governance, rule of law, economic and social development in Burundi and Africa in general.

1.12.1 Design of the questionnaire: non- Barundi

The researcher sought to study the views of non- Barundi on the issues of human rights and genocide. Unlike the Barundi one, this questionnaire¹⁴⁹ consisted of two sections. Section one contained biographical data while section two dealt with general comments similar to the Barundi questionnaire. The qualitative data from these questions was used for triangulation to confirm or contest the validity of conclusions reached in the qualitative study.

1.12.2 In-depth semi-structured and focus group interviews

1.12.2.1 In-depth semi-structured interviews

In-depth, semi-structured interviews were used for the collection of data. The use of this type of interview permitted the collection of more extensive and detailed data from individual participants, enabling them to articulate their own views and experiences. Aide memoirs for interviews¹⁵⁰ assisted the researcher in examining the phenomenon in context. This approach is supported by Charnley ¹⁵¹ who argues that semi-structured, in-depth interviews generate data from the participants' perspective as well as enable the researcher to understand the behaviour of participants from their own frame of reference. Participants were interviewed until saturation was reached, a stage at which no new data could be obtained.¹⁵² An interview guide was developed and employed to gather information from different categories of people such as politicians, land commissioners, civil servants, IDPs returnees and refugees in exile. The guide contained the following:

- the personal particulars of the respondent (title of the official level of education, roles and responsibilities, work experience and category e.g. politician, party leader, MP)
- which political party the respondent belongs to (ruling /opposition)

¹⁴⁹ Appendix C to the thesis.

¹⁵⁰ Appendix D to the thesis.

¹⁵¹ Charnely, E.; (1999). **Occupational Stress in Newly Qualified Staff Nurse. Nursing Standards**, at p. 32-37.

¹⁵² De Vos *et al*, *op cit* n. 146 at p. 254.

- the degree of the respondent's awareness of peace and ceasefire agreements in Burundi
- the respondent's participation in peace negotiations
- the respondent's consideration of success or failure in peace negotiations
- the contributory factors towards failure, if any
- the degree of respondent's awareness of human rights violations and genocide in Burundi
- the respondent's personal views on what should be done to have a permanent solution to the violation of human rights and genocide problems in Burundi.

1.12.2.2 Focus Group Interviews

During the group discussions, 5 small groups of Burundi in Bujumbura, the Capital of Burundi, and Gatumba, Gitaza and Rumonge in Burundi, Ulyankulu Refugee Camp, Dar- es Salaam and Kigoma in Tanzania, and Burundi community in South Africa were asked to express their opinions regarding human rights and genocide in Burundi. The entire discussions revolved around the following three questions:

- How do you perceive human rights and genocide in Burundi in general?
- What do you think are the causes of conflicts in Burundi?
- To what extent do you think the government and international community are trying to resolve Burundi's conflicts?

1.13 THE ROLE OF THE RESEARCHER

According to Yegis and Weinbach,¹⁵³ the researcher plays different roles during data collection and the authors identify the following five roles: concealed, non-participating, non-concealed, participating and minimal participating. The authors further state that the role which the researcher assumes depends on the nature of the research and how much the researcher wants to affect the quality of the data collected. In this study, the researcher participated during data collection by asking probing questions.

1.14 DATA ANALYSIS

As stated earlier structured questionnaires were used to collect data from Burundian refugees living either in exile or those who had returned to their country as well as non-Burundian

¹⁵³ Yegis, B.C.; and Weinbach, R.W.; (1996) **Research Methods for Social Workers**: Allyn and Bacon, London at p. 151.

respondents of different nationalities. Administration of the questionnaire was either through face-to-face or self-administered. The self-administration mode was used to access respondents in different countries through e-mail or postal mail.

For the Barundi, a more comprehensive questionnaire was used which focused on the collection of information related to the respondents and their experiences in exile, returning home and other information on violation of human rights as well as opinions on what should be done to stop the genocide and violations in Burundi and Africa.

For the non-Barundi respondents, opinions on what should be done to stop violations of human rights and genocide in Burundi as well as aspects that needed improvement in order to restore peace, human security, good governance and rule of law in African countries including Burundi were collected using a structured questionnaires. The questionnaires included both closed- and open-ended questions which focused on obtaining information from respondents.

Data analysis was carried out using Statistical Package for the Social Sciences (SPSS). Initially, data was screened to identify errors which were corrected before detailed analysis was conducted. For the open-ended questions, content analysis was carried out and common themes were identified and coded to create categories of common responses to questions asked. Data analysis was carried out, initially through descriptive statistics for the categorical variables (proportions) or continuous variables (means, standard deviation and ranges). Advanced statistical analysis was carried out to compare the statistical differences between the proportions using Chi-squared tests or between means using either t-test or Analysis of Variance (ANOVA). A critical probability of $P < 0.05$ was used to decide on statistical significance between proportions.

1.14.1 Data processing and analysis

According to Mouton, data analysis involves "breaking up" the data into manageable themes, patterns, trends and relationships.¹⁵⁴ It requires that the researcher be comfortable with developing categories, making comparisons, and determining contrasts. In analysing the data for this thesis, the following steps were taken:

- The researcher read through all the transcripts carefully in order to get a sense of the responses and wrote down the ideas in the margins.
- The underlying meanings were identified in all participants' views and interpretations were written down.
- A list of all topics was made and similar topics were clustered together.

¹⁵⁴ Mouton, J.; (2001) *How to Succeed in Your Master's and Doctoral Studies: A South African Guide and Resource Book*, Pretoria: Van Schaik Publishers at p. 108.

- The researcher coded the themes.
- Descriptive wording for topics found were turned into categories.
- The researcher grouped the data under different categories and some preliminary analysis was done.
- The researcher recorded the data and wrote the final report.

A database for quantitative data collected using structured questionnaires was designed. All variables in the questionnaires were also coded before entering them in an Excel database for further analysis. Descriptive statistics was computed for all variables recorded after which statistical analysis was carried out. The Chi-squared test was used to assess statistical significance of proportions of responses from different groups under study. Significance level of $\alpha=0.05$ was adopted as critical probability for statistical significance. This was verified by an independent expert in statistical analysis (see Appendix A).

1.14.2 Triangulation

Triangulation refers to the use of diverse research methods and techniques of data collection in a single study. It entails the cross-checking the consistency of specific data collected from various sources via multiple methods at different times. Some of the questions posed by this research could not be answered using only a single research method. Hence a multi-pronged approach of data collection and analysis known as triangulation was used. Hall and Hall¹⁵⁵ state that using different research methods or sources of data (triangulation) in order to examine the same problem has the advantage of compensating for the weakness associated with one method or source of data by the use of another. Hence in this research, focus group discussions, interviews, literature survey and observations were used in order to obtain reliable data. This is in line with Rapley who has argued that qualitative interviews entail a process whereby two people, who are in most cases strangers, sit down next to each other and discuss a specific issue.¹⁵⁶ In this study, the interviewer asked questions while the interviewee answered them in written and oral forms.

Creswell¹⁵⁷ asserts that triangulation can help to counter all threats to validity. In this study, field notes were taken by the researcher with the assistance of enumerators during the interviews. While facilitating the interviews, participant observation allowed the researcher to experience the challenges encountered by participants. An audiotape recorder was used

¹⁵⁵ See generally Hall, D. and Hall, I.; (1996) **Practical Social Research: Project Work in the Community**, London: Macmillan.

¹⁵⁶ Rapley, T.; "Interviews" in: Seale, C.; Gobo, G. J. F.; Gubrium and Silverman, D.; (eds) (2004) **Qualitative Research Practice**, London: Sage Publications, pp. 15-33.

¹⁵⁷ Creswell, *op cit* n. 121 at p. 217.

during the interviews and the recordings were later transcribed verbatim. The data was analysed by both the researcher and independent coder for validation purposes. Samples of transcribed data are included as appendices G and H to this thesis. Furthermore, some of the research findings were disseminated by way of a conference paper which was presented at an interdisciplinary conference¹⁵⁸ in order to test validity and reliability. In this study triangulation was intended to enhance consistency, credibility and dependability of the research findings.

1.14.3 Measures to ensure trustworthiness

Guba's model¹⁵⁹ was applied in this study to ensure the trustworthiness of the qualitative data. The four aspects that ensure trustworthiness are truth-value, applicability, consistency and neutrality.

1.15 SCOPE AND LIMITATIONS OF THE STUDY

In a study of this nature and scope, it is neither feasible nor advisable to try and traverse all the challenges in contemporary Burundi. Therefore, this thesis is limited to the question of human rights violations from a legal perspective and in the context of post-conflict reconciliation and transitional justice. The following reflects the chapter divisions of this thesis:

Chapter one introduces the study generally and presents the problem statement, aims and objectives, and the researcher's interest in the topic. It presents the significance and limitations of the study. It discusses the research design and methods, sampling, methods of data collection and analysis, issues of validity and reliability and ethical considerations.

Chapter two reviews the literature consulted during the research process and focuses on the concepts relevant for this study; human rights, in the specific historical context of Burundi are critically evaluated. For example, it examines the impact of the colonial legacy in Burundi, formation of military regimes through *coups d'état* as a form of dictatorship and the role of the military in mass killings, the influx of refugees and internal displacements, protracted conflicts and violence, rebellion as counter-insurgency in post-conflict Burundi and approaches to ending such conflicts. The chapter reviews the important legal documents, text books,

¹⁵⁸ See Ndimurwimo L. A.; and Mba M.L.M.; (2012) "Law and Development in Burundi: A Case Study in Post-conflict Reconciliation and Transitional Justice" A paper presented at the first Inter-disciplinary Annual Conference, **Catholic University of Eastern Africa**, Nairobi, Kenya, 26-30 June 2012.

¹⁵⁹ See Sobuce, N. W.; (2007) "The Experiences of Volunteers involved in Home-based Care of People Living with HIV/ AIDS", **Nelson Mandela Metropolitan University** Unpublished Master's Thesis) at p. 12. Available at: <http://www.nmmu.ac.za/documents/theses/21314%20Sobuce,%20NW.pdf>

academic writings, and analyses the history of Burundi while case law is referred to and explicates the current unresolved issues.

Chapter three deals with comparative perspectives and lessons from other countries.

Chapter four presents the research findings relating to refugees and IDPs collected through selected participants' survey in the form of structured and un-structured interviews, sometimes called open-ended interviews. These were generally considered as the best way to gain an understanding of the peoples' perceptions of the issues of violation of human rights and systematic mass killings in Burundi. It deals with the responses from the participants in the study.

Chapter five evaluates the data presented in chapter one by using a qualitative approach. When appropriate, reference is made to the previous chapters in order to either confirm or contradict the data collected through the interviews and responses from the questionnaires or bringing in new arguments and views. This chapter presents key findings on mass killings as derived from the data.

Chapter six summarises the research findings and makes recommendations on possible solutions to the problems identified, including the gaps, which in the opinion of the researcher, need further research.

1.16 ETHICAL CONSIDERATIONS

The researcher embraced and acknowledged the requirements laid down by the Research Committee of the North-West University (Mafikeng Campus). The researcher asked for permission to interview relevant people and protected their identity, thus upholding the spirit of anonymity and respecting the confidentiality clause. The plagiarism rules were complied with, and for that reason, the researcher identifies and acknowledges all sources consulted throughout the study.

1.17 SUMMARY

This chapter has provided the background against which the study is set. It dealt with the contextual framework of violations of human rights and the failure to establish an effective transitional justice model in post-conflict Burundi. It gave an overview of research aims, objectives, significance of the study and methodologies employed in this study. It stated the scope and limitations of the study and ethical considerations.

The next chapter of this thesis proceeds to examine the nature of the universality, indivisibility, interdependence and interrelatedness of human rights and the application of human rights norms in Burundi. In the context of this study, the analysis of the main features and concepts of human rights in chapter two are linked with debates on transitional justice.

CHAPTER TWO: THE NATURE OF HUMAN RIGHTS AND TRANSITIONAL JUSTICE THEORIES AND THEIR APPLICATION TO THE CASE OF BURUNDI

2.1 INTRODUCTION

Since end of the WWI and WWII, there has been a lot of emphasis on international protection and promotion of human rights. This chapter critically discusses the origin of the theories of human rights and transitional justice and their application to the Burundian context. This chapter proceeds with analysing the historical context of Burundi and evaluates the protection of human rights and complexities of mass killings amounting to genocide. Reparations for victims and the implications thereof on national reconciliation and reconstruction are also interrogated. The most important legal documents, case law, academic writings on Burundi are critically analysed hereunder. A review of the UN human rights activities in Burundi with reference to the post-conflict era is the chapter's major focus. This chapter, broadly, provides a contextual framework for the successive chapters.

A general overview of human rights violations reveals a continuum that spreads across the colonial era to the post-independence era. The genesis of ethnic conflicts in Burundi is rooted in the proliferation of land disputes, a massive internally displaced population and an influx of refugees which affects not only Burundi but other countries that receive and host refugees who are affected by the militarised politics in Burundi. For example, the formation of military regimes through *coups d'état* as a form of dictatorship has created and prolonged the problems of ethnically-driven conflicts, protracted armed conflicts and violence, rebellion and counter-insurgency, the influx of refugees and internal displacements. These problems have been replicated in post-conflict Burundi through arbitrary actions of executives involving army and police officials in harassing civilians, politically-motivated killings and the narrow interpretation of human rights laws by the judiciary.¹⁶⁰

Chapter one of this thesis states how in Burundi prior to independence in 1962, the colonisers favoured the *Tutsis*, providing them with better education and higher governmental and salaried positions. Largely as a result of this, from the time Burundi gained independence, the *Tutsis*, a minority group, held political control while the *Hutus* and the *Twas* were marginalized, politically and economically. This thesis elucidates that the right to education in Burundi must be interpreted and realised in the context of international and regional human rights instruments in order to deal with past injustices and marginalisation of Burundi from *Hutu* and

¹⁶⁰ Human Rights Watch "Human Rights in Burundi" available at: <http://www.hrw.org/node/105107> [accessed on 21/03/2014].

Twa ethnic groups including, women, refugees and IDPs. Furthermore, this chapter critically analyses some of the most important legal documents especially the Post-Transition Constitution of Burundi,¹⁶¹ human rights and humanitarian laws in order to explicate and put in relief the current unresolved issues in the post-conflict era such as integration of refugees and IDPs, land disputes and the lack of transitional justice mechanisms which has encouraged impunity.

2.2 HUMAN RIGHTS THEORY

Human rights are fundamental rights that any person has under law because of being human.¹⁶² This theory advocates that human rights are inherent in every human being, hence these rights are universal, inalienable (not transferable) and interdependent.¹⁶³ Donnelly has affirmed that human rights are inherently what any person deserves because of being human.¹⁶⁴ They are inalienable rights no matter how inhumanely people treat or act towards each other.

A Bill of Rights which enshrines individual rights that every person is entitled to is adopted by many states that observe the rule of law and democracy. After the atrocities of WWI and WWII for example, many countries in the world came together and proclaimed the Universal Declaration of Human Rights, 1948, referred to in chapter one. This human rights instrument was followed by other instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1966, the African Charter on Human and Peoples' Rights (African Charter), 1987, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers' Convention), 1990, Convention on the Rights of the Child, 1989, Genocide Convention, 1948, Convention against Torture and Other Cruel, Inhuman or

¹⁶¹ The Interim Constitution was signed by the Interim President (Domitien Ndayizeye) on October 20, 2004 as Law No 1/108 of 2004. It was approved by the Referendum as Post-Transition Constitution of the Republic of Burundi on 28th February, 2005.

¹⁶² See Alston, P. "Making Space for New Human Rights: The Case of Right to Development" **Harvard Human Rights Year Book** (1988) at pp.3-40, Buergenthal, T.; (1988) **International Human Rights in Nutshell**. West Publishing Company at p. 21.

¹⁶³ See the Vienna Declaration of 1993 after the World Congress.

¹⁶⁴ Donnelly, J.; (1999) "Human Rights, Democracy and Development" **Human Rights Quarterly** at p. 611. See Articles 1 and 2 of the UDHR, The Declaration of Tehran, 1986 and the Vienna Declaration, 1993 which reaffirmed the UDHR and the UN Charter. Tehran Declaration, 1986 for example affirms that the civil and political rights cannot be fully realised without realising the economic, social and cultural rights.

Degrading Treatment or Punishment (Torture Convention), 1984, ICC Rome Statute, 1998 just to mention a few.

Unfortunately, Africa's record on observing, respecting and protecting human rights in terms of the above instruments has not been a pleasant one because most African countries have struggled to sustain democracy and to respect the human rights of their people.¹⁶⁵ Huntington¹⁶⁶ reminds us that in post-colonial Africa, there has been a tendency to revert to dictatorship, military regimes, authoritarian one-party systems or a combination of both as was the case of Burundi before 1993. Mandela, as cited in Bentley and Southall, confirms that Burundi is one of those countries which has suffered greatly from political instability and civil war.¹⁶⁷ From independence in 1962, Burundi has faced developmental challenges which were aggravated by divisions between the *Tutsi* ruling minority and the *Hutu* majority.

The UN Charter and the International Bill of Human Rights oblige State Parties to promote the universal respect for and observance of human rights.¹⁶⁸ Yet, in practice many State Parties, including Burundi, do not abide by the principles laid down in the UDHR and other human rights instruments which they have solemnly signed and ratified. This thesis interrogates the role of Burundi as a State Party to the UN and signatory to most international human rights and humanitarian legal instruments. It reviews the literature on human rights protection and focuses on the concepts which are desecrated in Burundi.

2.2.1 The UDHR and its Normative Character

Since the proclamation of the UDHR in 1948, there has been an emphasis by the international community through the UN, on recognition of the inherent dignity and of inalienable rights of all human beings which are viewed as a foundation of freedom, justice and peace in the world. While there is a common international acceptance of human rights as Shaw contends,¹⁶⁹ there is still confusion regarding the application of human rights and humanitarian laws and the role of the international community. This confusion has in turn ignited an intensive jurisprudential

¹⁶⁵ Diamond L.J., Linz, J.J. and Lipset, S.M.; (1990) **Politics in Developing Countries: Comparing Experiences with Democracy**. London: Lynne Rienner at p. 371.

¹⁶⁶ Huntington, S.P.; (1991) **The Third Wave: Democratisation in the Late Twentieth Century**. London: University of Oklahoma Press at pp. 11-13.

¹⁶⁷ See Bentley and Southall, *op cit* n. 23 at p. ix.

¹⁶⁸ Article 55 Of the UN Charter, See also Article 13(1) of the UN Charter which provides that the UN General Assembly shall initiate studies and make recommendations relating to the realisation of human rights for all.

¹⁶⁹ Shaw, M.N.; (1997) **International Law**. Cambridge University: Cambridge at p.196.

debate as to which rights are enforceable and binding and which rights are simply articulate a desirable future pattern of behaviour.¹⁷⁰

The jurisprudential debate is centred around the fact that when the UDHR was proclaimed, it was intended to be an inspirational document and a yard-stick to measure the standards of the conduct of states in observing and promoting human rights. However, it is now generally accepted that this Declaration has acquired the status of customary international law.¹⁷¹ To the contrary, there is a tendency of disregarding international law by national authorities because international law is classified as a branch of ethics rather than a branch of law.¹⁷² The concept of human rights in terms of international law is often linked with ethics and morality.¹⁷³ Nevertheless, in the contemporary world, protecting and promoting human rights fall within the international community's agenda because the character of international law is determined by the society within which such law operates.¹⁷⁴

Scholars frequently refer to human rights as categorised into three generations¹⁷⁵ namely:

- The first generation rights or “blue rights” that consist of those civil and political rights that originate from natural law theories and popularised by writers such as John Locke, Rousseau and others that have been traditionally prioritised by the western world.
- The second generation rights or “red rights” are those rights dealing with economic, social and cultural issues.
- The third generation rights are known as group or “green rights” and emerged in the 1970s predominately supported by developing countries such as the right to development and the environment.¹⁷⁶

Despite the proliferation of international and regional human rights instruments, basic human rights and fundamental freedoms, as Smith has contended,¹⁷⁷ are still repeatedly violated. In

¹⁷⁰ Shaw *ibid* at p. 196.

¹⁷¹ Buergenthal, *op cit* n. 162.

¹⁷² Harris, D. J.; (2004) **Cases and Materials on International Law**: Sweet and Maxwell: London at p. 2, see further the discourse on international law in Von Bernstoff, J.; (2008) “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimension of Turn to Rights in International Law” **The European Journal of International Law** 19 (5) 903-924 at p. 907.

¹⁷³ Harris, *ibid* at p.2.

¹⁷⁴ Harris, *ibid* at p.1.

¹⁷⁵ Harris, *ibid* at p. 655.

¹⁷⁶ Harris, *ibid* at p. 655.

¹⁷⁷ Smith R.K.M.; (2005) **International Human Rights**: Oxford University Press, at p. 50.

the case of Burundi, for example, *Hutus* and *Twas* have been excluded from secondary and tertiary education.¹⁷⁸ The result has been exclusion from leadership positions, military, judiciary and key economic sectors.¹⁷⁹ This is contrary to the spirit of UDHR and other human rights instruments mentioned earlier.

Based on the interdependence and indivisibility of human rights, Hodgson, for example, has stated that the right to education has been framed in various international and regional human rights instruments to embrace the qualities of both the first and second generation rights.¹⁸⁰ In Hodgson's view, the right to education is based on the fact that human rights can only be completely guaranteed when there are positive actions of the state to put in place measures and policies that aim to protect and promote the right to education.¹⁸¹ Similarly, Taiwo has posited that education is a basic right on which the materialization of other rights depends.¹⁸² In other words, education as a right liberates all persons from the bondage of ignorance and fear and gives such person a sense of dignity and self-confidence.¹⁸³

The UN Human Rights Commission was created to interrogate state periodic reports frequently and this Commission reveals many gaps between the written constitutional guarantees of many states and the reality of human rights abuses.¹⁸⁴ It should be noted here that Burundi's record on reporting on human rights practices is questionable.¹⁸⁵ The post-conflict governments

¹⁷⁸ Ndarubagiye, *op cit* n. 9 at p. 44.

¹⁷⁹ Ndarubagiye, *ibid* at p. 44.

¹⁸⁰ See Hodgson, D.; (1998) **The Human Rights to Education** Aldershot/Brookfield USA/Singapore/Sydney: Ashgate/Dartmouth at pp. 72-73.

¹⁸¹ Hodgson postulates that the right to education is recognised by Article 28(1) of the CRC and Article 13(1) and (2) of the ICESCR, Article 13 (1) and (3) of the Additional Protocol to the America Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 4(a) of the Convention against Discrimination in Education among others.

¹⁸² Taiwo, E. A. (2011) "The Implementation of the Right to Education in South Africa and Nigeria" **LLD Thesis**, Nelson Mandela Metropolitan University at pp. 17-18.

¹⁸³ Taiwo, *ibid.* at p. 17.

¹⁸⁴ Smith, *op cit* n.177 at p. 50.

¹⁸⁵ See **Human Rights Watch Report** (2012), *op cit* n.97. The report states that human rights situation in Burundi especially the right to life and freedom of expression are not respected. See generally Article 10 of the CEDAW; Articles 23, 24 and 29 of the CRC; Article 17 of the African Charter, African Charter on the Rights and Welfare of the Child 1990; the UNESCO Convention Against Discrimination in Education 1960; the World Declaration on Education for All-Meeting Basic Learning Needs, adopted by the World Conference on Education for All on 9 March 1990; European Convention 1953; American Declaration of the Rights and Duties of Man 1948 among others. Apart from the human rights law, other laws such as refugee law and humanitarian law, migration law and trade law equally regulate education. See Tomasevski **Annual Report of the Special Rapporteur on the Right to Education** of 11 January 2001, E/CN.4/2001/52 para. 6; Tomasevsk, K.; (2005) "Globalizing What: Education as Human Right or as a Trade Service?" **Indiana Journal of Global Studies** 12 (1) 1-79, available at:

<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1289&context=ijgls>

of 2005 and 2010 have not taken sufficient measures to protect and promote human rights, including sufficient measures to deal with human rights violations and complying with reporting obligations. Following the unprecedented scale of atrocities and failure of post-conflict Burundi and the international community to put an end to the culture of impunity, Burundi's compliance with international human rights and humanitarian laws has become a matter of great concern.

In the above context, this study advocates that the UDHR is still an important document that could be used to apply moral pressure on Burundi as a State Party to the UN to refrain from violating basic human rights. These rights are enshrined in the Constitution of Burundi. Moreover, the ICCPR and ICESCR give human rights precedence over the powers of the states. For example, while states are allowed to regulate certain rights by imposing limitation clauses to human rights,¹⁸⁶ the State Parties to the UN are prohibited from violating the universal norms found in the UDHR.¹⁸⁷ Although Burundi has obligations as a State Party to the UN, there have been ongoing violations of political and civil rights and economic, social and cultural rights in Burundi.

Certainly, the International Bill of Rights has transformed the contents of the UDHR, ICCPR and ICESCR into legally-binding bilateral, multilateral treaties thereby strengthening the enforcement of human rights. Consequently, human rights in Burundi must be respected, promoted and observed at national level so that Burundi, like other international citizens, should enjoy the fundamental rights such as economic, social, cultural, environmental, political and civil rights. This thesis critically analyses the observance of human rights in Burundi with specific emphasis on the post-conflict period.

2.3 HUMAN RIGHTS IN BURUNDI: THE IMPACT OF COLONIAL HISTORY AND MILITARY COUPS ON HUMAN RIGHTS VIOLATIONS

This section situates the study in its historical context in terms of the geographical location, impact of colonialism and military regimes on human rights violations. It interrogates systematic mass killings and other gross human rights violations which have culminated into the influx of Burundi refugees and internal displacement and land disputes.

¹⁸⁶ See Article 47 of the of the Constitution of Burundi which provides that any limitation to a fundamental right must have a legal basis and be justifiable through the protection of another person's right and must be proportionate to its envisaged aim. See further section 36 of the Constitution of South Africa, 1996.

¹⁸⁷ Articles 15, 16, 17, 18, 54, 56 and 61 of the Constitution of Burundi impose duties on the state to respect and promote human rights.

2.3.1 Geographical location of Burundi in East Africa

Burundi is a relatively small landlocked country with an area of 27,830 square kilometres located in the Great Lakes Region of Central Africa. It is surrounded to the north by Rwanda, to the east and south by Tanzania and to the west by Lake Tanganyika and the Democratic Republic of the Congo (DRC).

2.3.2 Pre-colonial Burundi

Before the arrival of European colonial rule in Eastern-Central Africa, Burundi used to be part of the Rwanda-Urundi Kingdom. However, following the scramble for Africa at the Berlin Conference of 1885, the East African nations of Rwanda-Urundi and Tanganyika (now Tanzania) fell under the suzerainty of Germany as Germany East Africa or *Deutsche Ostafrika*.¹⁸⁸

The German colonial authorities introduced a system of indirect rule through *Tutsi* Kings, Chiefs and sub-chiefs.¹⁸⁹ An agreement known as the Kiganda Accord was entered into between the *Tutsi* King, Gisabo Mwezi IV and the Germany colonial authorities, on the advice of missionaries.¹⁹⁰ Under that Kiganda Accord, Burundi was declared a German Protectorate. German colonial rule cemented the monarchical system under which *Tutsi* Kings and the *Tutsi* tribe in general dominated the other two ethnic groupings, namely the *Hutus* and the *Twas*.¹⁹¹ For the sake of completeness, it is important to point out here that the *Twas* (or “pygmies”) are generally believed to be the original inhabitants of what is now Burundi and Rwanda; the *Hutus* are descendants of Bantu-people who had lived in the area since time immemorial while the *Tutsis* are Nilotic people from East Africa who invaded and conquered the *Twas* and *Hutus* around the 14th century and established a feudal system of government.¹⁹²

Under that system, while the *Tutsi* royalty were the political elites, landed-gentry and great cattle owners, the *Hutus* and *Twas* were reduced to feudal serfs and became a source of cheap labour by doing manual work such as building roads, carrying luggage, collecting stones and timber for construction work, building public edifices and domestic work and manual labour on farms owned by German settlers. However, following the defeat of Germany in the First World

¹⁸⁸ Ndarubagiye, *op cit* n. 9 at p. 22, see also Gahutu, *op cit* n. 21 at p. 8.

¹⁸⁹ Prunier, G.; (1995) **The Rwanda Crisis History of Genocide**, New York: Columbia University Press; at p. 25.

¹⁹⁰ Gahutu, *op cit* n.21 at p.12.

¹⁹¹ Ndarubagiye, *op cit* n.9 at pp. 17-21, Gahutu, *ibid* at pp. 1-7.

¹⁹² Krueger and Krueger, *op cit* n. 22 at p. 26.

War, Rwanda-Urundi was entrusted to Belgium under the mandates system of the League of Nations and later a trust territory under the Charter of the United Nations.¹⁹³

Under the trusteeship system, Belgium was supposed to prepare the people of the trust territory for self-rule and eventual independence but very little was done in that regard.¹⁹⁴ Instead, the pre-colonial system of kinship was ossified into a neo-feudal order, founded on a rigid dichotomy between the *Tutsi* overlords and the *Hutu* serfs.¹⁹⁵ That arrangement led, in turn, to stereotyping behaviours and the legitimization of the imaginary divide between the so-called superior race of immigrant "Hamites" (The *Tutsis*) and the so-called "primitive indigenous negroes" (*Hutus* and *Twas*).¹⁹⁶ For instance, from this system, a land or cow owner would be allowed to call his "subjects" by certain names such as "*umuhutu wanjye*," literally meaning, "my slave," from the indigenous language of Kirundi where "Hutu" simply means a slave.

A *Hutu* was seen as a subordinate or a follower of a more powerful person, a *Tutsi*. Consequently in contemporary Burundi, to call someone a *Hutu* may be inappropriate, if not offensive. In that milieu, the cattle-owning and landed-gentry *Tutsi* were perceived as Belgium's "noble savages," in sharp contrast with the *Hutus* who were frowned upon and despised as peasants, willing to toil for low-wage labour. Herein lies the roots of today's deep-seated ethnic hatred and rivalry which has scarred the country's psyche.¹⁹⁷ The killings of *Hutu* political leaders such as Presidents Melchior Ndadaye (1993) and Cyprien Ntaryamira, (1994); Prime Ministers Joseph Cimpaye (1965); Pierre' Ngendandumwe (1965), Joseph Bamina

¹⁹³ Under Article 22 of the Covenant of the League of Nations, colonies and territories of the states that had lost the First World War and which were inhabited by peoples "not yet able to stand by themselves under the strenuous conditions of the modern world" were transferred into League Mandates to be administered as such by the victorious power. See further Chapter XIII of the UN Charter, 1945. Under both German and Belgian rules, there were two types of administrations. An indigenous administration was headed by the *Tutsi* Kings (Bami) who dealt with matters relating to customary law such as land, cow, collection of per capita tax, recruitment of labourers, dealing with criminals, birth and deaths registration. On the other hand the European administration: was headed by the colonialists and dealt with health care services, finances, trade and remuneration of employees of both administrations. See Ndarubagiye, *op cit* n. 9 at p. 24.

¹⁹⁴ Flanz, G. H.; (2005) **Constitutions of the Countries of the World**: Oceana Publications: Oxford University Press, Inc. at p. v, Flanz argues that there has been weakness of the democratic institutions bequeathed by Belgium because it undermined the political stability of Burundi.

¹⁹⁵ Krueger and Krueger, *op cit* n. 22 at p. 26.

¹⁹⁶ See generally Isabirye, S. B.; and Mahmoudi, K. M.; (2000) **Ethnic Studies Report** Vol XVIII No.1 at p. 7.

¹⁹⁷ See generally Lemarchand, R.; (1994) **Burundi: Ethnic Conflict and Genocide**, Cambridge: Cambridge University Press at pp. 34-41.

(1965), Deputy Speaker of Parliament Paul Mirerekano (1965) and many others are directly traceable to this institutionalised ethnic pathology.¹⁹⁸

2.3.3 Transition to independence

It must be pointed out that Belgium as the trustee power under the UN Charter was supposed to “prepare” the people of Rwanda-Urundi for eventual independence but did very little in that regard. Instead, it imposed a system of forced labour, taxation and pacification campaigns against peasant uprisings, mainly in the 1920s and 1930s.¹⁹⁹ These uprisings were mostly directed at *Tutsis*, especially the Batware clan who were perceived as collaborating with the Belgium colonial masters.²⁰⁰

The earliest steps towards political reform were taken in 1959, culminating in the gradual decentralization of legislative power to indirectly elected Councils with the *Tutsi* King, Mwambutsa IV, as a constitutional monarch.²⁰¹ However, these minimalist changes failed because of the rising tide of nationalism and the “winds of change” sweeping across much of colonial Africa. In the late 1950s, several political parties were already in existence with the ultimate goal of gaining independence under a constitutional monarchy.²⁰² Among the most popular of these political parties was the National Unity and Progress (UPRONA) which was launched in 1958 as a liberation movement by King Mwambutsa’s eldest son, Prince Louis Rwagasore, with the support of *Hutu* nationalists like Paul Mirerekano, Pierre’ Ngendandumwe and Joseph Bamina. On 25 December 1959, a law was passed to abolish chiefdoms and sub-chiefdoms.²⁰³ This law also provided for the holding of elections on modern democratic lines. Another significant political party was the Christian Democratic Party (PDC) under Joseph Biroli which was established by the *Tutsi Batware* Lineage. Also there was a loose alliance called the Common Front Group under the presidency of Jean Baptisté Ntidendereza to counter UPRONA.²⁰⁴

It should be noted here that Burundi split from Rwanda in 1959. In the several years leading to the attainment of independence in 1962, UPRONA received external support from other liberation movements on the African continent, principally the Tanganyika African National

¹⁹⁸ Ndarubagiye, *op cit* n.9 pp. 31-33; Krueger and Krueger, *op cit* n.22 at p. 33. See also <http://www.africa.unpenn.edu/NEH/6history.html> [accessed on 9 May 2011].

¹⁹⁹ Lemarchand, *op cit* n. 197 pp. 34-43.

²⁰⁰ Lemarchand, *ibid* at pp. 34-43.

²⁰¹ Krueger and Krueger, *op cit* n. 22 at p. 27.

²⁰² Gahutu, *op cit* n. 21 at pp. 17-24.

²⁰³ Gahutu, *ibid* at p. 25.

²⁰⁴ Gahutu, *op cit* n. 21 at p. 20.

Union (TANU) under Julius Kambarage Nyerere who went on to become the first President of Tanzania.²⁰⁵ In 1960, general elections were held and won by UPRONA but the Belgian authorities did not publish the results because there were no international observers (including those from the UN) and more poignantly for the non-observance of democratic procedures. On this point, Cornwell and de Beer have rightly pointed out that Belgium's open hostility towards Prince Rwagasore had the ironically unintended consequences of raising his nationalist credentials.²⁰⁶

In January 1961, the UN pressurized Belgium to agree to dismiss an interim government it had installed and to hold fresh elections. In the elections held on 18 September 1961, UPRONA won 58 seats out of 64.²⁰⁷ The next day Prince Rwagasore was declared Prime Minister with a mandate to prepare the country for independence. However, Rwagasore's victory was short-lived as he was assassinated a few weeks later on 13 October 1961, eight months before political independence.

In line with the Constitution, the Vice Premier, Pierre' Ngendandumwe, a *Hutu*, was supposed to take over or Paul Mirerekano, the Chairperson of UPRONA and Vice-Speaker of the National Assembly (another *Hutu*) but King Mwambutsa appointed André Muhirwa, a *Tutsi* as Prime Minister, with the government dominated by his fellow *Tutsi* ethnic group. Among the Prime Minister's appointees was Jean Ntiruhwama as Minister for the Interior. Muhirwa and Ntiruhwama formed the UPRONA Youth Wing, the *Jeunesses Révolutionnaires Rwagasore-JRR* (named after the assassinated Prime Minister). This Youth Wing, composed mostly of *Tutsis*, was instrumental in massacring many *Hutu* political leaders, trade unionists and civilians in Kamenge in January 1962.²⁰⁸ The massacre of the *Hutu* leaders in 1962 continued in 1963 and sowed the seeds for more entrenched ethnic divisions in Burundi. At the time of independence on 1 July 1962, the country was already in turmoil, accentuated by deep ethnic divisions in the main liberation movement, UPRONA.

²⁰⁵ Ndarubagiye, *op cit* n. 9 at p. 28.

²⁰⁶ Cornwell, R.; and de Beer, H.; (1999) "African Early Warning Programme: The Politics of Intolerance," **Institute for Security Studies; Africa Watch, Burundi, Africa Security Review**: Available at: <http://www.iss.co.za/pubs/asr/8N06/AfricaWatch.html>. [accessed on 9 May 2011].

²⁰⁷ Gahutu, *op cit* n. 21 at p. 25; Ndarubagiye, *op cit* n. 9 at p. 29.

²⁰⁸ For example the killings of politicians, trade unionists, religious leaders, business people and ordinary civilians between 1961 and 1969, in particular the murder of Jean Nduwabike with his three colleagues, *Hutu* trade unionists who were executed in Kamenge, Bujumbura on 19 January 1962 and the assassination of Gabriel Gahimbare, the first Roman Catholic Bishop who had been appointed to replace Archbishop Grauls, a Belgian Prelate based at Gitega on 14 December 1964.

2.3.4 From constitutional monarch to military megimes

Burundi gained independence on 1 July 1962, ostensibly as a constitutional monarchy with the *Tutsi* King, Mwambutsa IV, as the Head of State. The Prime Minister was the Head of Government and was appointed by the King. He should have commanded the majority in the legislature. However, on numerous occasions the King refused to recognise *Hutu* Premier candidates, thus subverting the nascent and fledgling democratic process. Following the assassination of Prime Minister Rwagasore in October 1961, the *Hutu* Vice-Premier, Pierre' Ngendandumwe or Paul Mirerekano, another Hutu who was Parliamentary Speaker and Chairperson of UPRONA, should have taken over as Prime Minister. Contrary to what the Constitution dictated, King Mwambutsa appointed his fellow *Tutsi*, André Muhirwa as Prime Minister in November 1961.

Due to constant disagreements among the political elites, two groups emerged in Parliament, the Casablanca Group made up of *Tutsis*, and the Monrovia Group (consisting of *Hutus* and moderate *Tutsis*).²⁰⁹ In 1963 there were elections within a divided UPRONA. These elections were won by the Monrovia Group. King Mwambutsa was forced to appoint the leader of that group, Pierre' Ngendandumwe, a *Hutu*, as Prime Minister. Rather predictably, Ngendandumwe's tenure of office was cut short unconstitutionally. In 1964, Rwandese *Tutsi* refugees who had fled to Burundi in 1959 following the civil war in their own country wanted to attack Rwanda from Burundi. The government of Premier Ngendandumwe did not support that idea, leading to the dismissal of the Prime Minister by the King on 31 March 1964.²¹⁰ Albin Nyamoya, a *Tutsi* from the Casablanca Group, was appointed as Prime Minister but his government was dissolved on 7 January 1965. The following day, 8 January, King Mwambutsa re-appointed Pierre' Ngendandumwe as Prime Minister. Ngendandumwe's main priority was restoration of peace but he never lived to realize his vision as he was assassinated on 15 January 1965 by Rwandese *Tutsi* refugees.²¹¹

The assassination of Ngendandumwe plunged the country into further political instability. King Mwambutsa dissolved parliament and restored the absolute monarchy. In order to appease the *Hutus*, the King appointed the *Hutu* politician, Joseph Bamina, as Prime Minister on 16

²⁰⁹ Gahutu, *op cit* n.21 at p. 32.

²¹⁰ Gahutu, *ibid* at p. 37.

²¹¹ Ndarubagiye, *op cit* n. 9 at p. 32. See also Gahutu, *op cit* n. 21 at p. 39. The Rwandese collaboration in criminal activities has been demonstrated when the South African government expelled Rwandese and Burundian diplomats. See The Sunday Independent "Rwanda, SA Diplomatic Rift Gets Wider", 9 March, 2014. available at: <http://www.iol.co.za/sundayindependent/rwanda-sa-diplomatic-rift-gets-wider-1.1658417> [accessed on 10/ 03/2014].

January 1965. Almost two months later, on 31 March 1965, the King called for parliamentary elections, with parliamentary seats reduced from 64 to 33. These elections took place on 20 May 1965 and were won by UPRONA with 21 seats; the People's Party won 10 and 2 seats went to independent candidates. In the continuing marginalization of *Hutu* politicians and in disregard of the Constitution, instead of appointing a *Hutu* candidate, Gervais Nyangoma from UPRONA, the King went for another *Tutsi*, Leopold Biha who did not belong to any of the political parties represented in the parliament.²¹²

Under Biha's government, all the key posts were held by *Tutsis*. This subversion of the electoral process awakened *Hutu* political leaders and intellectuals such as Gervais Nyangoma, Paul Mirerekano and Emile Bucumi from the Monrovia faction to agitate for the overthrow of the monarch. King Mwambutsa fled the country and sought refuge in the then Zaire (now the DRC) and later in Switzerland, leaving all power in the hands of a young army Commander, Michel Micombero, a *Tutsi*.

Micombero's ascendancy to power marked the entry of the military into Burundi's tortured history. Micombero's first act of infamy was to orchestrate the execution of *Hutu* leaders like Gervais Nyangoma, Speaker of Parliament; Joseph Bamina, Vice-Speaker of parliament and Paul Mirerekano together with several *Hutu* ministers and officials.²¹³ In addition, innocent *Hutu* civilians were arrested and many of them died in prisons due to harsh and appalling conditions therein and some were tortured to death. At the same time, the Supreme Court of Burundi, which was supposed to be the sentinel of individual liberties and freedoms, acquitted those Rwandese *Tutsi* refugees who assassinated Prime Minister Ngendandumwe, holding rather curiously that there were no grounds for their prosecution in the first place.²¹⁴ That was on 14 December 1965.²¹⁵ They were released from prison in March 1966, marking yet another infamous milestone in the long history of impunity for politically motivated crimes.

Following the departure of King Mwambutsa and the establishment of a *de facto* military regime by Micombero, King Mwambutsa's other son, Prince Charles Ndizeye was enthroned under the dynastic name of Ntare V.²¹⁶ Shortly thereafter, on 12 July 1966, King Ntare declared an amnesty and released the *Hutu* survivors.²¹⁷ Ntare went on to recognize and appoint

²¹² Ndarubagiye, *op cit* n. 9 at p. 32.

²¹³ Ndarubagiye, *ibid* at pp. 33. Others assassinated in that year included Paul Nibirantiza, Pierre' Burarame and Leonard Ncahoruri together with about 14,000 *Hutu* civilians. See also Gahutu, *op cit* n. 21 at pp. 45-47.

²¹⁴ Gahutu, *ibid* at p. 47.

²¹⁵ Gahutu, *ibid* at p. 47.

²¹⁶ Ndarubagiye, *op cit* n. 9 at p. 34.

²¹⁷ Gahutu, *op cit* n. 21 at p. 47.

Micombero as Prime Minister. Micombero in turn prevailed on King Ntare to declare Burundi a one-party state with UPRONA as the only legitimate political party.

Although Micombero was a *Tutsi*, he was not in favour of the monarchy. As a *Tutsi* from the Hima clan in Bururi Province, his clan was greatly opposed to the “Royal” Batare clan who had dominated the country's political, economic and military establishments. Predictably, within a short time of his ascendancy to the throne, Ntare was overthrown in a military coup while on an official visit to Zaire and Micombero abolished the monarchy on 28 November 1966. The one party system, dominated by the *Tutsi*-led military continued until 1993 when the first democratically-elected *Hutu* President, Melchior Ndadaye came to power. He too was to die together with many *Hutus* in another military coup led by another *Tutsi* army officer, Pierre Buyoya.²¹⁸

It is common cause that Burundi's post-colonial history has been sullied by outbreaks of violence mainly against *Hutus* at the hands of *Tutsi*-led army. Attacks against *Hutus* are recalled in the brutal actions of *Tutsi* military forces in 1960s, 1972, 1988 and 1993 including the assassination of a first *Hutu* President, Melchior Ndadaye.²¹⁹ The Franciscans International, in collaboration with Dominicans, have raised the issue of grave human rights situations in third world countries, including Burundi and Rwanda.²²⁰ Although the international community has not taken notice of human rights violations in Burundi, this study stresses that gross human rights violations in the form of ethnic conflicts in Burundi firmly inscribe a pervasive prevalence.

The thesis emphasises that the consolidation of the social order system during the colonial era, post-independence injustices during military regimes, intra-regional disparities, weak economic bases, poverty and foreign interference are some of the fundamental dynamics behind the current human rights controversy in post-conflict era. These problems have created protracted conflicts and counter-insurgencies as explicated in the following section.

²¹⁸ President Melchior Ndadaye was assassinated by the Burundian army in a coup on 21 October 1993. Ndadaye's death fuelled more ethnic hatred between the *Tutsis* and *Hutus* which in turn ignited more mass killings of *Hutu* civilians at the hands of the *Tutsi*-dominated army.

²¹⁹ Sullivan, *op cit* n. 64 at p.75.

²²⁰ The statement made by the UN Commissioner on Human Rights Report - 54th Session Geneva, 16 March-24 April, 1998 on the UN Human Rights Project of Assisting Communities together. In Burundi, UN Commissioner on Human Rights Project of 1998 focused on women living in camps as displaced persons, Burundi's compliance with national and international human rights instruments, children and youth.

2.3.5 Protracted armed conflicts and violence, rebellion as counter-insurgency

It must be pointed out that the protracted conflicts along ethnic lines in Burundi have created violence and rebellion in the form of counter-insurgency. The war between the *Tutsi*-led army and *Hutu* rebel groups such as *Conseil National pour le Defense de la Démocratie - Forces Pour la Defense de la Démocratie* - CNDD-FDD - the current ruling party) and the main *Hutu* Party (*Forces Nationales de Liberation* - FNL) has attracted international attention. For example, peace and ceasefire agreements adopted in 2000, 2003, 2006 and 2008 were the result of international attention drawn to these conflicts.

The literature reveals that econometric studies have attempted to explain the economic and political motivations of the rebel groups.²²¹ There have been case studies of different guerrilla movements²²² and cross national rebellions.²²³ However, there is no corresponding literature on the political economy of how and why national military formations act during civil war.²²⁴ It must be noted that the failure to study the role of the military as an important factor in a given rebellious situation such as that in Burundi triggers questions relating to how military formations behave during civil wars. The conduct of armed forces during civil wars, according to Young, is a critical determinant of emergent political participations in governance, and more specifically the upholding of human rights.²²⁵ Although the military factor is neglected by scholars, it has determined the outcome of most modern African insurgencies. Similarly, Russell has noted in one of the rare systematic studies of rebellion that none has succeeded without the defection, participation or connivance of the regimes' armed forces.²²⁶

Taking Burundi as an example, rebel groups have capitalised on the defections from the *Tutsi*-led army, police and intelligence services when they assassinated *Hutu* leaders and committed mass murders against *Hutus* and moderate *Tutsi* civilians which may be interpreted broadly to

²²¹ See Collier, P.; and Hoeffler, A.; "On the Economic Causes of Civil War", **Oxford Economic Papers** (1998) 50(4): 563-573. Available at: http://oep.oxfordjournals.org/content/50/4/563.abstract?ikey=e7a924973a73bf6884f494fcb9fb31f709448608&keytype2=tf_ipsecsha [accessed 22/10/2012].

²²² Clapham, C.; "Rwanda: The Perils of Peace-making" **Journal of Peace Research** (1998), Available at: <http://jpr.sagepub.com/content/35/2/193.short>. [accessed 22/10/2012].

²²³ See Herbst, J.; (2004) "African Militaries and Rebellion: The Political Economy of Threat and Combat Effectiveness" **Journal of Peace Research** at p. 357. Available at: <http://jpr.sagepub.com/content/35/2/193.short> [accessed 22/10/2012].

²²⁴ Herbst, *ibid* at p. 357.

²²⁵ Young, E. T., (1996) "The Victors and the Vanquished: The Role of Military Factors in the Outcome of Modern African Insurgencies" **Small Wars and Insurgencies** 178-195, at p.179. <http://jpr.sagepub.com/content/41/3/357.refs>. [accessed on 20/11/2012].

²²⁶ Russell, D. E. H., (1974) *Rebellion, Revolution, and Armed Force: A Comparative Study of Fifteen Countries with Special Emphasis on Cuba and South Africa*. **African Affairs**, New York: Academic at p. 87. <http://afraf.oxfordjournals.org/content/74/295/240.extract> [accessed on 20/11/2012].

amount to genocide, war crimes and crimes against humanity.²²⁷ In situations where people rebel, the allegiance and consequent behaviour of the armed forces is a critical and decisive factor. Therefore the degree of threat posed by the armed forces of a given state is a critical determinant of how rebels will structure their own forces as evident in the cases of Sierra Leone, DRC, Liberia, Uganda, Rwanda and Burundi just to mention a few.²²⁸

While the last remaining rebel group, the National Liberation Forces (FNL), signed a ceasefire agreement with the government in September 2006, many provisions of this accord have not been implemented. For that reason, tensions are still simmering in places like Bujumbura Rural and the surrounding Provinces as noted during interviews conducted in December 2010 and January 2011.²²⁹ During the interviews and focus group discussions in Bujumbura, the Capital City, its hinterland and Rumonge, it was revealed that in the post-transition period, *Tutsi* political parties' militias such as *sans echecs* (which has not been demobilised) and *imbonerakure* (which was created to fight against persons who do not belong to CNDD-FDD) were responsible for gross violations of human rights.²³⁰

There have been reports of ceasefire violations through arbitrary arrests and executions of people suspected to be allied with the FNL.²³¹ The failure of power-sharing and attempts at peace-making in Burundi in 1993, as Sullivan observes, have cumulatively led to the killing of hundreds of thousands of Burundi. Such have played a significant role in feeding the tensions that led to the genocide in Rwanda in 1994.²³² This shows how conflicts in the Great Lakes Region of Africa tend to reinforce each other.²³³ For example, one of the accused assassins of President Ndadaye on 21 October 1993, Philbert Nduwumukama - alias Kiwi and other Burundi army officials who were released by the post-transition government in Burundi under the

²²⁷ Ndarubagiye, *op cit* n. 9 at p.95 and Gahutu, *op cit* n.21 at p. 73.

²²⁸ See generally Herbst, *op cit* n.223 at p. 364.

²²⁹ Personal Communication by way of Interviews and Participant Observation.

²³⁰ See for example **Immigration and Refugee Board of Canada**, Burundi: National Recovery Party (*Parti pour le redressement national*, PARENA) including its links with the *Tutsi* militias and armed forces and whether, since its foundation, PARENA's members have been involved in human rights abuses in Bujumbura and in Muramvya Province (1994 - April 2003), 30 April 2003, BDI41473.E, available at: <http://www.unhcr.org/refworld/docid/3f7d4d5a7.htm> [accessed on 05/12/2012]. See also Farmer, J.; (1999) "New Massacres in Burundi Civil War" **World Socialist Website**, 22 September 1999. available at: <http://www.wsws.org/en/articles/1999/09/buru-s22.html> [accessed on 05/12/2012] Farmer has argued that the *Tutsi* army re-established *Tutsi* militias such as the *sans-echecs*, to carry out attacks against *Hutus* and were responsible for the "ethnic cleansing" and political assassinations including the mass killings of 1990s.

²³¹ See **Human Rights Watch Report** (2012), *op cit* n. 97.

²³² Sullivan, *op cit* n. 64 at p. 75.

²³³ See for example, the case of *DRC v Burundi, Rwanda and Uganda*, 2004, ACHPR 19, at para. 94; *Armed Activities on the Territory of the DRC*, Order of 21 October 1999, ICJ Reports, 1999 101.

immunity legislation, were arrested on 15 September 2012 by the Congolese armed forces in Bunagana in the Eastern DRC on their way to join the M23 rebel group.²³⁴ Apparently, the conflicts in Burundi have resulted in the proliferation of a massive IDP and refugee problem which have affected Burundi and other countries that receive and host refugees.

2.3.6 Refugees and internally displaced persons

The UN Refugee Convention of 1951 (UN Refugee Convention) defines a refugee as:

A person who is outside of his country of nationality and who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who is not having a nationality and being outside of his country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.²³⁵

Due to ongoing armed conflicts in Burundi as stated above, many Burundi especially those from *Hutu* ethnic group were forced to leave Burundi because of fear of persecution as the Refugee Convention suggests.²³⁶ A large number of refugees fled Burundi in 1972, 1988 and 1993 although there was substantial number of refugees who fled the country in other periods.

In terms of international human rights law, a refugee has the right to leave any country including his/her own and return to his/ her country of origin.²³⁷ The right to leave and return to the country

²³⁴ See further Nyabuserongo News "*Arrestation du boucher du Président Melchior Ndadaye: Pierre Buyoya et Jean Bikomagu indexés*", available at: <http://nyabuserongo.org> [accessed on 14/12/2012].

²³⁵ Article 1A (2). Burundi is a State Party to the 1951 Refugee Convention and its 1967 Protocol, the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. Burundi signed also the AU Convention for Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) on 23/10/2009, but to date has not yet ratified the Kampala Convention. available at: <http://www.internal-displacement.org/kampala-convention>. [accessed on 22/11/2012].

²³⁶ Sullivan has estimated 300,000 refugees in 1972 (Sullivan, *op cit* n. 64 at p. 77), Krueger and Krueger 240,000 (Krueger and Krueger, *op cit* n.22 at p. 125). According to the International Refugee Rights Initiative (IRRI), about 38,000 Burundi refugees who fled to Tanzania in the 1990s after the assassination of Ndadaye and have been living in Mtabila Refugee camps would be repatriated. The Tanzanian government have declared that 38,050 refugees do not qualify for refugee status. A reference was made to Article 4(2) of the Tanzanian Refugees Act and declared that the Mtabila Camp would be formally closed on 31 December 2012. But 2,000 refugees would not be repatriated due to security concerns hence these individuals still qualify as refugees. Available at: <http://www.refugee-rights.org/Publications/Papers/Papers.html> [accessed on 04/12/2012]. However due to security concerns, 2000 refugees would not be repatriated. See Majaliwa, C.; (2012) "Tanzania: 2,000 Burundian Refugees Will Not Be Repatriated - Official" <http://allafrica.com/stories/201212040276.html> [accessed on 04/12/2012].

²³⁷ Article 13(2) of the UDHR.

is found in various human rights instruments such as the ICCPR,²³⁸ Convention on the Elimination of all Forms of Racial Discrimination²³⁹ and regional human rights instruments²⁴⁰ and re-iterated in national legislation such as South African Refugees Act, 1998, Tanzania Refugees Act, 1998 and Burundi refugee law.²⁴¹

Refugees in foreign countries do face challenges, for example, in the case of *The Union of Refugee Women and Others v The Director of the Private Security Industry Regulatory Authority and Others*²⁴² (*Refugee Women's case*) where refugee women including those from Burundi were denied employment in the private sector. Kondile A.J. with his empathy once acknowledged that refugees are a vulnerable group in the society and stressed that foreign nationals including refugees, are not inherently less trustworthy. The judge, in underlining one aspect of employment whereby some employers become reluctant to employ refugees, suggested that in terms of the constitution, refugees have rights like those of citizens, for instance, those accorded to them under sections 9, 23, 27, and 29 of the Constitution of South Africa.²⁴³

From the early 1972, 1990s and 2000, hundreds of thousands of Burundi fled their homes to escape army killings in 1972 and 1988 and the fighting between the *Tutsi*-led army and *Hutu* insurgent groups. In early 1990s, many Burundi predominantly *Hutus* were forcibly displaced after Ndadaye's death. For instance, after Buyoya's second *coup d'états* of 1996 as Zeender contends, the conflicts were intensified in the southern part of Burundi.²⁴⁴ As part of a military strategy, Buyoya's second military regime (a *Tutsi*-led government) ordered the relocation of hundreds of thousands of *Hutu* civilians into *regroupment camps*.²⁴⁵ In the late 1990s over

²³⁸ Article 12(4).

²³⁹ Article 5 (d) (ii).

²⁴⁰ Regional human rights instruments like the African Charter on People's Rights, OAU Refugee Convention and African's Children's Charter.

²⁴¹ See Articles 19 and 20 of *Loi n°1/32 du 13 novembre 2008 sur l'Asile et la Protection des réfugiés au Burundi*.

²⁴² 2007 (4) BCLR 339 (CC).

²⁴³ The Constitution of South Africa of 1996.

²⁴⁴ Zeender, G.; "Securing the Right to Stay: Local Integration of IDPs in Burundi", A paper prepared for expert seminar on protracted displacement hosted by Bookings-Ben and IDMC, Geneva on January 19 - 20, 2011, at p. 26. See further Deng, F.; (2000) Report of the Representative of the Secretary-General submitted to the UN Commission on Human Rights, Resolution 2000/53 – Addendum- Profiles in Displacement: Forced Relocation in Burundi, March 2000, E/CN.4/2001/5/Add.1. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=71. [accessed on 07/12/2012].

²⁴⁵ Similar to the Nazi concentration camps because these refugees/IDPs were denied basic human rights such as water, food, health care services, movement, worship, shelter and education.

800,000 or around 12 per cent of the population became IDPs.²⁴⁶To - date , most of these refugees and IDPs have not been able to return to their homes or be re-integrated. ²⁴⁷ Following the signing of peace and ceasefire agreements between the government and major insurgent groups like CNDD-FDD, PALIPEHUTU as well as the election of the proposed national unity government in 2005, some refugees were allowed to return from exile and IDPs returned home.²⁴⁸This thesis examines the extent to which the integration of Burundi refugees have been implemented in post-conflict Burundi. The following table illustrates the number of refugees who were repatriated to Burundi from exile from 2002 to 2008 ²⁴⁹ in line with the Arusha Peace Agreement requirements.²⁵⁰

Table 1: Burundi Refugees (Returnees) from Exile

Return of Burundian refugees by country of asylum, from 2002 to October 2008					
	DRC	Rwanda	Tanzania	Others	Total
2002-03	4,284	219	130,824	322	135,649
2004	879	151	89,039	258	90,327
2005	1002	4,489	62,338	279	68,108
2006	1,284	615	42,765	251	44,915
2007	45	111	39,506	136	39,798
2008	6	25	84,714	82	84,827*
Total	7,500	5,610	449,186	1,328	463,624

*435 in January, 1,991 in February, 8,377 in March, 6,675 in April, 5,272 in May, 19,635 in June, 17,504 in July 9,642 in August, 8,439 in September and 6,857 in October. 23,740 of the returnees in 2008 are former refugees of 1972 who returned from Tanzania's Old Settlements.]

Source: <http://www.unhcr.org/pages/49c3646c4d6.htm> [accessed on 05/12/2012].

In 2012 repatriation of Burundi refugees continued, for instance, 15,626 Burundi refugees out of the 38,000 in Mtabila Camp who were not integrated in Tanzania in 2008 have been

²⁴⁶ See generally UN Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Consolidated Inter-Agency Appeal for Burundi, 1 November, 1999, at p.6, available at: www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/87465440b0628237c125681c004f76b4.

²⁴⁷ IDPs respondents in Gitaza and Kabezi are among the examples.

²⁴⁸ Zeender, *op cit* n. 244 at pp. 20-40.

²⁴⁹ UNHCR "Repatriation of 1972 Burundian Refugees Hits 50,000 Mark" 16 September, 2009 www.unhcr.org/4ab0db636.html.

²⁵⁰ Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, Chapter I, Rehabilitation and Resettlement of Refugees, 28 August 2000, available at: www.brookings.edu/projects/ido/Laws-and-Policies/burundi.aspx. [accessed on 05/12/2012].

repatriated by November 2012.²⁵¹ According to the International Federation of Red Cross and Red Crescent Societies (IFRC), the Tanzanian government declared a cessation of refugee status to Barundi refugees on 1 August, 2012 which was followed by the decision on 8 October, 2012 to “shift from voluntary repatriation to orderly return” in order to enable the complete closure of Mtabila Refugee Camp by 31 December 2012.²⁵² Pursuant to asylum and refugee laws, involuntary repatriation of refugee amount to *refoulement*.²⁵³

This thesis argues that the procedures and arrangements to identify refugees must provide a guarantee against *refoulement*²⁵⁴ by ensuring that refugees who are entitled to legal protection are well protected. As the UNHCR has suggested, protection of refugees and respect for the principle of *non-refoulement* can be ensured only if claims to refugee status and asylum are determined substantively and expeditiously.²⁵⁵ Zeender has argued further that most efforts have been directed towards assisting returning refugees. Between 2002 and 2009 over 500,000 Barundi refugees returned, many of them were from Tanzania.²⁵⁶ However reintegration of these refugees, in particular those who fled in 1972, has created unexpected challenges for the government of Burundi. In most cases, returnees found their land had been occupied, expropriated, sold or redistributed to illegal owners.²⁵⁷ For some returnees who managed to get back their pieces of land, no title deeds were issued by the government to justify their legal ownership.²⁵⁸

The law imposes an obligation on the contracting states to respect the rights relating to refugee's personal status. These include the right to freedom of association,²⁵⁹ access to courts with legal assistance,²⁶⁰ engagement in wage earning employment and self-

²⁵¹ International Federation of the Red Cross and Red Crescent Societies (IFRC) “Tanzania: Refugee Repatriation DREF Operation n° MDRTZ014 Update n°1”, 26 November, 2012, available at: <http://www.ifrc.org/docs/Appeals/12/MDRTZ01401.pdf> [accessed on 05/12/2012].

²⁵² IFRC, *ibid* n. 247 at p. 1.

²⁵³ See Article 14 of the UDHR, Article 33 of the 1951 Refugee Convention relating to the principle of *non-refoulement* and Article 35 concerning cooperation between the State Parties and the UNHCR to facilitate and supervise the application of the Convention.

²⁵⁴ Article 33 relating to the principle of '*non-refoulement*' and Article 35 concerning cooperation with the office of the UNHCR, including the facilitation of its duty of supervising the application of the Refugee Convention.

²⁵⁵ UN High Commissioner for Refugees, UNHCR Note on the Principle of *Non-Refoulement*, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html> [accessed 07/12/2012].

²⁵⁶ Zeender, *op cit* n. 244 at p. 27.

²⁵⁷ Some respondents during interviews and focus group discussions in Rumonge and Gitaza in 2010- 2011 stated that they faced enormous land-related disputes upon arrival in Burundi.

²⁵⁸ The interviews with returnees in Rumonge.

²⁵⁹ Article 12 of the 1951 UN Refugee Convention.

²⁶⁰ Article 15 of the UN Refugee Convention, *ibid*.

employment,²⁶¹ freedom of movement and access to travel documents,²⁶² identity documents,²⁶³ housing and education,²⁶⁴ public relief and social security,²⁶⁵ assimilation and naturalization.²⁶⁶ It is not clear whether all contracting states abide with refugee laws. For example, the UNHCR raised concerns over the forced repatriation of Burundi refugees from Rwanda²⁶⁷ and the violation of refugees' rights in Tanzania.²⁶⁸

As pointed out earlier in this chapter, repatriation that is not voluntary amounts to *refoulement* which in turn violates the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) of which both Rwanda and Tanzania have ratified.²⁶⁹ Equally, refugees (returnees) from exile for instance those from Tanzania's Old Settlements who fled Burundi in 1972 stepped on Burundian soil after 37 years in exile were faced with integration challenges.²⁷⁰

This study argues that re-integration of refugees in exile, returnees and IDPs in Burundi is a complex problem. For example, it is not easy for Burundi refugees in exile to get the necessary documents immediately after their application for local re-integration which can allow them to have access to the basic rights such as the right to education, health care services, social security services, gainful employment and ownership of property.²⁷¹ Similarly, returnees' re-integration in Burundi has not been a smooth process as it was initially intended to be. As Fagen has postulated, while referring to four case studies of post-conflict countries of Burundi, Bosnia, Iraq and Afghanistan, there are factors that hinder successful integration of returnees.²⁷² These factors include but not limited to a flawed government's assumption that returnees will be restored to the prior lives they had before fleeing their country, lack of long-

²⁶¹ Article 17 and 18 of the UN Refugee Convention, *ibid.*

²⁶² Articles 26 and 28 of the UN Refugee Convention, *ibid.*

²⁶³ Article 27 of the UN Refugee Convention, *ibid.*

²⁶⁴ Articles 21 and 22 of the UN Refugee Convention, *ibid.*

²⁶⁵ Articles 23 and 4 of the UN Refugee Convention, *ibid.*

²⁶⁶ Article 34 of the UN Refugee Convention, *ibid.*

²⁶⁷ See "UNHCR Concerned over Return of Burundian Refugees by Rwanda", 3 June, 2009 <http://www.unhcr.org> [accessed on 05/06/2009].

²⁶⁸ See USCRI Action Alerts "Stop the Violation of Burundian Refugees' Right in Tanzania" <http://uscricrefugees.org/site/PageNavigator/ACTAdvocate> [accessed on 19/06/2009].

²⁶⁹ Rwanda ratified the OAU Convention on 19, November 1979 and Tanzania on 10, January, 1975.

²⁷⁰ See UNHCR Report "Returnees After 37 years in Exile in the Transit Camp in 2008" <http://www.unhcr.org> [accessed on 01/12/2009]. Returnees from Tanzania's Old Settlements of Ulyankulu, Katumba and Mishamo who fled Burundi in 1972 returned in Burundi after 37 years in exile.

²⁷¹ Focus Group Interviews with Burundi respondents in Tanzania and South Africa.

²⁷² Fagen, P. W., (2011) "Refugees and IDPs after Conflict: Why They Do Not Go Home" **United States Institute of Peace**, at: <http://www.usip.org/files/resources/SR268Fagen.pdf>

term engagements or implementation integration strategies and the focus on rural integration while ignoring urban integration. For example, the IDMC Report has revealed that some 100,000 IDPs remain at the crossroads by living in settlements throughout Burundi or with host families.²⁷³ To - date , there is a substantial number of Burundi who are still living as refugees outside the country while some are still IDPs inside Burundi. Some live in the old UNHCR-administered camps in Tanzania while others are living in other countries. Many of these refugees are reluctant to return home for fear of land related disputes and security concerns.²⁷⁴

It should be noted that Burundi, a State Party to the 1951 Refugees Convention and its 1967 Protocol, paradoxically has entered reservations with regard to certain provisions such as those relating to the right to employment,²⁷⁵ public education²⁷⁶ and freedom of movement.²⁷⁷ This is contrary to the human rights law standards. Furthermore, Burundi is a State Party to the 1969 OAU Convention and has signed the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), but has yet to ratify it.²⁷⁸ Similarly, Burundi is neither a State Party to the 1954 Convention Relating to the Status of Stateless Persons nor to the 1961 Convention on the Reduction of Statelessness. These are among legitimate short-comings which prevent Burundi from executing its legal duties and obligations under the IDPs and refugee laws such as integration of refugees.

2.3.7 Integration of refugees and resolution of land disputes

Generally, Burundi refugees are divided into two categories: "the 1972 caseload" or refugees who fled Burundi in the early 1970s during the genocide of 1972 and "the 1993 caseload" which

²⁷³ See the Internal Displacement Monitoring (IDMC) Report of 2008, available at: http://www.adh-geneva.ch/RULAC/pdf_state/Burundi.internal.displacement.May08.pdf. [accessed 07/12/2012].

²⁷⁴ The Immigration and Refugee Board (IRB) Report, "Burundi: Status of Land Disputes and Process for Recovering Property Seized by People in Power during the Genocides; Whether *Hutus* are Mistreated by *Tutsis* when Dealing with Property Issues; Obstacles to Recovering Property and the Possibility of Restitution", 18 June, 2009, BDI103169.FE, available at: <http://www.unhcr.org/refworld/docid/4b20f0322b.html>. [Accessed 26 November 2012]. See also Kanuni, P.; "Land Crisis as Burundi Refugees Return from Tanzania," *Africa Review*, November 8, 2012 available at: <http://www.africareview.com/News/Land-crisis-as-Burundi-refugees-return-from-Tanzania/-/> See further, African Center for the Constructive Resolution of Disputes (ACCORD) "ACCORD (2012) "Trains Burundian Land Commission Staff and Partners in Resolving Land Disputes" 24 August, 2012, available at: <http://reliefweb.int/report/burundi/accord-trains-burundian-land-commission-staff-and-partners-resolving-land-disputes>

²⁷⁵ Article 17 of the 1951 Refugees Convention.

²⁷⁶ Article 22, *ibid*.

²⁷⁷ Article 26, *ibid*.

²⁷⁸ See the UNHCR Report submitted to the OHCHR on Burundi Universal Periodic Review of July 2012: available at: <http://www.unhcr.org/refworld/pdfid/5004fdf12.pdf> [accessed on 23/11/2012].

refers to refugees who fled in the early 1990s and after the assassination of President Ndadaye in 1993. This section critically examines the challenges which returnees from exile face such as re-integration and land related conflicts when they reclaim back their land or other properties which were taken illegally by *Tutsis* under the *Tutsi*-led military regimes. The question of land remains among the critical issues in post-conflict Burundi because it is linked to re-integration challenges that are still facing Burundi refugees.

Land ownership under the Land Code of 1986 which was enacted during the Bagaza military regime to recognize public and private land ownership including land acquired under customary law has been criticised. Fransen and Kuschminder have affirmed that land legislation has been applied wrongly to violate returnees' land and property rights.²⁷⁹ The Land Code states that "irrespective of conditions under which the land was acquired, owners who have occupied land and properties for 30 years or more are entitled to legal ownership".²⁸⁰ Clearly, the 1986 land legislation has been used to protect the rights of illegal owners who have occupied the land for at least 30 years, while denying the rights of legitimate owners such as refugees from the 1972 caseload who have been in exile for more than 30 years whose land or properties were expropriated illegally.

It must be acknowledged that the international community, through various legal, institutional and mechanisms has established standards of protection for IDPs and refugees which State Parties are obliged to implement. Similarly, regional instruments that reinforce international standards are modelled to suit national challenges. It is remarkable to note that the socio-political environment in post-conflict Burundi is still perilous while reintegration of Burundi returnees also remains fluid. As noted during interviews, land disputes remain a critical challenge in Burundi. For instance, the African Center for the Constructive Resolution of Disputes (ACCORD) has reported in August, 2012 that in 2011, 87% of cases registered were land related disputes which the Land Commission (*Commission Nationale des Terres et autres Biens*- CNTB) has been dealing with in the post-transition period.²⁸¹ There has been an increase of land disputes in Burundi since the repatriation of refugees began.

²⁷⁹ For general discussion see Fransen, S.; and Kuschminder, K.; (2012) "Back to the Land: The Long-term Challenges of Refugee Return and Reintegration in Burundi" **New Issues in Refugee Research**: Research Paper No.242 at pp. 14-15, available at: <http://www.unhcr.org/5040ad9e9.pdf> [accessed on 15/08/2013].

²⁸⁰ *Loi n° 1/008 du 1er septembre 1986 portant Code Foncier du Burundi*.

²⁸¹ See **ACCORD Report** "ACCORD Trains Burundian Land Commission Staff and Partners in Resolving Land Disputes", 23 August, 2012, available at: <http://reliefweb.int/report/burundi/accord-trains-burundian-land-commission-staff-and-partners-resolving-land-disputes> [accessed on 24/08/ 2013], see also Theron, J. (2009) "Resolving Land Disputes in Burundi" **Conflict Trends**: African Center for the Constructive Resolution of Disputes, at p.7.

Regrettably, the government of Burundi has not done enough to solve the problems being faced by refugees and IDPs in terms of policy making and law reform. Like many African countries, Burundi is confronted with common challenges such as poverty, unemployment, corruption where a small group of political elites embrace their political gains at the expense of the majority Burundi and local community attitude towards returnees. These problems have encouraged the governments (in both pre-peace and post-peace agreement era) to disregard international human rights and humanitarian norms. The post-conflict government, for instance, has failed to take into consideration the historical factors that have been encouraging internal displacements and refugee problems. These include: the failure to harness ethnic diversity, promote national cohesion and put in place effective transitional justice mechanisms of truth and reconciliation to deal with past, current and future human rights abuses.

This study interrogates unresolved issues in the context of post-conflict reconstruction and pending unresolved refugees, IDPs and land issues that still need to be resolved in a comprehensive manner or would have been resolved through effective transitional justice mechanisms. This thesis articulates that the failure to acknowledge and consider restoration and restitution in order to deal with the past injustices in form of restoration of human dignity and restitution in Burundi amounts to a failure to deal with human rights violations.

Article 2 of the ICCPR obliges State Parties to guarantee the rights contained therein. Article 2(3) specifies that each State Party must undertake to ensure that any person whose rights or freedoms are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity. It goes further and stipulates that each State Party must ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. The State Party must develop the possibilities of judicial remedy and the competent authorities and shall enforce such remedies when granted.

Considering the concept of justice, lack of progress towards truth and reconciliation in post-conflict Burundi calls for the restorative processes to be implemented in order to minimise land disputes, the influx of refugees and IDPs. Thus, truth and reconciliation are important mechanisms to buttress or entrench transitional justice. It must be pinpointed that there are remedies available for violations of human rights and Burundi are entitled to these remedies. As stipulated in the legal framework of the Basic Principles right to truth, justice and a remedy for serious violations of international human rights and humanitarian laws are guaranteed in the major human rights legal instruments. For example, Article 8 of the UDHR state that

everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

2.3.8 Human rights in post-conflict era

This section proceeds with interrogating human rights violations and systematic carnages in post-conflict period. Like most contemporary peace agreements, Burundi's peace accords aimed at addressing the question of how to deal with the legacy of human rights atrocities committed by *Tutsi*-led army and insurgent groups.²⁸² However Vandeginste has identified a sophisticated by-passing mechanism which has been put in place to benefit a wide range of former elites and opponents who agreed to share power so that their interests could continue to be protected through impunity at the expense of democracy and constitutionalism.²⁸³

As Liebenberg has noted, there is always a tension between human rights and democracy.²⁸⁴ For example, Burundi's constitutional democracy is subject to criticism because the failure of the post- transition government to resolve Burundi conflicts and ongoing gross human rights violations. It must be pointed out further that the desire to share political power and economic resources in Burundi has forced some *Hutu* politicians who have been unfairly discriminated against by *Tutsi* for long time to use the same as a motivating factor to seek better bargaining political positions and powers. The result has been government inflexibility in responding to these aspirations which makes confrontation unavoidable as revealed in the political tensions after 2010 elections.²⁸⁵ Moore, for example, has criticized the international organisations such as the UN and European Union (EU) for not condemning Burundi's 2010 elections flaws.²⁸⁶

Based on the above views, this thesis critically examines and underscores the fact that there is no political will to promote and observe human rights in Burundi. This is demonstrated in ongoing political instability, ethnic strife and wars, poverty and homelessness, refugee and internal displacement problems. It is common cause that gross violations of human rights in

²⁸² Vandeginste, *op cit* n. 67 at p.194.

²⁸³ Vandeginste, *ibid* at p. 207.

²⁸⁴ Liebenberg, S.; (2012) "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" , **African Human Rights Law Journal** at p. 4.

²⁸⁵ See, Ould-Abdallah, A. (2000) "Burundi on the Brink 1993-1995: A UN Special Envoy Reflects on Preventive Diplomacy", **United States Institute of Peace Press**, Washington D.C., at p.71. Ould-Abdallah has argued that when Burundi held elections it was not prepared for majority democracy. See further Ould-Abdallah, A , "Stakeholders and Owners" in Reyhler, L.; and Paffenholz, T.; (2001) (eds) **Peace Building: A Field Guide**, Lynne Rienner Publishers, London, at p. 157.

²⁸⁶ Moore, J.; (2010) "Human Rights Watch Report on Burundi Highlights Election Flaws", available at: <http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/1202/Human-Rights-Watch-report-on-Burundi-highlights-election-flaws>. [ccessed on 17/11/2011].

Burundi are not confined to a single incident, rather they are traceable to the sequence of mass-killings of civilians in the incidents of 1960's, 1972, 1988 and 1992 and 1993 which the previous and current regimes have failed to address in a comprehensive manner. While at national level the incorporation of the Bill of Rights in the constitutions is a common (although not universal) feature of constitutional democracy, courts on the other hand are given a significant role to interpret and enforce the provisions of Bills of Rights with various remedial powers. In post-conflict Burundi, the judiciary is not independent enough to exercise its constitutional judicial obligations as reported by the Amnesty International in 2012.²⁸⁷

Reviewing the phenomenon of the human rights violations since independence in Burundi, it is clear that the same issues have dominated the discourse over the last 52 years.²⁸⁸ Gahutu has claimed that the *Tutsis* have managed to deceive both Burundi and the international community when they proclaim that three ethnic groups live in a complete harmony while at the same time arresting and summarily executing thousands of defenseless civilians from the other ethnic groups. Since the *Tutsis'* arrival in 16th century they have dominated and exploited both the *Hutus* and the *Twas* through semi-feudal systems.²⁸⁹

Most studies on Burundi have focused on the need to restore democracy in the country while ignoring the question of impunity. For example, the International community has been focusing on establishing a formal peace while not paying adequate attention to the current human rights violations and accountability for past human rights abuses.²⁹⁰ Though the UNHCR Report²⁹¹ suggests that Burundi is enjoying improved security and stability on the political front, the demobilization of combatants of the PALIPEHUTU insurgent group had been completed and the movement had become a political party,²⁹² yet, there is still the uneasiness that the re-integration of the former combatants will pose security risks if not accompanied by effective measures for their smooth re-integration into the national plans of rehabilitation.

Harassment and intimidation of political opponents, journalists and human rights activists have increased during the Nkurunziza governments. For example, political leaders like Leonard Nyangoma of CNDD together with Agathon Rwaswa of PALIPEHUTU-FNL and others were

²⁸⁷ Amnesty International Annual Report, 2012 available at: <http://www.amnesty.org/en/annual-report/2012> [accessed on 27/11/2012].

²⁸⁸ See Ndarubagiye, *op cit* n. 9 at pp. 31-83.

²⁸⁹ Gahutu, *op cit* n. 21 at p. 74.

²⁹⁰ Human Rights Watch (2009) "Pursuit of Power Political Violence and Repression in Burundi" <http://www.allafrica.com>. [accessed on 28/01/2010].

²⁹¹ UNHCR Global Appeal 2010-2011- Burundi: www.unhcr.org [accessed on 28/01/2010].

²⁹² UNHCR Report, *ibid*.

forced to flee the country after the 2010 elections.²⁹³ Furthermore, the Chief Prosecutor's office ordered the arrest of lawyers and journalists²⁹⁴ such as Suzanne Bukuru, on July 15, 2011, François Nyamoya,²⁹⁵ Rugurika, Chief Editor for African Public Radio (*Radio Publique Africaine* - RPA),²⁹⁶ Patrick Mitabaro,²⁹⁷ Jean-Claude Kavumbagu,²⁹⁸ and Alexis Sinduhije.²⁹⁹ Another example is Hassan Ruvakuki (a journalist) who has been charged with terrorism and sentenced to life imprisonment on June 2011 by the High Court in Cankuzo in Burundi after interviewing members of a rebel group while discharging his journalist duties. Ruvakuki appealed to the Gitega Appeal Court. His appeal was heard in October and November 2012 and adjourned for a final decision on 8 January 2013,³⁰⁰ the charge was changed from terrorism to participating in an association formed for the purpose of attacking people and property.³⁰¹ The Court of Appeal finally held that the appellant was guilty and sentenced to three years' imprisonment but later after serving 16 months of imprisonment Ruvakuki was acquitted of all criminal charges by the Court of Appeal and released because in the Courts' opinion the charges were not well substantiated.

²⁹³ Vandeginste, S. (2011) "Power-sharing as a Fragile Safety Valve in Times of Electoral Turmoil: The Costs and Benefits of Burundi's 2010 Elections" *The Journal of Modern Studies* 49 (2) at p. 331. See also Palmans, E., "Burundi's 2010 Elections: Democracy and Peace at Risk" *European Centre for Electoral Support*, 1-21 at p. 18.

²⁹⁴ Human Rights Watch "Burundi Stop Harassing Lawyers and Journalists" August 11, 2011. Available at: <http://www.hrw.org/news/2011/08/11/burundi-stop-harassing-lawyers-and-journalists>.

²⁹⁵ A spokesman for the opposition party, Movement for Solidarity and Democracy (*Mouvement pour la solidarité et la démocratie*, MSD) who was arrested on July 29, 2011.

²⁹⁶ Summoned by the Bujumbura Public Prosecutor's Office four times since July 18, to explain recent broadcasts discussing political developments.

²⁹⁷ The Chief Editor of Radio Isanganiro was formally summoned by prosecutors to explain his station's media reports. On May 3, he was accused of "disseminating information that may affect the security of the state" after airing an interview with an exiled opposition leader who questioned a government Bill that required all political parties to re-register within six months. On 1 of August, 2011 Mitabaro was accused of "dissemination of language that insults the judiciary" after broadcasting an interview with Ruyikiri in which he contended that certain judges were dishonoring the judiciary by their actions.

²⁹⁸ Kavumbagu was charged with treason but acquitted on May 13, 2011. See, <http://www.hrw.org/news/2011/05/18/burundi-journalist-acquitted-treason-charges>.

²⁹⁹ A Burundian opposition leader who was arrested in January 2012 in Dar Es Salaam Tanzania at Burundi's government request: <http://www.wavuti.com/4/post/2012/1/tanzania-frees-burundi-opposition-leader-alexis-sinduhije.html#axzz1oyWOD4fS> [accessed on 05/02/2012].

³⁰⁰ See All Africa News "Burundi: Radio Reporter Convicted of Terrorism Marks a Year Behind Bars", available at: <http://allafrica.com/stories/201211290549.html> [accessed on 05/12/2012]. See also Reporters Without Borders "The Hassan Ruvakuki Case: Burundian Authorities Entrenched in Injustice", 21 February, 2013. Available at: <http://en.rsf.org/burundi-the-hassan-ruvakuki-case-burundian-21-02-2013,44103.html>

³⁰¹ See All Africa News, *ibid*.

The right of freedom of expression in Burundi is limited by criminal laws in terms of what is referred to as "press offences".³⁰² These offences impose criminal sanctions such as fines, imprisonment or both on journalists and media employees who are charged with defamation, discrediting the state, insulting the head of state, and threatening state security.³⁰³ For instance, the Press Act, 1997³⁰⁴ was enacted to prohibit dissemination of "information inciting civil disobedience or serving as propaganda for enemies of Burundi nation during a time of war". A similar piece of legislation was passed in 2003 which imposes five years imprisonment and fines for disseminating information that insults the President or is defamatory in nature towards certain individuals.³⁰⁵

The law also prohibits racial or ethnic motivated hate speech.³⁰⁶ While Burundi's Constitution provides for the right of freedom of expression,³⁰⁷ Article 31 of the 2005 Constitution simply provides that "*La liberté d'expression est garantie*", means, "the freedom of expression is guaranteed" without further elaboration. In practice, the right of freedom of expression is easily being violated or not respected in Burundi as demonstrated in the above mentioned examples.³⁰⁸ In comparison with other countries like South Africa, the Constitution gives more details on the right to freedom of expression where it states that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.³⁰⁹

While in practice journalists generally are rarely charged with serious offences such as treason, in 2006 and 2007, four journalists in Burundi were imprisoned to four to six months on press offences while other were called in for questioning on similar charges.³¹⁰ This means that

³⁰² Offences in terms of the Press Act, 2003 (*Loi No 1/025 Du 27 Novembre 2003 Régissant la Presse au Burundi*).

³⁰³ Articles 10, 11 and 50 of the Press Act, 2003.

³⁰⁴ *Revu le Décret-loi n°1/006 du 21 Mars 1997 Régissant la Presse au Burundi*.

³⁰⁵ Article 46 of *Loi No 1/025 Du 27 Novembre 2003 Régissant la Presse au Burundi*.

³⁰⁶ See, The Open Society Institute (2007) "Burundi: IBA Welcomes Journalists' Acquittal". Available at:

<http://lexisnexis.nmmu.ac.za/nxt/gateway.dll/zkfaa/bsxha/ibpxa/0apxa/3apxa/bbpxa?f=document&q=press%20act%20in%20burundi&x=Advanced#LPHit1>. [accessed on 08/09/2012].

³⁰⁷ Article 31 of Burundi Constitution, 2005 provides that: "the freedom of expression is guaranteed in Burundi".

³⁰⁸ UNHCR Report (2011) "Freedom of the Press 2011- Burundi" 01/09/2011, available at:

<http://www.unhcr.org/refworld/country,,FREEHOU,,BDI,,4e5f71b628,0.html>.

³⁰⁹ Section 16(1) of the Constitution of Republic of South Africa of 1996.

³¹⁰ Human Rights Watch Report (2011) "Burundi: Journalists Acquitted of Treason Charges" 18/05/2011. Available at:

<http://www.hrw.org/news/2011/05/18/burundi-journalist-acquitted-treason-charges>.

government of Burundi has incorrectly interpreted Article 19 (3) the ICCPR.³¹¹ This is contrary to Article 19(2) of the ICCPR which provides that everyone has right to freedom of expression which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. As underlined in the Constitution, this study emphasises that protection and promotion of the right to freedom of expression, and other political and civil rights are among the pillars of consolidating the rule of law and constitutionalism.

Protecting human rights in Burundi therefore requires that Burundi receive some degree of decency and humane treatment. Human rights which are the basic rights and freedoms to which all humans are entitled to, among others, the right to: life, liberty, freedom of thought and expression and equal treatment before the law. These rights represent entitlements of the individual or groups and must be protected and promoted by the government of Burundi. Such rights are ascribed naturally, which means, they are not earned and cannot be denied on the basis of grounds like race, creed, ethnicity or gender.

This thesis argues that the rights above are often advanced as legal rights and protected by the rule of law. The conduct of governments and military forces, for instance, as the case with Burundi must comply with these standards. Various basic rights may not be violated under any circumstances because they are set out in international human rights legal instruments such as, the UDHR, ICESCR and ICCPR and have attained the level of *jus cogens*, for example, the prohibition of torture and slavery.

2.4 BURUNDI'S DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS LAW AND REPORTING OBLIGATIONS

2.4.1 Domestication of international law

The Constitution of 2005 requires that international law must be considered when dealing with human rights issues.³¹² This section discusses the application of international and regional human rights instruments. Generally, the enforcement of international law at the municipal level can be done through monism or dualism approaches.

2.4.1.1 Monism

Monism is a legal system whereby international law does not need to be translated into national law. Monism holds that, international treaties acquire the force of law upon ratification. Monist

³¹¹ Article 19 (3) of the ICCPR provides for the rights and duties. For example, in terms of paragraph 2 special duties and responsibilities are provided for.

³¹² See Title II of Burundi Constitution of 2005.

states consider international law and national law as one unified legal system. In case of conflict between international law and national rules, international law takes precedent.

2.4.1.2 Dualism

Dualism on the other hand, considers international law and national law as different legal systems and distinct in nature. Dualist states consider that international law is not directly applicable under national legal system, it must be translated into national legislation before it can be applied by the national courts. In other words, state's ratification of international or regional treaties is not enough, hence, national legislation must be enacted before it can be applied and enforced.

2.4.1.3 The application of international law in Burundi

Burundi is a signatory to many international human rights instruments which re-enforce the rights enshrined in the UDHR and the International Bill of Rights. The incorporation of international law under Article 19 of the Constitution amounts to domestication and makes Burundi a monist state. However, the effectiveness of Article 19 can be criticised due to consistent gross violations of human rights norms in post-conflict Burundi. Treaties or conventions other than those specifically mentioned in the Constitution require ratification and domestication. This means, they are binding after ratification and fulfilment of the necessary requirements of entry into force for both bilateral and multilateral treaties.³¹³ The ratification power of the parliament in Burundi is further limited by the executive³¹⁴ with respect to treaties that have the effect of engaging state resources; hence, a specific legislation is required.³¹⁵

Article 19 of the Constitution provides that:

The rights and duties proclaimed and guaranteed, among others, by the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter on Human and Peoples Rights, the Convention on the Elimination of all Forms of Racial Discrimination against Women and the Convention on the Rights of the Child are an integral part of the Constitution of the Republic of Burundi.³¹⁶

Article 19 of the Constitution is far-reaching because it recognises the role of international and regional human rights instruments. In line with Article 19, policy-formulation and law-making on human rights, human security, political and socio-economic development in Burundi must be subject to the Constitution.³¹⁷ Although the provision under Article 292 of the Constitution stipulates that the rules of international law are binding once Burundi ratified international or

³¹³ Article 292 of the Constitution, *ibid*.

³¹⁴ Article 289 of Burundi Constitution empowers the President to sign international treaties.

³¹⁵ Article 129 of the Constitution, *ibid*.

³¹⁶ Article 19 of Constitution of 2005.

³¹⁷ See Articles 13 -18 of Burundi Constitution of 2005.,

regional treaties, however, the application and supremacy of the international law is limited. For example, the courts in Burundi have been reluctant to apply the rules international law while inconsistent in interpretation of international human rights law have been demonstrated in the rulings of the Supreme and Constitutional Courts as demonstrated in the *Bwampamye* and *Minani* cases discussed under section 2.6 of this thesis.

This thesis argues further that the promotion and observance of human rights in Burundi at both national and international levels must be subject to further inquiry. For example, the scholarly works on the root causes to the human rights violations in Burundi have been dominating while the question of impunity at large has been ignored. As Killander and Adjolohoun have observed,³¹⁸ the courts in many dualist countries in Africa use international law to a larger degree than the monist countries such as those of Francophone Africa including Burundi. In other words, monist states like Burundi make little use of international law when interpreting constitutional provisions, with specific reference to the Bill of Rights.³¹⁹ This thesis acknowledges that domestication of international law, whether under monism or dualism, must be considered as step that has been taken by the State Parties to discharge their duties and obligations under international law especially in observing and promoting human rights.

This study has examined and noted that the substantive rules of international law are recognised in Burundi, what is missing is the application of international law and the political will on the part of the government of Burundi and courts in particular at the municipal level to act in a manner required by international law by complying with the requirements of international human rights and humanitarian laws.

2.4.2 Legal obligations imposed under UN and regional institutions

This section makes special reference to women³²⁰ and children's rights. Article 25(2) of the UDHR provides that children are entitled to special care and assistance and all children are to be treated equally in terms of social protection. The CRC is a comprehensive multilateral treaty that re-iterates the UDHR principles on protection and promotion of the children's rights in the world. Article 3 specifies the "best interests of the child" principle and imposes duties on the State Parties to enact legislation to ensure that the children's rights to family environment and freedom from abuse are respected.³²¹ In addition, the Optional Protocol to the Convention on

³¹⁸ Killander, M.; and Adjolohoun, H., "International Law and Domestic Human Rights Litigation in Africa: An introduction" in Killander, M.; (ed) (2010) **International and Domestic Human Rights Litigation in Africa**, Pretoria University Law Press: Pretoria at p. 3.

³¹⁹ See the discussion under Lesson from the African Human Rights Commission Decisions.

³²⁰ Articles 2 and 7 of the UDHR provide for equal rights and prohibit discrimination.

³²¹ Burundi signed and ratified the CRC on 8 May, 1990 and ratified it on 19 October, 1990.

the Rights of the Child on the Involvement of Children in Armed Conflict, 2000 was signed on 13 November 2001 by Burundi but ratified on 24 June 2008 after seven years. This Protocol outlaws the involvement of children in armed conflicts.

Equally, the CEDAW was signed by Burundi in 1980 and ratified in 1992. Although Burundi is a State Party to both CRC and CEDAW, yet, children and women's rights are still being violated in terms of child soldiers,³²² and women abuses in the form of rape, sexual assault³²³ and other forms of domestic violence continue on a grand scale.³²⁴ The African Charter provides for civil, political, economic, social and cultural rights as justiciable rights. Burundi ratified and incorporated the provisions of African Charter as part of her laws in 1989. In terms of the Post-Transition Constitution of the Republic of Burundi of 2005,³²⁵ the key human rights instruments are incorporated therein.³²⁶

This thesis argues that although reporting in terms of the ICCPR and other human rights instruments is crucial in the eyes of the international community, however, reporting requirements have been formalistic in Burundi due to lack of a higher degree of political will to submit or complete the universal periodic review reports on human rights on time. Taking an example of reporting in terms of the ICCPR,³²⁷ Burundi's compliance with the ICCPR is questionable because for a long time since the ratification of the ICCPR in 1990, Burundi's human rights record was first assessed under the universal periodic review in 2012. At the same time, impunity for past and current human rights violations remains unaddressed and the post-conflict government has failed to bring the perpetrators of human rights violations to justice.³²⁸

To violate the most basic human rights is to deny individuals their fundamental moral entitlements. In other words, it is to treat these individuals as if they are less than human and

³²² See Majekodunmi, B.; (1999) "Protection in Practice: The Protection of Children's Rights in Situations of Armed Conflict UNICEF Experience in Burundi" **UNICEF**, available at: <http://www.unicef-irc.org/publications/pdf/protection.pdf>. [accessed on 27/11/2012].

³²³ Per Blake, J., in *Ngirincuti's* case rape is a most horrific crime where a genuine victim deserves the utmost sympathy because it is used as an instrument of persecution in Burundi. See *Ngirincuti v Secretary of State for the Home Department*, *op cit* n. 12, par 16.

³²⁴ Muhorakeye, E., "The Battered Women of Burundi", **Radio Netherlands Worldwide** 9 November 2010, available at: <http://www.rnw.nl/africa/article/battered-women-burundi>

³²⁵ The Constitution of 2005.

³²⁶ The UDHR, International Bill of Rights, African Charter, CEDAW and CRC.

³²⁷ Pursuant to Article 40, State Parties must submit periodic reports on measures adopted to give effect to the rights under the ICCPR and on progress made in the enjoyment of these rights.

³²⁸ Amnesty International Report (2012) "Burundi Time for Change: A Human Rights Review". Available at: <https://www.amnesty.org/en/library/info/AFR16/003/2012/en>. [Accessed on 10/12/2012].

undeserving of respect and dignity. For instance, there are acts deemed “crimes against humanity”, these include genocide, torture, slavery, rape, enforced sterilization or medical experimentation, and deliberate starvation.³²⁹ Because the policies to deliberately violate people’s fundamental rights are sometimes implemented by governments, limiting the unrestrained power of the state is an important part of international law. Although Burundi has domesticated international law, this thesis emphasises that the fundamental laws that prohibit the various crimes against humanity are the principle of non-discrimination and the notion that certain basic rights must apply universally.

The ICCPR of 1966 entered into force on 23 March 1976 and Burundi acceded to the ICCPR on 9 May 1990. Unlike regional treaties and conventions, the ICCPR does not contain an explicit provision requiring states to prosecute and punish any violations of the rights and freedoms enumerated by the Covenant. It thus does not seem either to forbid the granting of amnesties or other forms of immunity. However, Article 2 (3) (a) provides “that State Parties to the Covenant must ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy”. Some scholars have argued that the right to an effective remedy includes an obligation to investigate the violation and to prosecute the perpetrators.³³⁰

It has been argued further that the states’ duty to ensure the rights provided for in the Covenant implies states’ obligation to prosecute persons who violate the ICCPR. By falling short of this obligation, States Parties in practice do create and promote a culture of impunity, making it impossible to ensure adherence to and respect for human rights in general.³³¹ This practice adversely affect the objectives of the other international, regional legal instruments such as the UDHR, Genocide Convention, Torture Convention, ICESCR, CEDAW, CRC, ICC Statute, African Charter and the Constitutive Act (CA) of the African Union.

Despite the challenges associated with gross violations of human rights and mass killings, Burundi as a signatory to the UN and regional human rights instruments, has a duty to respect

³²⁹ Paust, J.J; Bassiouni, M. C, Scharf, M.P; Gurule, J. Sadat L., Williams, B. and Williams, S.A. (2001) **Human Rights Module: On Crimes Against Humanity, Genocide, Other Crimes Against Human Rights, and War Crimes**, Carolina Academic Press, at p. 130.

³³⁰ Russell-Brown, S., L.; (2003) “Out of the Crooked Timber of Humanity: The Conflict Between South Africa’s Truth and Reconciliation Commission and International Human Rights Norms Regarding Effective Remedies” **Hastings International and Comparative Law Review** 227-263 at pp. 254-255.

³³¹ Reisman, W.M.; (1996) “Legal Responses to Genocide and Other Massive Violations of Human Rights Law and Contemporary Problems” **Yale Law School** at pp. 75-77.

the political, economic, social, cultural, environmental and developmental rights of her people in line with the human rights theory. The Preamble to the African Charter, among other things, put emphasis on the right to development by stipulating that it is vital to pay particular attention to all rights because of their interdependency.³³² Article 22, which provides for the normative basis of the right to development, for instance, states that:

All peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

The inclusion of this provision in the African Charter is significant in enriching the contents of the right to development and its jurisprudence. The African Commission on Human and Peoples' Rights (African Commission), in its landmark decision in the case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* held that:

The deprivation of the right of people of DRC to freely dispose of their wealth and natural resources was linked to other violations of rights to their economic, social and cultural development. States have a duty to individually or collectively ensure the exercise of the right to development guaranteed under article 22 of the African Charter.³³³

The right to development as stated in the *DRC* case has a link to other rights. This right is included in Burundi's Constitution of 2005.³³⁴ The Preamble and Article 52 of the Constitution, *inter alia* re-iterate the UN human rights instruments and African Charter's core principles so as to ensure that the rights enshrined therein are respected in order to improve the living standards and sustainable development of Burundi.

Burundi as a member of various international and regional organizations, including the UN, the World Trade Organization (WTO), the AU, the African Development Bank (ADB), the Common Market for Eastern and Southern Africa (COMESA), the Free-tariff Zone of Eastern and Southern Africa (FZESA), and the East Africa Community (EAC)³³⁵ has a duty to help Burundi to realize a just and lasting peace, based upon the democratic principles and sustainable economic development. The *DRC* case has confirmed that Burundi routinely act contrary to the human rights theory. Although the UN Charter, according to Hathway, has ushered a new

³³² Santos, B.S., (1995) **Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition**: Routledge: New York at p. 357.

³³³ *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) par. 95.

³³⁴ Article 52 provides that everyone is entitled to obtain the satisfaction of economic, social and cultural rights indispensable to the dignity and to the free development.

³³⁵ <http://www.lexisnexis.com/hottopics/lnacademic/> [accessed on 28/04/2011].

era of universally accepted human rights norms,³³⁶ Burundi has not been willing to live up to her promises because of the continuing patterns of gross human rights violations.

Burundi's Constitution of 2005 stipulates that there must be a legal framework in which human rights must be protected and promoted, this means, to prioritize human rights reform strategies by ensuring justiciable social and economic development. While the Constitution emphasises on the importance of observing and promoting human rights, the question remains as to how sustainable social, political and economic development should be implemented in Burundi, a country that has suffered severely from gross violations of human rights and poverty for many years.

At regional level, Burundi's conduct is contrary to the objectives of the AU. Article 3 of the Constitutive Act sets the objectives of the African Union (AU) as follows:

- encourage international co-operation, taking due account of the UN Charter and the UDHR;³³⁷
- promote peace, security, and stability on the continent;³³⁸
- promote democratic principles and institutions, popular participation and good governance;³³⁹
- promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;³⁴⁰
- establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;³⁴¹
- promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;³⁴²
- promote co-operation in all fields of human activity to raise the living standards of African peoples.³⁴³

This thesis critically analyses the extent to which Burundi as a member state to AU has put into practice the objectives articulated above with particular reference to respecting the

³³⁶ Hathway, J.C.; (2005) **The Rights of Refugees under International Law**, Cambridge University Press, Edinburgh at p.16.

³³⁷ Article 3 (e).

³³⁸ Article 3 (f).

³³⁹ Article 3 (g).

³⁴⁰ Article 3(h).

³⁴¹ Article 3(i).

³⁴² Article 3(j).

³⁴³ Article 3(k).

principles of democracy, human rights, the rule of law and good governance,³⁴⁴ a complete condemnation and rejection of unconstitutional changes of governments.³⁴⁵

Mboya, while referring to the right to intervention, has argued that to a large extent, the CA has not been put into practice as reflected only in few instances.³⁴⁶ Although the AU has deployed peace-keeping missions in Burundi and other African countries, Williams has observed that provided *coup d'états* are prohibited, massive electoral deceit or serving presidents changing the constitutions in order to extend their terms have not obtained the same reaction from the AU.³⁴⁷ Mboya went further and stated that because many members took power through coups, this puts the AU in a tricky position as under the cover of the CA lies the conflict between the doctrine of state sovereignty and the values of respecting fundamental human rights, rule of law, good governance and democratic principles.

Burundi was among the AU member states which adopted the CA in July, 2000. During that time the country was under military regime (Buyoya's second *coup d'état* 1996-2003). According to Ndarubagiye, Buyoya came back to power through another coup in order to prevent the investigation relating to the 21 October 1993 coup and the subsequent assassination of President Ndadaye.³⁴⁸ Ironically Buyoya is one of the members of AU High Level Implementation Panel (AUHLIP) for Sudan peace building, who advised the parties on the importance of immediate steps to implement the Kadugli Security Agreements.³⁴⁹ Buyoya emphasized that there should be no unilateral action taken by either party that might negatively affect the security or political situation in the Abyei area.³⁵⁰ He was assured by the Sudanese leaders (President Salva Kiir and Vice President Ali Osman Taha) that neither government would include an unconditional claim to Abyei in its draft national Constitution. In this regard, both parties re-iterated their commitment to the Comprehensive Peace Agreement (CPA). On the basis of these commitments, the AUHIP understood that the status of Abyei would remain

³⁴⁴ Article 4(m).

³⁴⁵ Article 4(p) and Article 23 (2).

³⁴⁶ Mboya, T.; (2009) "Conflict Between State Sovereignty and the Right of Intervention Under the Constitutive Act of the African Union" **African Insight** at p. 89.

³⁴⁷ See Williams, P.D.; (2008) "The African Union's Emerging Security Culture: Options for US Policy Makers" **Center for Strategic and International Studies** at p. 2. Williams has argues that respecting human rights, upholding rule of law and safeguarding democratic principles constitute an integral part of the Constitutive Act of the AU, but the same principles are yet to be embraced by the majority of African leaders.

³⁴⁸ Ndarubagiye, *op cit* n. 9 at p. 89.

³⁴⁹ See Sudan Tribune "African Panel Says None of the Sudanese Parties Should Undertake Unilateral Action in Abyei". Available at: www.sudantribune.com/African-Panel [accessed on 30/11/2012].

³⁵⁰ <http://www.au.int/en/sites/default/files/Press%20Release%20on%20Abyei-8-9-1-1.pdf>. [accessed on 08/05/2011].

unchanged until a political settlement was agreed to. Recently Buyoya has been appointed as the AU High Representative for Mali and the Sahel Region to resolve crisis in Mali.³⁵¹

Using Buyoya's commitment to resolve Sudanese and Mali conflicts, it remains to be seen whether the same will happen in Burundi because Buyoya was a signatory to the Arusha Peace and Reconciliation Agreement in 2000. But to - date the agreement has not been put into practice in order to comply with the objectives of that accord.

The Constitution of 2005 recognises the role of international and regional human rights instruments.³⁵² These instruments have the force of law capable of being relied upon at domestic and international levels. In line with Article 19, policy-formulation and law-making on human rights, human security, political and socio-economic development in Burundi are enshrined. Article 274 stipulates further that the National Monitoring Unit for a Prevention and Eradication of Genocide, War Crimes and Crimes against Humanity (Monitoring Unit) must be established to monitor and deal with genocide related cases or human rights abuses. This is in line with Article 5 of the Genocide Convention that requires the Contracting Parties to enact necessary legislation in accordance with their constitutions in order to give effect to the provisions of the Genocide Convention in particular to provide effective penalties for persons guilty of genocide or any of the other acts as provided for in Article 3.³⁵³

Article 6 of the Genocide Convention stipulates that persons charged with genocide or any other crimes listed in Article 3 must be prosecuted by the national tribunal of the State Party in which the crime was committed or by an international tribunal which has jurisdiction. In Burundi, the issues relating to the commission of the crime of genocide especially during the military regimes have been approved by authors from different perspectives and are rarely subject to scholarly analysis as it has been with the genocide of Rwanda. That means, acknowledging the crime of genocide without proper investigation and prosecution is a *lacuna* in law.

³⁵¹ See African Press Organisation "The African Union Appoints Mr Pierre Buyoya as its High Representative for Mali and the Sahel" www.netnewspublisher.com. [accessed on 26/10/2012].

³⁵² Article 19 of the Constitution of 2005.

³⁵³ Article 3 provides that the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) (e) Complicity in genocide.

2.4.3 Politically motivated killings in Burundi

Literature reveals that politically-motivated killings which can amount to the crime of genocide has been committed in Burundi since independence in 1962.³⁵⁴ Gahutu has elaborated on the persecution and elimination of *Hutus* and moderate *Tutsis* in 1961-1965 and during the military regimes from 1966-1993.³⁵⁵ Although Bentley and Southall were unclear as to whether those killing amounted to genocide, yet they accept that Burundi had endured mass killings bordering on genocide that have gone unpunished.³⁵⁶ Krueger and Krueger have stressed that Burundi has had a history of torture and an unhappy legacy of assassinations of leaders and civilians by the *Tutsi*-led army.³⁵⁷ Ndagijimana, a Rwandese lawyer who witnessed *Hutu* students' mass killings at the University of Burundi premises in 1972 has argued that "a person does not need to be a criminal law expert to understand the genocide in Burundi".³⁵⁸ The author recalls how government, police and army officials drew up a list of persons belonging to *Hutu* ethnic group and concludes that this act culminated into the deaths of thousands of civilians, including 700 university students who were murdered within a period of three months in 1972.³⁵⁹

The following table illustrates few examples of politically motivated killings in respect of which an inference of genocide can be drawn. Table 2 below highlights prominent *Hutu* and moderate *Tutsi* leaders who were killed because of fighting against injustices. The list is not limited to the massacres of politicians, trade unionists, religious leaders, business people and civilians between 1961 and 1969, the genocide of 1972, the Ntega and Marangara genocide of 1988, the genocide of 1993 and others.

Table 2: Examples of Politically Motivated Killings

Title position held	Name & Surname	Ethnic group	Year of Death
King	Ntare V Charles Ndizeye	<i>Tutsi</i>	1972
Speaker of the Parliament/ Vice Speaker	Paul Mirerekano	<i>Hutu</i>	1965
	Potien Karibwami	<i>Hutu</i>	1993
	Gilles Bimazubute	<i>Tutsi</i>	1993
President	Melchior Ndadaye	<i>Hutu</i>	1993
	Cyprien Ntaryamira	<i>Hutu</i>	1994

³⁵⁴ Ndarubagiye, *op cit* n. 9 at p. 37.

³⁵⁵ Gahutu, *op cit* n. 21 at pp.17- 56.

³⁵⁶ Bentley and Southall, *op cit* n. 23 at p. 31.

³⁵⁷ Krueger and Krueger, *op cit* n. 22 at p. 24.

³⁵⁸ Ndagijimana, J.; (2005) *Bujumbura Mon Amour*, La Pagaie, at p. 62-66. Available at www.burundibwacu.info [accessed on 10/12/2012].

³⁵⁹ Ndagijimana, *ibid* at p. 62-66.

Prime Minister	Louis Rwagasore	<i>Tutsi</i>	1961
	Joseph Cimpaye	<i>Hutu</i>	1965
	Paul Ngendandumwe	<i>Hutu</i>	1965
	Joseph Bamina	<i>Hutu</i>	1965
Minister	E. Nigane	<i>Hutu</i>	1965
	Ignace Ndimanya	<i>Hutu</i>	1965
	Andre Baremera	<i>Hutu</i>	1965
	Emile Benyuje	<i>Hutu</i>	1965
	Ferdinand Bitariho	<i>Hutu</i>	1965
	Zacharie Ntirica	<i>Hutu</i>	1965
	Andre Ruramusura	<i>Hutu</i>	1965
	Marc Ndayiziga	<i>Hutu</i>	1972
	Pascal Bubiriza	<i>Hutu</i>	1972
	J.C. Bandyambona	<i>Hutu</i>	1972
	Barnabe Kanyaruguru	<i>Hutu</i>	1972
	Martin Ndayahoze	<i>Hutu</i>	1972
	Juvenal Ndayikeza	<i>Hutu</i>	1993
	Ernest Kabushemeye	<i>Tutsi</i>	1995
	Cyriaque Simbizi	<i>Hutu</i>	1994
	Bernard Ciza	<i>Hutu</i>	1994
Intellectuals and army officers	23 <i>Hutu</i> intellectuals and army officers were accused of plotting a coup, where confessions were extracted under torture	<i>Hutu</i>	1968-1969
Provincial Governors	Joachim Nurwakera	<i>Hutu</i>	1993
	Anglebert Sentamo	<i>Tutsi</i>	1993
	Evariste (Governor of Bubanza Province)	<i>Hutu</i>	1993
	Fidele Muhizi	<i>Hutu</i>	1993
	Fidele Muhizi	<i>Hutu</i>	1995
	Malachie Surwavuba Deo (Governor of Kirundo Province)	<i>Hutu</i>	1995

Source: (Ndarubagiye 1995, Gahutu 2000, Krueger and Krueger 2007 and <http://www.africa.unpenn.edu/NEH/bhistory.htm>. accessed 2011/05/09).

Admittedly, there are many other *Hutus* and moderate *Tutsis* who have been killed whose names are not featured in the table above. For example, trade unionists and politicians who were killed and others tortured and buried alive in 1962, religious leaders like Father Gabriel Gihimbare who was assassinated in 1965; he was the first Roman Catholic *Hutu* Bishop in Burundi who was appointed to replace Archbishop Grauls, a Belgian Bishop based at Gitega, the massacre of 10,000 *Hutus* of 1965, the 1972 genocide where 300,000 *Hutus* were killed, Ntega and Marangara, where the *Tutsi* dominated army killed more than 50,000 *Hutus*, the massacre of 20,000 *Hutus* of 1991³⁶⁰ and an unknown number of deaths that occurred

³⁶⁰ <http://www.grandslacs.net/doc/0190.pdf>. [accessed on 04/05/2010.]

immediately after the assassination of President Melchior Ndadaye in 1993, the estimated number of 150, 000 people is generally accepted.³⁶¹

It is submitted that owing to the credible evidence of the politically motivated and systematic mass killings of *Hutus* according to authors like Ndarubagiye, Gahutu, Bentley and Southall and Krueger and Krueger as mentioned above, impunity continues to go on unabated because the perpetrators have not been taken to courts of law as a way of encouraging accountability. The post-conflict government of Nkurunziza and the international community have done nothing to prosecute the perpetrators of these mass murders and other heinous international crimes committed in Burundi as it was the case of Rwanda. Schabas has opined that the fundamental difficulty with genocide prosecutions is a practical one.³⁶² In most states where the crime of genocide has been committed, prosecution have not been instituted because the perpetrators remain in power or have influence due to post genocide social, economic and political *modus vivendi*³⁶³ as demonstrated in Kenyan and Libyan cases which is built upon forgetting the crimes of the past.³⁶⁴ This study accepts that genocide is an international crime which attracts universal jurisdiction and conceived as *sine qua non*³⁶⁵ if the perpetrators are to be prosecuted and punished.

This thesis limits itself to Burundi's case and argues that problems of mass killings call for further investigation to ensure accountability for crimes committed. It must be emphasised that although there is no prosecution for genocide that has taken place in Burundi, yet, the requirements of genocide as set out in the case of *Prosecutor v Kayishema* by the ICTR have been met, namely:

- Mental element or specific intent to destroy in whole or in part a particular group. Sometimes it is not easy to establish it directly but may be inferred through a systematic nature of massacres and the scale of cruelty of the killing.³⁶⁶
- Discrimination or singling out of a specific group identified at the symbolization stage,

³⁶¹ Krueger and Krueger, *op cit* n. 22 at p. 41.

³⁶² Schabas, W.A., (2009) **Genocide in International Law: The Crime of Crimes**. Cambridge: Cambridge University Press at p. 410.

³⁶³ A practical compromise or temporary agreement between contending parties pending a final settlement <http://www.thefreedictionary.com/modus+vivendi>. [accessed on 04/05/2010].

³⁶⁴ Schabas, *op cit* n. 362 at p. 410.

³⁶⁵ A causal connection that exists between a particular act and an injury when the injury would not have arisen but for the act, available at : <http://legaldictionary.thefreedictionary.com/sine+qua+non>. [accessed on 04/05/2010].

³⁶⁶ *The Prosecutor v Akayezu* Judgement 2 September 1998 para. 114.

- Physical element *in casu* the killing and causing serious bodily harm to the victims,³⁶⁷ and,
- Psychological impact due to widespread civilian attacks.

It is also admitted that the genocide of Burundi has complexities which can be regarded as obstacles militating against successful investigation and prosecution initiatives.

2.4.4 Broader interpretation of Burundi genocide claims

While there are complexities about Burundi's genocide which are not explicitly favoured in the eyes of international community, the Preamble to the Constitution of Burundi of 2005 reaffirms Burundi's resolve to put to end the underlying causes of ethnic and political violence, genocide and exclusion, bloodshed, insecurity and political instability which have plunged Burundi into unprecedented suffering and threaten prospects for economic development, equality and social justice. Article 48³⁶⁸ advocates for the supremacy of the Constitution whereby the legislative, executive and judiciary have to enforce it. Article 52 guarantees every citizen of Burundi the right to obtain the satisfaction of economic, social and cultural rights indispensable to dignity. However, unwillingness and inability to investigate and prosecute Burundi's genocide at national and international levels militate against upholding the requirements of the Constitution and international law.

The ICC Prosecutor can investigate only crimes in terms of Articles 13(a) and (c), if it is clear that the crime was either committed by a State Party national or on the territory of a State Party. The procedural law aspects of laying charges under the ICC may be subject to criticism because it is open to political interference. Thus, no investigation or prosecution may start or proceed for a period of twelve months after the UN Security Council for example, in a Resolution adopted under the UN Charter³⁶⁹ and has requested the ICC to that effect, the request in question may be renewed by the UN Security Council under the same conditions.³⁷⁰ As stipulated in the Rome Statute, the application of the Rome Statute and its rules unless otherwise provided, for under sub-rules 2 and 3, rule 162 and rules 164 to 169, "shall apply *mutatis mutandis*" to the ICC's investigation, prosecution and punishment of offences defined in Article 70.³⁷¹ Unless the context states otherwise requires, Article 87 and

³⁶⁷ *The Prosecutor v Kayishema* Case No. ICTR-95-1, Judgment (May 21, 1999) paras 290-291.

³⁶⁸ Under the Constitution of Burundi of 2005, any law which is not in conformity with the same is void.

³⁶⁹ Chapter VII of the UN Charter which deals with respect to threats to peace, breaches of peace and acts of aggression.

³⁷⁰ Article 16 of the ICC Rome Statute.

³⁷¹ Article 70 Article of the ICC Rome Statute specifies and empowers the Court over the offences against the administration of justice when committed intentionally:

1. The Court shall have jurisdiction over the following offences.

Rules 176 to 180 apply appropriately subject to the communications between the Court and State Party on matters relating to enforcement of sentences. Certainly, the procedural technicalities may be viewed as barriers towards dealing with genocide-related cases like Burundi.

Before the Holocaust, protection of human rights was understood as the internal responsibility of a nation. However, after the years of outrageous cruelty, consensus emerged that the protection of human rights and the prevention of genocide had to be the responsibility of the international community. The Genocide Convention does more than define the crime because it holds State Parties, like Burundi, accountable and responsible for preventing and punishing genocide. It does not, however, require military intervention within or outside of sovereign borders. While there have been international efforts to punish genocide by establishing

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- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - (b) Presenting evidence that the party knows is false or forged;
 - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
- 2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
 - 3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
 - 4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
 - (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

international tribunals and the ICC, equally, there have been no cases under international humanitarian and human rights laws that have effectively managed to prevent genocide. This is the dilemma still facing contemporary Burundi and the rest of the world.

The word genocide implies a level of wickedness associated with other crimes. Sometimes it expresses the actions that are based not only on financial or military gains or reprisal, but also on hatred for another group in order to eradicate that group completely. However, the crime of genocide has a very specific legal meaning. In defining the word genocide, courts or judicial organs are carefully guided by several elements that must be met before the Genocide Convention can be applied. Following the narrow definition of genocide, it was adopted by the UN Security Council in establishing the statutes of the two *ad hoc* tribunals (the ICTY and ICTR in 1993 and 1994 respectively and by the states drafting the Rome Statute of the ICC in 1998).

Scholars like Henham and Behrens often continue to underline the difficulty of applying genocide's specific legal definition and the inconsistencies and complications inherent thereunder. Henham and Behrens, for example, have stated that political and economic pressures have been associated with international criminal justice.³⁷² As a result, the word genocide has been co-opted by politicians, the media in the public scene, who frequently consider the legal definition of genocide to be old-fashioned or overly legal.³⁷³

Given the level of disapproval associated with genocide, it is imperative to point out that any determination of whether or not genocide has been committed in Burundi must be done with great care. For example, when the judges of the ICTY, the ICTR or the ICC were asked to determine if the actions of accused person(s) amounted to genocide (or related offences such as conspiracy and attempt), it was their job to apply the law as it stands. That means, they ought not to concern themselves with how the general public might define the crime or, indeed, how the judges themselves would like to see it defined in the name of justice. This is in line with the positivist approach of applying the law as it is, and not as it ought to be.

While opinions may differ as to whether positivist judges at the national level who overrule national laws may, in some instances, be a good thing, it may not be credible to argue that positivism is the best approach in the case of defining a crime. To punish an accused for conduct which was not illegal at the time of the crime would be a violation of the fundamental

³⁷² Henham, R.; and Behrens, P.; (eds) (2008) **The Criminal Law of Genocide: International, Comparative and Contextual Aspects**, at pp. 444-448. Available at: <http://www.law.leiden.edu/organisation/publiclaw/publicinternationallaw/staff/larissa-van-den-herik.html>.

³⁷³ Henham and Behrens, *ibid*.

law and a non-derogable human rights norm of *nullem crimen sine lege*, as well as, any sensible notions of fairness and justice.

However, what emerges from other approach of natural law is a recognition of the judge's approach in the ICTY and ICTR *ad hoc* tribunals to attempt to categorize crimes as genocide or crimes linked thereto in spite of the limitations inherent in the Genocide Convention definition. As articulated in the Statutes of the ICTY and ICTR, the natural law approach can be employed to broaden the Convention's definition. A good example of such expansion is demonstrated in the *Akayesu's* case by the ICTR where crime of rape was equated to genocide.

There are two approaches which have been used by judges of the *ad hoc* tribunals. First, the judges offer a creative interpretation of the Genocide Convention's definition frequently based on a difficult and selective interpretation of the *travaux préparatoires*. Secondly, the judges rely on the accused perpetrators being bound by customary international law which, they argue, as progressed and developed beyond treaty law to include obligations *erga omnes* and peremptory norms of *jus cogens*.

The natural law approach, therefore, suggests a broad interpretation that can be relevant to Burundi's case because neither positivist nor natural law schools of thought may stand on its own. That is why the research findings in this study, for example, have favoured both prosecution and truth and reconciliation within the parameters of national and international laws.

To address human rights issues in Burundi, a proper investigation and prosecution of international crimes including war crimes, crimes against humanity and aggression must be considered and viewed as major components of transitional justice. It must be emphasized that transitional justice must not be viewed as a 'special' kind of justice, but rather be considered as an approach towards achieving true justice in transition from armed conflicts and/or state repression by encouraging openness and accountability for the past wrongs including redressing the victims. Thus, transitional justice must provide for recognition of the rights of victims and promote trust among Burundi and strengthens democracy, rule of law and good governance principles.

The failure to deal with impunity in Burundi whether individually or collectively has long term implications in Burundi society, a thread that runs throughout this thesis.

2.4.5 Implications of narrow interpretation of genocide in Burundi

There are implications associated with genocide and human rights violations in Burundi. These include an ongoing fear of repression, trauma and lack of trust among Burundi including loss of self-esteem and dignity as shown in the following examples: The research findings have revealed also that some Burundi refugees who opted for local integration in exile, still have memories of genocide incidents and concluded that it is not safe to go back to Burundi because no one has been brought to justice. For example, one refugee respondent from Old Refugee Camp in Tanzania stated the following:

I do not feel safe to go back to Burundi. People should change their minds through education, seminars and media about bringing peace by talks rather than killing. Politicians should be at forefront to discourage their members from resorting to killings. Genocide cases should be dealt with thoroughly including those that happened in 1960s, 1970s, 1980s and 1990s as they still have connection with the current politically motivated killings.³⁷⁴

Equally, violation of the constitutional rights such as the right to life, freedom of expression, movement, dignity, privacy, and socio-economic rights during Burundi conflicts have been adversely affected by ongoing armed conflicts. For example, the crimes of rape and sexual violence against women as underscored in the *Ngirincuti* case, not only have caused grave bodily harm to the victims, but also their social standing in the community which has psychological impact for the current and future generations.

Barundi and non-Barundi respondents in this study have demonstrated a considerable positive attitude towards working together to bring the perpetrators of genocide and other international crimes to book so as to advance the cause for human security, political stability and respect for human rights. However, lack of political will to prevent and intervene in Burundi's case, inconsistent judicial interpretation of genocide, denial of genocide and the international community's reluctance to respond vigorously to genocide in pre- peace agreements period have diminished the meaning of genocide in Burundi. Likewise, there is an overlap between the crime of genocide and crimes against humanity which can hinder the prosecutions and encourage denial of genocide.

2.4.6 The overlap between genocide and crimes against humanity

The *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda (ICTR) have resisted accepting the view that the crime of genocide overlaps with crimes against humanity. For example, in the case of *Prosecutor v Kayishema and Ruzindana*³⁷⁵, the Trial Chamber of the ICTR opined that the correspondence between genocide and crime against humanity is

³⁷⁴ A refugee respondent in Ulyankulu who still recall the genocide incidents.

³⁷⁵ (Case No ICTR-95-1-T) Judgement 21st May, 1999 par. 89.

not perfect. It stated further that crimes against humanity must be directed against a civilian population whereas genocide is directed at 'members of a group' without further clarification.

The ICJ on the other hand, in its *Advisory Opinion on Reservations to the Genocide Convention* held that:

The origins of the Convention show that it is the intention of the United Nations to condemn and punish genocide as a crime under international law involving a denial of human rights which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the UN. The first consequence arising from this conception are the principles underlying the Convention which are recognized by civilized nations as binding on states even without any conventional obligation.³⁷⁶

The ICJ has emphasized the idea of universal jurisdiction. The sentiment in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* was echoed in the case of *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*³⁷⁷ and the Case Concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.³⁷⁸ This statement is often cited as judicial recognition of the prohibition of genocide under international criminal law.

Criminal conduct in many countries including Burundi tend to point towards the highest levels of government. Hence, human rights law cannot be promoted because the states are terrified by the prospect of prosecution of their own leaders and military personnel either by international or municipal courts, because of lack of political will and conflict of interests as demonstrated in the Kenyan and Libyan cases cited earlier; on unwillingness and inability to prosecute government officials. Based upon these countervailing factors, the possibility of prosecuting the perpetrators is very slim because the states prefer to insist on the strictest conditions and favour the narrowest definitions of the crimes under the Genocide Convention. What is important is that the law on genocide is a broader aspect of international human rights law because the prohibition of the ultimate threat to particular ethnic or other groups is at the core of the values protected by human rights instruments and norms of customary international law. Although the crime of genocide is narrowly defined, extra-ordinary obligations are imposed upon the states to assume its prevention and punishment.³⁷⁹ Because of the *lacunae* in the human rights and

³⁷⁶ In the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Reports 16 p. 23.

³⁷⁷ [1996] ICJ Reports 226 par. 31.

³⁷⁸ Judgement of 26th February, 2007.

³⁷⁹ Schabas, *op cit* n. 362 at p.3.

humanitarian laws such as selective morality in dealing with cases relating to gross violations of human rights and genocide and the overlaps between genocide and crimes against humanity, another theory, "the denial theory," has emerged.

2.5 THE COMPLEXITIES OF HUMAN RIGHTS VIOLATIONS IN BURUNDI

Although Burundi has experienced systematic brutalities of mass killings amounting to genocide, unlike the Rwandan genocide of 1994, the key difference is that in Burundi the *Hutu*, not *Tutsi*, were targets of extermination especially in 1960s-1990s period as stated earlier. It must be stressed that unless perpetrators of mass killings and gross human rights violations are held responsible under national and international laws, the efforts to bring peace, stability, stop these killings and protect and promote human rights will always be hampered.

Being a State Party to the UN, AU and other regional institutions, it is argued that Burundi does not conduct itself according to the International Bill of Rights. Article 5 of the Genocide Convention for example states that State Parties are obliged to enact legislation that criminalize genocide and associated acts and to punish the perpetrators. The Gatumba massacre case of 2011, for example, demonstrates the pattern of mass killings and how these killings have been entrenched in Burundi society.

Some scholars, according to Ndayizigiye, present Burundi's ethnic differences as a primary factor for animosity, massacres, genocide and daily violence.³⁸⁰ In a broader understanding, social, economic and political structures still carry the legacies of discrimination based on ethnicity, political parties' affiliation, gender and regionalism. Additionally, the Gatumba massacre of 18 September, 2011 is one of the incidents that portray a pattern of gross violation of human rights and genocide in Burundi rooted in ethnic hatred and greed.³⁸¹ However, it must be acknowledged that the casual link to Burundi's conflicts is a complicated one.

Although Burundi's Constitution and Penal Code criminalises genocide, no perpetrators have been indicted or prosecuted for international crimes committed in Burundi or outside Burundi

³⁸⁰ Jean Berchmans Ndayizigiye, Paper Prepared for Round Table 1 of the 2005 Workshop on Humiliation and Violent Conflict, Columbia University, New York, December 15-16, 2005. <http://www.humiliationstudies.org/documents/NdayizigiyeNY05meetingRT1.pdf>. [accessed on 15/09/2011].

³⁸¹ See generally, Human Rights Watch "Burundi: Investigate Deadly Bar Shooting", September 20, 2011 <http://www.hrw.org/news/2011/09/20/burundi-investigate-deadly-bar-shooting> . Horowitz, S. A.; (2005) *From Ethnic Conflict to Stillborn Reform: The Former Soviet Union and Yugoslavia* Texas A & M University Press, Fearon and Laitin 2003 cited in Raleigh, C. (2007) *The Political Geography of Civil war: Insurgencies in Central Africa* : University of Colorado at Boulder.

as was the case of Rwanda, Chile, Guatemala or Sierra Leone. The core facts common to various accounts can be summarised in the incidents of systematic mass murders of *Hutu* and *Twa* ethnic groups (1960s, 1972, 1988 and 1993 mass killings), and mass killings in form of reprisals and counter-reprisals. Some scholars have suggested that the current government of Burundi has made significant achievements in terms of judicial reform, reconstruction initiatives, and social services.³⁸² Others, to the contrary, assert that gross violation of human rights claims have not been dealt with the necessary rigour and the culture of impunity has been ossified as a result.

2.6 LESSONS FROM THE AFRICAN HUMAN RIGHTS COMMISSION, BURUNDI AND UK COURT DECISIONS

Vrancken and Killander, in Govindjee and Vrancken, have stated that at common law, a person who approaches a court for relief is required to have an interest in the subject matter of the litigation in the sense of being personally adversely affected by the alleged wrong.³⁸³ Other authors like Currie and de Waal³⁸⁴ agree on this view. It is submitted that the universality of human rights theory is relevant in the contemporary world because many states regularly proclaim their acceptance and adherence to the norms articulated in the UDHR. Charges against human rights violations are among the strongest legal actions under customary international law. If a person (natural or juristic) is threatened or denied a basic human right according to Taiwo, s(he) has a *locus standi* or can institute a legal claim in the court of law in order to challenge the existing institution's practice that does not comply with respecting and protecting human rights.³⁸⁵

To guarantee and promote the enjoyment of human rights, the constitutions of the states must empower the courts to enforce and protect human rights.³⁸⁶ To the contrary, Bentley and Southall, while referring to Burundi's situation, have submitted that, [t]he Constitutional Court of Burundi (CCB) which is the highest court in the country tend to undermine its judicial obligation which result into the constitutional crisis leading to human rights violations.³⁸⁷ This is contrary to Articles 225 and 228 of the Constitution that state, *inter alia*, that the Constitutional

³⁸² International Crisis Group 7 February 2011, Office of High Commissioner for Human Rights in Burundi Report of 2010-2011.

³⁸³ Govindjee, A.; and Vrancken, P.; (2009) **Introduction to Human Rights**: LexisNexis: Durban, at pp. 251- 257.

³⁸⁴ Currie, I. and de Waal, J. (2005) **The Bill of Rights Handbook**: Juta and Company: Landsdowne at p. 80.

³⁸⁵ Taiwo, E. A.; (2009) "Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A Need for a More Liberal Provision" **African Human Rights Journal** at p. 547.

³⁸⁶ Taiwo, *ibid* at p. 547.

³⁸⁷ Bentley and Southall, *op cit* n. 23 at p. 51.

Court (*la Cour Constitutionnelle*) has jurisdiction over constitutional matters and must respect the Constitution including the Charter of Fundamental Rights, the state organs and other institutions.

This study stresses that judicial transformation in Burundi is required. Transformation generally means a change from the state of affair that existed previously to a new one. Judicial transformation in Burundi entails dealing with the negative attitude of the previous colonial and military regimes' judiciary. In other words, judicial transformation in the case of Burundi requires bringing candidates for appointment from other ethnic grouping. Currently, judiciary is dominated by *Tutsis*. Therefore, the appointment of judges must be fair and transparent without the interference of executive and legislative organs of the state. Likewise a diverse judiciary is required in terms of gender, minority and ethnic group representation. The judiciary must be constitutional inspired and consider international norms especially in dealing with human rights cases. Furthermore the Burundi judicial system efficient and responsive to the needs of Barundi by facilitating the access to justice and promotion of human rights.

This thesis examines the lessons which can be learnt from the African Human Rights Commission, Burundi and the Courts' decisions as stated hereunder.

2.6.1 Democratic Republic of the Congo v Burundi, Rwanda and Uganda

The African Human Rights Commission (AHRC) has set a good example in abiding with the principles of human rights theory. In the case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*,³⁸⁸ the AHRC held that the respondent states violated the African Charter on Human and People's Rights.³⁸⁹ In elaborating its findings, the Commission held that the illegal exploitation of DRC's natural resources contravened Article 21 of the African Charter and this includes that violation of DRC's citizens' right to economic, social and cultural development.³⁹⁰ As underscored by Mansfield, regardless of any military achievements in the *DRC's* case, it is clear that military operations have had a devastating impact on the civilian population and the deterioration of human rights.³⁹¹

³⁸⁸ Refer *Republic of the Congo v Burundi, Rwanda and Uganda*, *op cit* n. 305.

³⁸⁹ Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter on Human and Peoples' Rights.

³⁹⁰ Article 22 of the African Charter.

³⁹¹ Mansfield, J.; (2009) "Prosecuting Sexual Violence in the Eastern Democratic Republic of Congo: Obstacles for Survivors on the Road to Justice" **African Human Rights Journal** at p. 374.

2.6.2 *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*

In the case of *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*,³⁹² the AHRC ruled that the death sentence based on an unfair trial did not conform to international standards. By refusing Mr Gaëtan Bwampamye (the applicant) his legal representation to plead his case in the Criminal Chamber of the Ngozi Court of Appeal, the court did not comply with the African Charter on Human and People's Rights and all the relevant international instruments. The judgment which was handed down on 25 September 1997 by the Ngozi Court of Appeal in sentencing Mr Gaëtan Bwampamye to death was confirmed on 5 October of the same year by the Supreme Court of Burundi (SCB).

The court, in rejecting the right to legal representation, held:

[T]he law implies no obligation on the part of the judge to nominate a lawyer, though he may do so whereas in the case under consideration, the accused had always been assisted by a lawyer and that they had appeared together at the public sitting. In view of such situation, the appellant had no reason to claim that the judge should appoint a lawyer for him since he already had one who had performed all [the] essential functions of a lawyer for him.

Rejection of legal representation in the *Bwampamye's* case did not comply with the common law principle of *audi alteram partem*. As a result, the accused was denied his rights to a fair hearing in terms of the rules of natural justice. The right to equal treatment before the courts of law, especially in a serious criminal matter relating to death penalty, demands that both defence and prosecution be accorded an equal opportunity to prepare and present their pleas relating to the indictment during the trial. In others words, prosecution and defence parties should argue their cases before the court on an equal footing.

The African Human Rights Commission, for instance, has confirmed that the right to a fair trial involves the fulfilment of certain objective criteria, including the right to equal treatment. The right to defence by a lawyer, especially where this is called for in the interests of justice as well as the obligation on the courts and tribunals to conform to international standards, is crucial in order to give a fair trial to both parties.³⁹³ On an application to the AHRC, the Commission found that the court *aquo* and the appellate court in Burundi violated Article 7(1) (c) of the African Charter.³⁹⁴ Relying upon the *ratio decidendi* in *Bwampamye's* case, the Commission urged the government of Burundi:

³⁹² (2000) AHRLR 48 (ACHPR 2000).

³⁹³ *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000) par. 27.

³⁹⁴ Article 7(1) (c) of the Charter states that every individual shall have the right to have his cause heard. This comprises among other things the right to defence, including the right to be represented by counsel of his choice.

- To report its findings to the parties concerned and to the Assembly of Heads of State and Government of the AU.³⁹⁵
- To draw all the legal consequences of this decision; and to take appropriate measures to allow the re-opening of the file and the re-consideration of the case in conformity with the laws of Burundi and the pertinent provisions of the African Charter on Human and Peoples' Rights.³⁹⁶
- To bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter.³⁹⁷

The right to defence in the *Bwampamyé's* case has implied that at each stage of the criminal proceedings, the accused and his legal representative must be able to reply to the indictment before the court arrives at its decision, even when it is contrary to established procedures.

2.6.3 Public Prosecutor v Minani

In the case of *Public Prosecutor v Minani*,³⁹⁸ the respondent Jean Minani, was accused of the murder of one Lieutenant Colonel Lucien Sakubu, contrary to Article 144 of the Criminal Code, Book II. The evidence produced to the court by the prosecution side was obtained through torturing the defendant. The acts of torture were confirmed by delegates of Amnesty International who visited the cells of the Special Investigation Brigade (BSR). A document authenticated by a lawyer and addressed to the Criminal Chamber confirmed this torture and it was agreed to send photographs proving the acts of torture suffered by the accused.

The African Human Rights Commission held that the confession of the respondent obtained through torture by the Burundian police could not be used as evidence. This was against the requirements of the Torture Convention that obliges State Parties to ensure that education and information regarding the prohibition of torture are fully included in the training of law enforcement personnel, civil or military, medical, public officials and other persons who are involved in the custody or treatment of individuals subjected to any form of arrest, detention or imprisonment.³⁹⁹

³⁹⁵ *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* *ibid* at para. 32.

³⁹⁶ *Avocats Sans Frontières* *ibid* at para. 33.

³⁹⁷ *Avocats Sans Frontières* *ibid* at para. 34.

³⁹⁸ (2002) AHRLR 67 (BuCA 1998).

³⁹⁹ Article 10 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment of 1984.

2.6.4 Ngirincuti v Secretary of State for the Home Department

Apart from the legal principles established in *DRC, Bwampamye and Minani* cases stated above, impunity as indicated by the UK House of Lords in the case of *Ngirincuti v Secretary of State for the Home Department*⁴⁰⁰ continues to be prevalent in Burundi. In this case, the court held that rape, sexual assaults and other crimes, despite of their prevalence are rarely investigated. Human Rights Watch in upholding the principle established in *Ngirincuti*'s case took note of the mass killings and political intimidation carried out by the state's agents and stated that the government had done little to investigate incidents or bring perpetrators to justice.⁴⁰¹

Rape and sexual abuses, military activities, denial of legal representation and torture as discussed through case law in the cases of *Ngirincuti*, *Democratic Republic of the Congo*, *Bwampamye* and *Public Prosecutor v Minani* suggest that, Burundi is in default of its duty to respect and promote the fundamental rights and co-operate with other states to achieve the objectives of the UDHR and African Charter, that means to comply with the human rights theory. Violations of human rights and genocide are the most controversial issues in contemporary Burundi, and should be given priority in the national and international agenda to conform to the demands of transitional justice.

2.7 TRANSITIONAL JUSTICE

It is more than thirteen years after signing the APRA in 2000 and the subsequent peace and ceasefire agreements which were designed to move Burundi from civil war to democratic stability. To - date, Burundi has not established transitional justice mechanisms that aim at enhancing reconciliation or prosecuting those responsible for the crimes committed during the country's turbulent years.

The lack of mechanisms such as a truth and reconciliation commission and criminal tribunal has perpetuated a culture of impunity, allowing human rights violations and genocide to flourish. A truth and reconciliation commission which was proposed by the Arusha Peace Agreement remains the most problematic aspect of the current government.⁴⁰² Amnesty International has stressed that there has been limited progress in Burundi to ensure accountability for crimes under international law due to lack of political will.⁴⁰³ Although a judicial

⁴⁰⁰ [2008] EWHC 1952 (Admin).

⁴⁰¹ Human Rights Watch Report, 2009.

⁴⁰² Bentley and Southall, *op cit* n. 23 at p. XIV.

⁴⁰³ Vandeginste, *op cit* n. 67.

commission was established to investigate extra-judicial executions in 2012, no progress has been made, hence impunity continues to be a major challenge in the legal system of Burundi.⁴⁰⁴

The international community accepts that peace, justice and development are indispensable requisites of human freedom and, thus, calls for a more co-ordinated approach to post-conflict recovery.⁴⁰⁵ Today, transitions to democracy are typically launched through constitutional negotiations and anchored on efforts to fix broken state institutions or create new ones. These are settled strategies for addressing the political, social and economic causes of conflict in troubled societies. Powel has opined that transitional justice has been slow to appreciate or capitalize on the inherent potential of these political processes to further justice and peace.⁴⁰⁶

Barungi and Mbugua have submitted that peace building includes efforts directed towards promoting human rights and human security in war-torn societies such as Burundi.⁴⁰⁷ Addressing the root causes of the conflict through demilitarisation, democratisation and advocating justice in the form of social and economic development is one way of trying to heal society from injustices of the past.⁴⁰⁸ The authors posit that post-conflict reconstruction activities should aim at addressing the root causes of the conflict in order to end the pervasive culture of violence and conflict. Goti concurs with Barungi and Mbugua and avers that political means of exposing the past violence in order to establish responsibility and accountability are unavoidable.⁴⁰⁹ In Burundi, this search for a just and comprehensive resolution or search for an end to the past violence remains elusive.

⁴⁰⁴ Amnesty International Annual Report, 2013, available at: <http://www.amnestyusa.org/research/reports/annual-report-burundi-2013>

⁴⁰⁵ Powell, D.; (2010) "The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition", **International Journal of Transitional Justice** at p. 230. Available at: journals.permissions@oxfordjournals.org.

⁴⁰⁶ Powell, K.; (2005) "The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect" **Institute for Security Studies Monograph Series** journals.permissions@oxfordjournals.org. [accessed on 23/05/2011].

⁴⁰⁷ Barungi, B.; and Mbugua, K.; (2005) "From Peace Keeping to Peace Building: Post-Conflict Reconstruction in Africa" **Conflicts Trends** at p. 31.

⁴⁰⁸ Barungi and Mbugua, *ibid* n. 407 at p. 31.

⁴⁰⁹ Goti, J.M.; (2010) "Editorial Note: A Turbulent Past and the Problem with Memory" **The International Journal of Transitional Justice**, at p.153. Goti claims that an official transparency is an important aspect of political decency.

This study accedes to Pinheiro's views who has stressed that Burundi should join Rwanda and Bosnia on the troubled issues of accountability.⁴¹⁰ Burundi according to Gasana,⁴¹¹ are still waiting for justice. This thesis emphasises that by disregarding the peace and ceasefire agreements, the government is compromising the progress the country had made in the past 13 years after the establishment of the post-transition constitutional governments.

International human rights law lays down obligations which State Parties are bound to observe by becoming parties to international conventions and treaties. These parties assume their duties and obligations to respect, protect and promote human rights.⁴¹² Even where domestic jurisdictions fail to address gross violations of human rights, mechanisms and procedures for individual complainants are available at regional and international levels to ensure that human rights are respected and protected.⁴¹³ Article 9 of the UDHR, for example, provides that, "no one shall be subjected to arbitrary arrest, detention or exile". The provisions of UDHR are reiterated in Article 9 of the ICCPR of 1966, yet, arbitrary arrests, IDPs and refugees' problems are prevalent in Burundi.⁴¹⁴ Article 26 of the UDHR articulates that "[t]he will of the people shall be the basis of the authority of the government". The interpretation thereof is clear that democracy in contemporary Burundi should be one of the pillars of the socio-economic development, as civil and political rights provide room for accountability and transparency.

The UN Commission for Human Rights (now Human Rights Council) that was created under Article 68 of the UN Charter is an important UN body to deal with violations of human rights. But Weinstein has challenged the UN and African states on their selective nature of

⁴¹⁰ IDMC (2007) **Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the Pinheiro Principles**, Internal Displacement Monitoring Centre, at pp. 4-10. available at: http://www.ohchr.org/Documents/Publications/pinheiro_principles.pdf [accessed on 19/05/2012].

⁴¹¹ Jean-Marie Gasana, in an independent consultant on Africa's Great Lakes Region cited in the IRIN Report "Burundi: Delays in Justice Mechanisms Fuel Impunity", 3 December, 2010. Available at: <http://www.irinnews.org/printreport.aspx?reportid=91280>. [accessed on 19/05/2011].

⁴¹² Through ratification the countries undertake to put in place measures and legislation compatible with their treaty obligations and duties in order to provide the principal legal protection at national level by not interfering with the enjoyment of human rights.

⁴¹³ See Article 8 of the UDHR which provides that: everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

⁴¹⁴ See UNHCR Report, 6 August 2012, "Kakuma Camp in Kenya Surpasses its 100,000 Capacity". Available at: <http://www.unhcr.org/501fdb419.html>. [accessed on 10/08/2012]. Among refugees who were registered in Kakuma Refugee Camp in Kenya in 2012 a significant number was from Burundi.

condemning violations of human rights.⁴¹⁵ The UN's credibility has been undermined by the obvious use of political criteria to determine which violations deserve the UN's attention.⁴¹⁶ In Burundi, for example, the UN ignored the gross violations of human rights that took place before, during and after 1994 but chose to recognise and react to the violations of human rights of Rwanda in 1994 although both countries share the same historical background.

The central thrust of the thesis is that without the necessary resolve to put an end to the culture of impunity and to establish responsibility and accountability for past wrongs, there will be no lasting peace in Burundi. As the Chilean writer, Ariel Dorfman has poignantly observed:

Enemies remember the past differently and until they agree in some way on the past, are able to forge a memory common to both sides, their rivalry will refuse to vanish. That is why Truth and Reconciliation Commissions, with all their flaws and concessions, all the pain they do not expose all the crimes that may remain unpunished, are indispensable step in a transition to democracy after a period of systematic violence.⁴¹⁷

Dorfman's observation calls for a process to reveal and preserve the truth about the past so that it may never happen again. This point was underscored by the Most Reverend Desmond M Tutu, writing in the Report of The Truth and Reconciliation Commission of South Africa in these remarkable words:

However painful the experience the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so that they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.⁴¹⁸

As emphasized by Sachs,⁴¹⁹ a new constitutional order that values participatory democracy, equality, truth telling as means of dealing with crimes of the past so that they may not be

⁴¹⁵ Weinstein, W.; (1976) "Africa's Approach to Human Rights at the United Nations" **African Studies Association** at pp.16-19. Available at: <http://www.jstor.org/stable/1166557>. [accessed on 17/03/2011].

⁴¹⁶ Weinstein, *ibid* n. 415 at p.19.

⁴¹⁷ Dorfman, A.; "Whose Memory? Whose Justice? A Meditation on How and When and if to Reconcile," 8th Mandela Lecture, 31 July 2010 at pp. 5-6. See further: Sachs, A.; (2009) **The Strange Alchemy of Life and Law**, Oxford: Oxford University Press.

⁴¹⁸ The Truth and Reconciliation Commission of South Africa Report of 1998 which was presented to President Nelson Mandela on 29 October 1998, at para. 27, available at: <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>, [accessed on 17/05/2012]. See further Cameron, J.; in the case of *The Citizen 1978 (PTY) LTD and Others v Robert John McBride and Others*, CCT/10, (2011) ZACC 11 at paras 50-51, *AZAPO and Others v President of the Republic of South Africa and Others*, 1996 ZACC 16 and Langa, CJ; in the case of *Du Toit v Minister for Safety and Security and Another*, 2009 (12) BCLR 1171 (CC).

⁴¹⁹ Sachs, *op cit* n. 417 at pp. 70-71.

repeated is required in Burundi. The learned Justice referred to the case of South Africa, his observation applies with equal force to the Republic of South Africa has a persuasive value to the case of Burundi.

Although there are general principles of protection of human rights in the world whereby democratic states include in their constitutions Bill of Rights, measures and policies which are taken at national level differ and are sometimes ineffective. That is why courts, tribunals and other adjudicative bodies which have been created to deal with cases of gross violations of human rights have been criticized as unsuccessful.⁴²⁰ For example, Silverman while referring to the case of *Prosecutor v Thomas Lubanga Dyilo*,⁴²¹ has criticised the ICC for handing down of one case after a decade since its establishment and asserts that it has been sloppy. Clark on the other hand has opined that the ICC's work is not the only possible response to atrocities in Africa.⁴²² In the light of Clark's view, national and local mechanisms of truth-telling and reconciliation are vital tools of transitional justice because they have more profound and lasting effects than the prosecution of the international crime suspects by the ICC.

This thesis stresses that Burundi and international community have to work together and look for better solutions to deal with human rights violations by encouraging openness, responsibility and accountability. Article 1 of the UDHR stipulates that all human beings are born free and equal in dignity. Articles 3 and 5 provide further that everyone has right to life, liberty and security, hence no one must be subjected to torture or cruel, inhumane or degrading treatment and punishment. Yet, there is a gap between the UDHR provisions and human rights realities.⁴²³ Taking Burundi as an example, this thesis takes notice and points out as to how

⁴²⁰ The ICC continues to face criticism for targeting African suspects for crime of genocide, war crimes and crimes against humanity See **Legalbrief** "Setback for Bemba War Crimes Trial" 09/10/2012 available at: <http://www.legalbrief.co.za/article.php?story=201210091059097>.

See also Silverman, J.; (2012) "Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?" **BBC News Magazine** 14 March 2012. Available at: <http://www.bbc.co.uk/news/magazine-17351946>. [accessed on 01/12/2012].

⁴²¹ Case No. ICC-01/04-01/06-1119. Thomas Lubanga Dyilo from DRC was convicted by the ICC where rebels under his command have been accused of gross violations of human rights including ethnic mass killings, rape, mutilation, torture and forcibly recruiting child soldiers. On 17 March 2006, Lubanga became the first person to be arrested under a warrant issued by the ICC. His trial for war crime for using child soldiers under the age of fifteen years and using them to participate actively in hostilities began on 26 January 2009, he was found guilty on 14 March, 2012. On 10 July 2012, Trial Chamber I of the ICC sentenced him for 14 years of imprisonment also ordering that, the time from Lubanga's surrender to the ICC in 2006 until the sentencing day should be deducted from the 14 year term to 8 years.

⁴²² Clack, P.; (2011) "The ICC is Only a Small Piece in the Justice Puzzle of Africa's Conflicts" **East African**, 11 April, 2011, available at: <http://www.allafrica.com>. [accessed on 16/10/2012].

⁴²³ See Boven T.C.; "United Nations and Human Rights : A Critical Appraisal in Cassese, A.

Burundi, a signatory to most of international and regional human rights instruments, for a long time has been conducting itself contrary to what these instruments dictate.⁴²⁴

Given the significance of respecting political and civil rights, Burundi's government has an obligation to enhance diverse political participation, including appointment of a new Independent National Electoral Commission (CENI) to ensure that all political parties will participate in the upcoming elections of 2015 in order to avoid the outrages of the 2010 local and presidential elections,⁴²⁵ in particular, extra-judicial and politically motivated killings, mistreatment of political opponents, torture and limitation of civil rights such as freedom of expression, peaceful demonstration, association and assembly. To the contrary, the opposition leader, Agathon Rwasa, has been prevented from holding public meetings after being in exile for three years since 2010.⁴²⁶

With the current state of affairs in post-conflict Burundi, this thesis notes further that "provisional immunity" in terms of the Provisional Immunity Law and Decree⁴²⁷ mentioned before which was granted to political elites pending the establishment of the BTRC and Special Criminal Tribunal (SCT) is a matter of serious concern. For example, while not defining what would constitute "politically motivated crimes", the provisional immunity provisions explicitly exclude genocide, war crimes, and crimes against humanity. This defect has attracted criticism.⁴²⁸ The Amnesty International has criticised the provisional immunity initiatives for failing to address impunity adequately. According to Amnesty International, the application of provisional immunity law has had a negative impact on truth, reconciliation and national healing and reconstruction processes.

It is imperative to point out that impunity denies the victims their right to have perpetrators of heinous crimes brought to justice, know the truth and be compensated. This is contrary to what Article 8 of Protocol I of the APRA and Articles 269 to 273 of the 2005 Constitution provide in respect of measures underpinning peace consolidation, security, national healing and

(1979) **UN Law Fundamental Rights: Two Topics in International Law**, Sijthoff and Noordhoff, Alphen aan den Rijn: The Netherlands at p. 120.

⁴²⁴ See **Human Rights Watch Report** (2012), *op cit* n.97.

⁴²⁵ The UN Security Council Resolution 2090 (2013), *op cit* n.6. See further the UN Secretary-General Ban Ki-moon statement at the Geneva Conference of Development Partners held in October 2012 on a call to present a "new Burundi" that protects its freedom of expression, association and political participation which are foundations of true democracy.

⁴²⁶ See BBC News "Burundi's Main Opposition Leader and Ex-rebel Agathon Rwasa Has Come Out of Hiding After Three Years", 6 August 2013, available at: <http://www.bbc.co.uk/news/world-africa-23590991> [accessed on 12/08/2013].

⁴²⁷ Law No. 1/32 of 22 November 2006 and Decree No. 100/357 of 20 December 2006.

⁴²⁸ See Amnesty International Report, 2006.

stability.⁴²⁹ It must be noted further that there is still a dilemma in Burundi concerning the type of transitional justice model to be put in place in order to reveal the truth, accountability, reparation, national reconciliation and reconstruction, restoration of human dignity, upholding democratic values and tolerance in order to deal with ongoing trauma and collective memories of mass killings.

Although Burundi is a State Party to a number of international and regional conventions and treaties, notably, the Rome Statute of the International Criminal Court (ICC Rome Statute) since 2004 and has assumed obligations to fight impunity for crimes committed, little has been done in this regard.⁴³⁰ Impunity continues to be a serious concern in Burundi because of the

⁴²⁹

Article 8 (1) of the Arusha Agreement under Protocol I, Chapter II, provides that:

- (a) National commission known as the National Truth and Reconciliation Commission shall be established and shall have the following functions: Investigation- bring to light and establish the truth regarding the serious acts of violence committed during the cyclical conflicts which cast a tragic shadow over Burundi from independence (1 July 1962), classify the crimes and establish the responsibilities as well as the identity of the perpetrators and the victims. However, the Commission shall not be competent to classify acts of genocide, crimes against humanity and war crimes;
- (b) Arbitration and reconciliation- the crisis is a profound one: the task of reconciliation will be long and exacting. There are still gaping wounds which will need to be healed. To this end the Commission shall, upon completion of its investigations, propose to the competent institutions or adopt measures likely to promote reconciliation and forgiveness, order indemnification or restoration of disputed property, or propose any political, social or other measures it deems appropriate. In this context, the transitional National Assembly may pass a law or laws providing a framework for granting an amnesty consistent with international law for such political crimes as it or the National Truth and Reconciliation Commission may find appropriate;
- (c) Clarification of history- the Commission shall be responsible for clarifying the entire history of Burundi, going as far back as possible in order to inform Burundians about their past. The purpose of this clarification exercise shall be to rewrite Burundi's history so that all Burundians can interpret it in the same way.

Article 8 (2) Candidates for membership of the Commission shall be put forward by civil society associations, political parties, religious denominations or women's organizations, or may stand as individual candidates.

⁴³⁰

UN News Report "Impunity Remains a Concern in Burundi Despite Progress on Human Rights", 3 May 2012 available at:

<http://www.un.org/apps/news/story.asp?NewsID=41912&Cr=Burundi&Cr1>

[accessed on 29/07/2013] and the Amnesty International Report, 2013 available at:

<http://www.amnesty.org/en/region/burundi/report-2013#section-22-3>

[accessed on 12/06/2013]. The Amnesty International Report, 2013 refers to a number of extra-judicial execution cases in 2010 and 2011 and confirms that impunity for gross violations of human rights continues. For example, a Commission of Inquiry that was established to investigate allegations of crimes committed by police and army officers, local administrator and several *Imbonerakure* (youth members affiliated to the ruling party CNDD- FDD), yet, no trials have taken place and majority of perpetrators have not been held to account.

ineffectiveness of judiciary, legislature and executive.⁴³¹ This is contrary to the statutory assurance that the ICC Rome Statute is a complementary to Burundi's criminal law. The Constitution of 2005 penalizes international crimes and the Penal Code of Burundi⁴³² criminalises genocide, war crimes, crimes against humanity, torture and other cruel, inhuman and degrading treatment and prescribes severe punishment for rape and other forms of sexual violence.⁴³³ However, to - date no perpetrators of mass killing have been prosecuted while reparation for the victims of international crimes has been hampered due to lack of effective transitional justice mechanisms.⁴³⁴

2.8 SUMMARY

This chapter has examined the connection between the universal aspiration of human rights norms in terms of international and regional human rights instruments and the complexities of their application and interpretation in the adversities of post-conflict Burundi. It has analysed the extent to which post-transition governments of CNDD-FDD of 2005 and 2010 have failed to promote, observe and respect human rights, democracy and constitutionalism.

Having generally discussed the origin of theories of human rights and transitional justice this study acknowledges the complaints relating to violations of human rights, commission of international crimes that are reported almost every year in Burundi. These human rights abuses in contemporary Burundi have resulted mostly due to lack of political will to deal with the past human rights abuses that tend to encourage impunity. Given the human rights situation in contemporary Burundi prosecution is hampered by legal immunity and accountability is not taken to its logical conclusion.

This chapter underlines that post-conflict Burundi is still fragmented and lacks the necessary criteria to ensure human security and socio-political and economic sustainability. This chapter supplements chapter one and puts emphasis on current problems such as the protracted conflicts and rebellion as counter-insurgency which have escalated the problems of refugees

⁴³¹ See Mudge, L.; and Tertsakian, C.; (2012) "You Will Not Have Peace While You Are Living: The Escalation of Political Violence in Burundi": **Human Right Watch Report, 2012** at p.55. Available at: http://www.hrw.org/sites/default/files/reports/burundi0512ForUpload_1.pdf [accessed on 30/10/2012].

⁴³² See Title XII of the Constitution and *Loi N°1 / 05 du 22 Avril 2009 Portant Revision du Code Penal*, was signed by the President on 22 April 2009.

⁴³³ See Articles 274 - 276 of the Constitution and Article 8 of the Revised Penal Code.

⁴³⁴ See Amnesty International "Burundi: Time for Change: A Human Rights Review Amnesty International Submission to the UN Universal Periodic Review" January-February 2013, available at: <http://www.amnesty.org/en/library/asset/AFR16/003/2012/en/804f68bd-2e0e-487d-b782-d0d2c9fd1e4e/af160032012en.pdf> [accessed on 02/05/2013].

and IDPs. There is also case law justification of human rights violations and lack of transitional justice mechanisms which all affect the exercising of participative democracy in Burundi.

The next chapter compares Burundi with selected case studies with respect to their transitional justice models in terms of measures taken to ensure accountability and responsibility of perpetrators of gross violations of human rights and reparations for the victims.

CHAPTER THREE: COMPARATIVE PERSPECTIVES AND LESSONS FROM OTHER COUNTRIES

3.1 INTRODUCTION

This chapter makes a comparative analysis of state practices on prosecution of perpetrators of genocide, leading to individual and collective or state responsibilities and reparations to the victims. It evaluates gross violations of human rights and genocide with a view to seeing what Burundi can learn from other countries such as Chile, South Africa, Argentina, Guatemala, Cambodia, Rwanda, Sierra Leone, DRC, Djibouti, Gambia, Guyana and East Timor. After articulating the legal and political framework, this chapter explores reparation approaches that were used to identify perpetrators, victims and eventually establish individual criminal accountability and state responsibilities in the countries discussed. It considers whether the granting of amnesty for the perpetrators and reparation policies in these countries did not trump the right to an effective judicial remedy.

This chapter concludes with an evaluation of strengths and weaknesses and lessons that can be drawn from these selected case studies. Explicitly, South Africa and Chile are considered as good examples to inspire Burundi in terms of truth-telling and reparations. South Africa is specifically relevant because it was among the facilitators of peace and ceasefire agreements in Burundi and its transitional justice mechanism is well-documented and was used by governmental delegation of Burundi during negotiations for designing transitional justice mechanisms. Chile is remarkable for its comparative success and contribution to the development of the right to reparations in the Latin America as seen from Dorfman's observation in chapter two.

3.2 TRANSITIONAL JUSTICE MODELS: LESSON FOR BURUNDI FROM OTHER JURISDICTIONS

Transitional justice generally can be defined as the notion of justice associated with political change which is characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.⁴³⁵ While some scholars correctly situate transitional justice after WWII, with specific reference to the Nuremberg and Tokyo Tribunals, this concept has gained popularity as a subject of academic inquiry during the 1990s after the end of the Cold War.⁴³⁶ At this time, rapid and simultaneous transitions from dictatorship in East and Central Europe, including the resolve to deal with protracted armed conflicts in different countries, has raised

⁴³⁵ Teitel, R.G.; (2003) "Transitional Justice Genealogy" *Harvard Human Rights Journal* at 69.

⁴³⁶ Teitel, *ibid* at p. 69.

the need for universally acceptable ways of dealing with the legacy of gross human rights violations.⁴³⁷ Therefore, various measures which are adopted while recovering from past authoritarian regimes to democracy are recognised as transitional justice because these measures focus on how emerging democratic regimes should deal with the legacy of grave human rights violations perpetrated under predecessor regimes. The major focus has been to deal with the past whilst stabilising the present and building the nation for the future.

This chapter refers to transitional justice against the backdrop of questions posed in chapter one, namely:

- Can Burundi learn from other countries such as South Africa and Chile in terms of transitional justice mechanisms?
- What practical guidelines could be designed in order to stop mass killings and gross violations of human rights in post-conflict Burundi?

This thesis asserts that there are lessons which Burundi can learn from other countries, should it resolve to address gross violations of human rights rigorously in the cause of accountability and the pursuit for justice. This thesis critically examines the issues of accountability for serious international crimes committed in Burundi and suggests that there are considerations that ought to be taken into account in holding accountable the persons who are suspected of having committed serious international crimes which include both natural and juristic persons. This accountability demand originates from both national and international laws.

3.3 INDIVIDUAL CRIMINAL AND STATE RESPONSIBILITIES AND DIPLOMATIC IMMUNITY: A COMPARATIVE ANALYSIS

There have been uncertainties with respect to accountability and responsibility for gross human rights violations in Burundi. For example, the APRA, Constitution and Penal Code call for prosecution, monitoring, prevention and eradication of genocide, war crimes and crimes against humanity.⁴³⁸ Yet, the application of the genocide provisions in Burundi and persecution of the perpetrators of genocide remain practically impossible. Accordingly, non-compliance with international humanitarian and human rights laws, peace and ceasefire agreements, Constitution, Penal Code and lack of transitional justice mechanisms in post-transition arrangements in Burundi has encouraged impunity for genocide and other crimes committed

⁴³⁷ Nibogora, *op cit* n. 16 at p. 15.

⁴³⁸ Articles 274 - 276 of the Constitution of Burundi, 2005.

during Burundi's armed conflicts. Clearly, the substantive aspect of genocide in Burundi has been obliterated by denial theory.

This thesis refers to the principles of individual and collective criminal responsibilities to see how they supplement transitional justice initiatives. Thus, examples from the cases of Rwanda, Sierra Leone, DRC, Latin America, Cambodia, Djibouti, Gambia, East Timor and Guyana are discussed hereunder. A special attention on individual responsibility is given to the cases of Rwanda, Argentina, DRC, Djibouti, Gambia, East Timor and Sierra Leone while Guyana and Guatemala cases demonstrate examples of state or collective criminal responsibility. Furthermore, countries such as South Africa, Chile and Cambodia are used to transition justice mechanisms and reparation for victims of genocide and gross violations of human rights.

3.3.1 Rwanda

Rwanda's case has attracted international attention after the genocide of 1994.⁴³⁹ In the Great Lakes Region and Africa in general, the Rwanda case is set as the axis on which accountability and judicial processes relating to international criminal responsibility rotates. The ICTR,⁴⁴⁰ an

⁴³⁹ See UN Resolutions 955 (1994) 8 November 1994 on establishment of the ICTR and its Statute, 1165 (1998), 30 April 1998 on establishment of a third Trial Chamber that amended Articles 10, 11 and 12 of the ICTR Statute, 1329 (2000), 30 November 2000 relating to appointment of two additional judges who would sit in the Appeals Chamber, 1411 (2002) 17 May 2002 that amended Article 11 of the Statute on composition of judges of the Chambers, 1431 (2002) 14 August 2002 that established a pool of 18 *ad litem* judges and amended Articles 11,12 and 13 of the ICTR Statute., 1503 (2003) 28 August 2003 that urged the Prosecutors the ICTR and ICTY to formalise a completion strategy by amending Article 15 of the Statute in order to complete all investigations by the end of 2004, trials by the end of 2008 and finish their tasks in 2010, 1512 (2003) 27 October 2003 on increasing the number of *ad litem* judges that were to be appointed at any time to serve in the Trial Chamber and amending Articles 11 and 12 of the Statute relating to composition of and attributes of judges who could serve in the Trial Chambers, 1534 (2004) 26 March 2004-calling on the ICTY and ICTR Prosecutors to identify cases which should be transferred to national jurisdictions and requesting the Tribunals to provide assessments of the implementation of their respective completion strategies every 6 months, 1684 (2006) 13 June 2006- extension of the term of office of 11 permanent ICTR Judges until 31 December 2008, 1717 (2006) 13 October 2006-extending the term of office of the ICTR *ad litem* Judges appointed in June 2003 until 31 December 2008 , 1824 (2008) 18 July 2008- extending the term of office of the ICTR Trial Judges (*ad litem* and permanent) until 31 December 2009 and extending the term of office of the two ICTR Appeals Judges until 31 December 2010 and amending Article 11 of the ICTR Statute,1855 (2008) 19 December 2008-amending Article 11 of the ICTR Statute and extending the number of *ad litem* Judges allowed at the Tribunal, 1878 (2009) 7 July 2009-amending Article 13 of the ICTR Statute by increasing the composition of the Appeals Chamber, (2009) 16 December 2009-underlining ICTR intention to extend the terms of office of all trial and appeals judges by 30 June 2010 and temporarily increasing the number of *ad litem* judges allowed at the Tribunal at any one time; deciding that one ICTR trial judge complete his case, notwithstanding the expiry of his term of office.

⁴⁴⁰ The ICTR was established pursuant to paragraph 3 of UN Resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906) after considering the Reports of the Special Rapporteur on Rwanda of the UN Commission on Human Rights (S/1994/1157, annex I and annex II).

ad hoc International Tribunal, was established to exercise jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed in the Rwandan territory.⁴⁴¹The ICTR's jurisdiction is stipulated in its Statute.⁴⁴²Article 1 of the Statute empowers the ICTR to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January and 31 December 1994 as well as Rwandan citizens responsible for violations committed in the territory of the neighbouring states.⁴⁴³

It has been observed that in terms of the above provisions there are jurisdictional limitations in terms of territory, period and citizenship. In other words, the ICTR jurisdiction was limited to Rwanda and neighbouring territories where Rwandan citizens committed genocide and gross violations of human rights. Moreover, the time frame for commission of crimes was *ratione tempore* and limited to 1 January and 31 December 1994.⁴⁴⁴Thus, the ICTR had limited jurisdiction which was determined by the period when the alleged genocide was committed and territorial jurisdiction which was demarcated within Rwanda and the neighbouring states.⁴⁴⁵Lastly the ICTR had jurisdiction over three categories of crimes, namely: genocide,⁴⁴⁶crimes against humanity⁴⁴⁷and war crimes.⁴⁴⁸

The provisions of ICTR Statute on war crimes have to be interpreted within the meaning of Article 3 common to the Geneva Conventions (Common Articles 3) which addresses non-

⁴⁴¹ See Williamson, J.; (2006) "An Over view of International Criminal Jurisdiction Operating in Africa", available at: www.icrc.org/eng/assets/files/other/lrrc_861_williamson.pdf at p. 111 [accessed 21/ 05/ 2013].

⁴⁴² The ICTR Statute was enacted on 8 November, 1994 and amended by the UN Security Council Resolutions (Res. 1165 -1998, Res. 1329 - 2000 -04-30 2000-11-30, Res. 1411 – 2002 and 1431 2002-05-17). The list is not exhaustive, see, for example, Res 977 (1995) designating the town of Arusha as the seat of the ICTR; (Res 978-1995) on arrest of persons responsible for acts within the jurisdiction of the ICTR; Res 989 (1995) on the nomination of ICTR judges; Res 1047-1996) on appointing Mrs Louise Arbour as Prosecutor of the ICTR and of the ICTY, Res 1200 (1998) regarding the nomination of the ICTR judges, Res 1241 (1999) on deciding that Judge Aspegren would finish the pending cases which he begun before expiry of his term of office, Res 1259 (1999) on appointing Ms Carla Del Ponte as Prosecutor of the ICTR and of the ICTY, Res 1347 (2001), regarding the nomination of the ICTR judges, Res 1449 (2002) on a list of judge candidates, Res 1477(2003) on nominations of *ad litem* Judges, Res 1482 (2003) allowed Judges Dolenc, Maqutu, Ostrovsky and Pillay to remain on service in order to finish pending cases that begun before the expiry of their respective terms in the office, Res 1505 (2003) on appointing Mr Hassan Bubacar Jallow as ICTR Prosecutor, Res 1705 (2006), on authorisation of an *ad litem* Judge Solomy Balungi Bossa to continue to serve in the *Butare* case until its completion, Res 1774(2007) on reappointing Mr Hassan Bubacar Jallow as an ICTR Prosecutor for a maximum term of 4 years.

⁴⁴³ Article 1 of the Statute of the ICTR.

⁴⁴⁴ Article 7 of the Statute of the ICTR.

⁴⁴⁵ Article 7 *ibid*.

⁴⁴⁶ Articles 1 and 2 of the Statute of the ICTR.

⁴⁴⁷ Article 3 of the Statute of the ICTR.

⁴⁴⁸ Articles 1, 2, 3, and 4 of the Statute of the ICTR.

international armed conflicts and prohibits violence to life, taking hostages, violation of the personal dignity and trials and executions without a fair judgment⁴⁴⁹ and Additional Protocol II to the Geneva Convention.⁴⁵⁰ Although Article 4 of the ICTR Statute was envisioned to deal with non-international armed conflicts, it does not limit the actions amounting to war crimes and remains unclear as to whether international armed conflicts are incorporated.⁴⁵¹ Referring to Common Article 3, the ICTR in the *Akayesu* case affirmed that the Common Article 3 forms part of customary international law.⁴⁵² This view was also supported by the ICTY in the case of *Prosecutor v Naletilic and Martinovic*.⁴⁵³

Similarly, an inference can be drawn from the ICTR's reasoning in the case of *Prosecutor v Akayesu*⁴⁵⁴ where concerns were raised that sexual violence was used as an instrument of war, as part of a pattern to destroy the spirit, the will to live and life itself. In addition the ICTR had jurisdiction over individual persons only as set out in Article 5 of the Statute of the ICTR.⁴⁵⁵ Articles 5 and 6 relating to individual criminal responsibility were linked to the ICTR's jurisdiction to prosecute an individual or a group of people who had a common purpose to commit crimes.

This thesis compares the cases of Rwanda and Burundi and argues that the international community took notice and responded quickly to the genocide of Rwanda in 1994 and established the ICTR while special legislation was enacted in 1996 to deal with genocide cases in what is referred to as *Gacaca* (a traditional process of truth and reconciliation). To the contrary, Burundi to - date is still lagging behind in establishing a Truth and Reconciliation Commission to investigate genocide issues that have been raised in this study or prosecuting the perpetrators of mass killings which are equal or beyond the genocide of Rwanda under Burundi criminal justice system.

Similarly, the international community has failed to establish an *ad hoc* international criminal tribunal similar to the ICTY and ICTR to prosecute the perpetrators of genocide and other international crimes committed in Burundi. Furthermore, in 2007 Rwanda passed a new law that created special procedures to transfer cases from the ICTR to be tried before the Rwandan

⁴⁴⁹ Common Article 3 of the Geneva Conventions.

⁴⁵⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of the victims of non-international armed conflicts (Protocol II), of 8 June 1977.

⁴⁵¹ Protocol II *ibid*.

⁴⁵² *Prosecutor v Akayesu Case No. ICTR-96-4-T* (Trial Chamber), September 2, 1998, paras. 608- 609.

⁴⁵³ *Case No. IT-98-34-T* (Trial Chamber), March 31, 2003, par. 228.

⁴⁵⁴ *Case ICTR 96-4-T*, Judgment 732 (2 September 1998).

⁴⁵⁵ Article 5: International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the ICTR Statute.

High Court and the Supreme Court.⁴⁵⁶Regrettably, Burundi has not followed Rwanda's example to prosecute the perpetrators of systematic mass murders, rape and grave violations of human rights or by invoking the broad principle of universal jurisdiction. However, the fact remains that systematic mass killings and sexual violence against civilians, forced internal displacements and influxes of refugees who have been subjected to harsh conditions and the destructions of economic, social and cultural relations since 1960s to - date do not uphold international criminal law, human rights and humanitarian law standards.

It has been also noted that by virtue of national legislation and case law there is no pure universal jurisdiction.⁴⁵⁷ But, states through national legislation may provide for instances where such jurisdiction can be inferred although they may not be equal to the jurisdiction accorded under international law. For example, the USA and Australia have made confined choices to exercise universal jurisdiction.⁴⁵⁸As many countries may not have national legislation to exercise and recognize forms of extra-territorial jurisdiction, sometimes the legal obligations found under international treaties can allow them to act universally.

In practice, states are neutral in exercising universal jurisdiction. The neutrality aspect of jurisdiction tends to bring confusion if the case of Rwanda can be used as an example. Scholars, legislators and courts often fail to articulate on important issues around jurisdiction. Some questions may be asked: was the accused within the jurisdiction at the time when the crimes were committed? Was the arrest warrant issued? Harris has argued that there is no established state practice on universal jurisdiction. Traditionally, states were ruled by personal sovereigns like monarchs or emperors where there was a close identity in international law between the rulers and their state. For that reason the rulers were immune from civil and criminal jurisdictions of other states.⁴⁵⁹

Currently, there are indications that universal criminal jurisdiction for international crimes committed can be invoked in terms of international criminal law.⁴⁶⁰The duty to prosecute and the treaties which contain the provisions relating to *aut dedere aut prosequi* (extradite or prosecute) tend to open the door to criminal jurisdiction depending on the nature of heinous crimes committed as it was in the *Pinochet* case.⁴⁶¹It is submitted that the principle of universal jurisdiction is relevant to the Burundi's case because of immunity which has been given to

⁴⁵⁶ Schabas, *op cit* n. 362 at pp. 418-419.

⁴⁵⁷ Harris, *op cit* n. 172 at p. 298.

⁴⁵⁸ Harris, *ibid*.

⁴⁵⁹ Harris, *ibid*.

⁴⁶⁰ Harris, *ibid* at p. 298.

⁴⁶¹ See *R v Bow Street Metropolitan Stipendiary Magistrates, Ex Parte Pinochet Ugarte* 3 WLR 1,456 (H.L. 1998).

political elites to shield them from prosecution. It must be pointed out that obligations which are contracted at the international level according to Schabas, pierce the impenetrable walls of state sovereignty in order to encourage accountability and responsibility for gross human rights violations. Where for example international obligations are breached, an individual may be punished for international crimes as a matter of international law even if his /her own state or the state where crimes were committed refuses to do so as the cases of Kenya and Libya suggest.⁴⁶²

It is imperative to point out that Burundi has delicate and insecure transitional arrangements due to immunity law as pointed out earlier. The result has been ongoing systematic mass killings, impunity for past crimes, ill-treatment of political opponents, avoidance of individual and collective responsibility based on reciprocal accusations among *Hutu* and *Tutsi* ethnic groups, reinforcement of paternalist governance systems inherited from military regimes, emergence of new armed groups, weak political institutions and judiciary and corruption which are among major problems that have hindered the progress towards individual and state responsibilities. This state of affairs has a negative impact on reparations for victims of genocide, national reconciliation, healing, political stability and economic development in Burundi.⁴⁶³ The following example from Sierra Leone demonstrates the complications of issuing an arrest warrant against the perpetrators of genocide and other international crimes in order to hold individual perpetrators accountable.

3.3.2 Sierra Leone

This thesis considers Sierra Leone as an example of a country that has used a mixed transitional justice mechanism to address past human rights violations. Like Burundi, in the aftermath of armed conflicts in Sierra Leone, there has been a strong public desire to hold responsible persons accountable for their commission of international crimes. However, Sierra Leone had no capacity within its judicial system to indict and prosecute the alleged perpetrators

⁴⁶² Schabas, *op cit* n. 362 at pp. 435-436, see the discussion under section 5.4.1.

⁴⁶³ See Nibogora, *op cit* n. 16 at p. 67.

of international crimes.⁴⁶⁴ Furthermore, Sierra Leone was constrained by a blanket amnesty for crimes as specified under the Lomé Peace Agreement of 1999.⁴⁶⁵

In 2000, the Special Court for Sierra Leone (SCSL)⁴⁶⁶ which combined international and national components to create a hybrid transitional justice system was established to address the issues of international crimes committed during armed conflicts in the Sierra Leone.⁴⁶⁷ The SCSL that was established, pursuant to an agreement between the UN Security Council and the government of Sierra Leone under the Resolution 1315,⁴⁶⁸ which proposed a different judicial model, different from the ICTY and ICTR as it consisted of a mixture of domestic and international systems to prosecute individuals who allegedly bore "greatest responsibility" for crimes committed during the armed conflicts.⁴⁶⁹ Thus, the SCSL was a model other than the *ad hoc* tribunals established by the UN Security Council to try perpetrators of gross human rights violations in Rwanda and the former Yugoslavia.

Consequently, the SCSL operated separately from the Sierra Leone's domestic judicial system. The Statute of the SCSL drew its principles from international humanitarian law and a limited amount of domestic criminal law.⁴⁷⁰ The Statute favoured the prosecution of crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II including other acts of serious violations of international humanitarian law.⁴⁷¹

⁴⁶⁴ See Article 1 of Agreement between the United Nations and the government of Sierra Leone on the Establishment of a Special Court for Sierra Leone which provides that court was to be established to prosecute persons who bear the greatest responsibility for serious violations of International Humanitarian Law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Agreement was ratified through the Special Court Agreement, 2000 (Ratification) Act, 2000. See also Kendall, S.; and Staggs, M.; (2005) "From Mandate to Legacy: the Special Court for Sierra Leone as a Model for Hybrid Justice: The Interim Report on the Special Court for Sierra Leone", April 2005 at p.2, **U.C. Berkeley War Crimes Studies Center** available at:

<http://wcsc.berkeley.edu/wp-content/uploads/Papers/BWCSC%20Interim%20Report%20on%20the%20Special%20Court%20for%20Sierra%20Leone.pdf> [accessed on 21/05/2013].

⁴⁶⁵ A peace agreement signed on 7 July 1999 between the warring parties in the armed conflicts of Sierra Leone where President Ahmed Tejan Kabbah signed an agreement with the Revolutionary United Front (RUF) leader Foday Sankoh granting Sankoh a position in the transitional government as well as an amnesty for him and all combatants.

⁴⁶⁶ Statute of the Special Court for Sierra Leone, 16 January 2002 was established pursuant to the UN Security Council Resolution 1315 of 14 August 2000.

⁴⁶⁷ See Philimon, L. K.; (2012) "The Establishment of an African Criminal Court: Strengths and Weaknesses", **LLM Thesis**, Nelson Mandela Metropolitan University.

⁴⁶⁸ United Nations Security Council Resolution 1315 of 14 August 2000.

⁴⁶⁹ See Kendall and Staggs, *op cit* n. 464 at p.2.

⁴⁷⁰ Article 5 of the Statute of the SCSL, 2002.

⁴⁷¹ Article 5 of the Statute of the SCSL *ibid*.

Referring to the later, the SCSL developed an innovative jurisprudence of criminalising the use of child soldiers and forced marriages during armed conflicts as a crime against humanity.⁴⁷²

Individual criminal responsibility under the SCSL Statute was defined as follows:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime. [A] state official accused of crimes listed in the Statute whether as Head of State or Government or as a responsible government official shall not relieve such person of criminal responsibility nor mitigate punishment. Any of the acts referred to in the Statute if committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Individual criminal responsibility for the crimes referred to 5 shall be determined in accordance with the respective laws of Sierra Leone.⁴⁷³

Like the ICTR, the SCSL Statute limited the jurisdiction of the court to crimes committed in the Sierra Leonean territory.⁴⁷⁴ Jurisdiction was further restricted to persons who bore the greatest responsibility,⁴⁷⁵ thus making it impossible for the SCSL to try other individuals who did not fall into these categories.⁴⁷⁶

Sierra Leone suffered grave atrocities associated with armed conflicts for about eleven years since 30 November 1996. It has been estimated that about ten thousand people were killed while gross violations of human rights were committed against civilians.⁴⁷⁷ During the armed conflicts in Sierra Leone, insurgent groups such as the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC)⁴⁷⁸ fought against the government and its militias.⁴⁷⁹ The civilian population was largely targeted by the warring factions and suffered enormous atrocities.⁴⁸⁰ The insurgent groups, for example, started the war in 1991 and forced civilians to be combatants during the entire armed conflicts.⁴⁸¹ As a result of gross violations of human rights in Sierra Leone, many civilians suffered bodily harm such as amputations of their bodily parts such as their legs and arms, bodily mutilations, rape and other acts of sexual

⁴⁷² Kendall and Staggs, *op cit* n. 464 at p.2.

⁴⁷³ Article 6 of the SCSL Statute.

⁴⁷⁴ Article 1 of the Statute of the SCSL *ibid*.

⁴⁷⁵ Article 1 of the Statute of the SCSL *ibid*.

⁴⁷⁶ See Philimon, *op cit* n. 467 at p. 27.

⁴⁷⁷ Philimon, *ibid* at p. 27.

⁴⁷⁸ See *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-A.

⁴⁷⁹ Kamara, J.F.; (2009) "Preserving the Legacy of the Special Court of Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone" *Leiden Journal of International* pp.761-777.

⁴⁸⁰ See Kendall and Staggs, *op cit* n.464 at p.2.

⁴⁸¹ Kamara, *op cit* n.479.

violence, mass killings, abductions and forced recruitment into armed groups, the use of children as combatants and the exploitation of Sierra Leone's diamond reserves to finance the war.⁴⁸² Chopping of limbs, rape and sexual violence were used as a tool to instigate terror and control.⁴⁸³ Although, Charles Taylor, the former President of Liberia never took part in the actual atrocities in Sierra Leone, he was found guilty on account of an accomplice or aiding and abetting in the planning to commit crimes pursuant to Article 6 of the SCSL Statute.

As expressed by the UN Security Council, the serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone called for individual responsibility as way of dealing with impunity.⁴⁸⁴ Additionally, the UN Security Council Resolution 1260 of 20 August 1999, welcomed the signing of the Lomé Peace Agreement to end armed conflicts in Sierra Leone, included provisions for amnesty.⁴⁸⁵ The indictment which was issued in 2003 against Charles Taylor, for atrocities allegedly committed during the Sierra Leone conflict (1999-2003) was the first indictment issued by the court but raised serious concerns for regional peace and stability in West Africa.⁴⁸⁶ Taylor whose trial was transferred to The Hague rather than Free Town in Sierra Leone, raised conflicting views on whether or not such transfer was for ensuring justice for the victims of the alleged war crimes and crimes against humanity.⁴⁸⁷ Finally, Taylor was found guilty in 2012 and responsible for crimes committed including terror, mass murders and mutilating civilians, rape and using child soldiers and responsible for aiding and abetting as well as planning some of the most heinous and brutal crimes recorded in human history. Like Burundi, the question remains that the actual perpetrators have never been prosecuted which is still a matter of great concern in the Sierra Leonean justice system.

This thesis notes the strengths and weaknesses of the SCSL. For example, among the strengths of SCSL was to have jurisdiction over a wide range of international crimes such as crimes against humanity that included serious violations of Common Article 3 to the Geneva

⁴⁸² Kendall and Staggs, *op cit* n.464 at pp. 10 - 11.

⁴⁸³ Kamara, *op cit* n.479.

⁴⁸⁴ United Nations Security Council Resolution 1315 of 14 August 2000.

⁴⁸⁵ McDonald, A.; (2002) "Sierra Leone's Shoestring Special Court" at p. 123. Available at: <http://www.icrc.org/eng/assets/files/other/121-144-mcdonald.pdf> [accessed 23/09/2013].

⁴⁸⁶ See *Prosecutor v Charles Ghankay Taylor*, *op cit* n. 478 para 259, available at: <http://www.scs-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8%3D&tabid=53> [accessed 23/02/2014]. Taylor was found guilty of crimes against humanity, war crimes in terms of violating Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violation of International Humanitarian Law. The court held that Taylor was responsible for aiding and abetting the acts of terror, unlawful killings of civilian population, rape, sexual and physical violence against women, use of child soldiers, abduction and forced labour against women and children and looting. See also University of Witwatersrand School of Law "International Conference on Africa and The Future of the International Criminal Justice", 14 -16 July 2010 at p.2, available at: <http://www.asil.org/files/africaigcallforpapers.pdf> [accessed 21/09/2012].

⁴⁸⁷ *The Prosecutor v Charles Ghankay Taylor*, *ibid* at paras. 260-273.

Conventions, war crimes and a few selected aspects of Sierra Leonean law relating to the abuse of girls and arson.⁴⁸⁸In 2010, the President of Sierra Leone formally apologised to women victims of his country's 10-year armed conflicts. This apology forms part of ongoing efforts to provide a fair compensation, rehabilitation and other benefits to eligible victims.⁴⁸⁹

This thesis notes the weaknesses of the SCSL. For example, the crime of genocide was not dealt with under the Statute of SCSL as it was assumed that there was no genocide committed during Sierra Leone's armed conflicts. The Statute further excluded grave breaches of Geneva Conventions in terms of international armed conflicts.⁴⁹⁰Moreover, the SCSL had no power to make decisions that were binding on third parties.⁴⁹¹In other words it could not exercise its jurisdiction over state officials that took part in peace-keeping negotiations in Sierra Leone, except where the court was authorised to do so by the UN Security Council or where the state involved was unwilling or unable to carry out an investigation or prosecution against their personnel.⁴⁹²

Although the situation of Sierra Leone has some similarities to that of Burundi, the inherent weaknesses of the SCSL have amplified the flaws in that model and in turn have undermined individual and collective criminal responsibilities, its legitimacy, administration of justice and fairness, efficiency and legacy of reparations to victims.

The following section discusses the DRC case.

3.3.3 The Democratic Republic of Congo

This thesis refers to the DRC case with specific reference to the case of *DRC v Belgium* (Yerodia's case).⁴⁹³ The Yerodia's case dealt with an arrest warrant against a former Foreign Minister of the DRC official in 11 April 2000. The case demonstrates the dilemma of issuing an arrest warrant against an individual perpetrator with a view to reinforcing individual accountability. This case involved a Belgian investigating Judge who issued an international arrest warrant in *absentia* against Abdulaye Yerodia Nombasi of DRC (a former Minister for Foreign Affairs), charging him with the offences of war crimes under the Geneva Conventions,

⁴⁸⁸ *Prosecutor v Charles Ghankay Taylor*, *op cit* n. 478, the court found Taylor criminally responsible for gross violations of human rights based on instructions and advice he gave to Sam Bockarie, see Perriello, T.; and Wierda, M.; (2006) "The Special Court of Sierra Leone Under Scrutiny" **International Centre for Transitional Justice**, available at: <http://ictj.org/publication/special-court-sierra-leone-under-scrutiny> at p.15, [accessed on 23/09/2013].

⁴⁸⁹ Perriello and Wierda, *ibid* at p.15.

⁴⁹⁰ Perriello and Wierda, *ibid* at p.15.

⁴⁹¹ See Igwe, C.S.; (2008) "The ICC's Favourite Customer: Africa and International Criminal Law" **Comparative and International Law Journal of Southern Africa** at p. 294.

⁴⁹² Igwe, *ibid* at p. 294.

⁴⁹³ *ICJ Rep* 2002 at p.3.

1949 and crimes against humanity which were allegedly committed due to the speeches made by the accused in 1998 that incited racial hatred and led to the murder and execution of civilians. The accused was not in Belgium when the warrant was issued. In June 2000 the warrant was sent to the DRC and transmitted to the Interpol which circulated it to other states.

Under the 1993 law, Belgium had criminal jurisdiction over the offences concerned wherever they may have been committed. However no Belgian was a victim of the alleged offences committed by Yerodia nor was there any other link between Belgium and the accused. In November 2000, Mr Yerodia was moved to become the Minister of Education and ceased to hold government office in April 2001. DRC filed an application to the ICJ against Belgium. The Court upheld the DRC's immunity claim.

However, in the separate opinion of three dissenting judges, Higgins, J., Kooijmans, J. and Buergenthal while referring to the Australian and UK national laws and other national legislation providing for extra-territorial criminal jurisdiction relating to international crimes, the minority held that:

[T]he crimes illustrate the trend to provide for the trial and punishment under international law for certain crimes committed extra-territorially. But none of them represent a classical assertion of a universal jurisdiction over offences committed elsewhere by persons having no relationship or connection with the state. The case law under these provisions has largely been cautious on reliance on the universal jurisdiction.

Using the Yerodia's case as an example, jurisdictional limitation was used to prevent an effective application of individual criminal responsibility.⁴⁹⁴

As Harris has noted while referring to the *Pinochet's* case, the concept of universal jurisdiction is uncertain because there is no established practice in which states can exercise a true universal jurisdiction.⁴⁹⁵ Although the Geneva Conventions of 1949 provide that: "each High Contracting Party shall be under obligation to search for persons alleged to have committed or to have ordered to be committed grave breaches and shall bring such persons, regardless their nationality before its own courts,"⁴⁹⁶ there is no territorial or national linkages that seem to suggest an accurate basis for universal jurisdiction. As such, it all depends upon the different interpretations given to the Geneva Conventions which justify academic and legal

⁴⁹⁴ Refer to the *Yerodia's* case, *ibid* n. 493.

⁴⁹⁵ Harris, *op cit* n. 172 at p. 297.

⁴⁹⁶ Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Geneva Convention of 12 August 1949.

controversies. Occasionally, national legislation can highlight on the universal jurisdictional issues, however, there is no consensus when it comes to its bindingness.⁴⁹⁷ For example, in the *Yerodia's* case, Belgian's warrant of arrest against the accused in Belgium or possibly in other countries would, in principle, seem to violate no legal rule of international law. However, the diplomatic immunity which the accused had under the Geneva Conventions contradicts the notion of universal jurisdiction.

In the contemporary world, international law which considers the rights and competences of the Heads of States attached to their capacity as representatives of their states tends to undermine State officials' criminal accountability.⁴⁹⁸ There are two types of immunities recognizable under customary international law, namely, functional immunity or "*ratione materiae*"⁴⁹⁹ and personal immunity "*ratione personae*."⁵⁰⁰ As such, an inference can be drawn from the *Yerodia's* case that since times immemorial, Heads of States enjoy immunity from criminal jurisdiction and inviolability as required by the Vienna Convention on Diplomatic Relations of 1961 (Vienna Convention).

The law recognizes categories of staff of diplomatic missions who must enjoy immunity from jurisdiction. The Vienna Convention grants immunities *ratione personae* by virtue of their offices.⁵⁰¹ Thus, state officials are granted personal inviolability including freedom from arrest as it was observed by the majority in the *Yerodia's* case.⁵⁰² Service staffs who are not nationals or permanent residents of the receiving state enjoy immunity *ratione materiae*.⁵⁰³ All members of diplomatic missions who enjoy immunities whilst in office enjoy a subsisting immunity *ratione materiae* in respect of their official actions even after they have left their offices.⁵⁰⁴ Equally, Heads of State and Cabinet Ministers are immune from prosecution for the crimes they have committed as state officials in their respective offices. As demonstrated in the *Mugabe's* case,

⁴⁹⁷ The *Yerodia's* case, *op cit* n. 493.

⁴⁹⁸ Evans, M.D.; (2010) **International Law**: Oxford University Press, at p. 400.

⁴⁹⁹ Immunity granted to officials who perform certain functions of state.

⁵⁰⁰ Immunity granted to certain officials because of the office they hold, rather than the crimes they have committed.

⁵⁰¹ Article 37(1) of the Vienna Convention.

⁵⁰² The ICJ upheld the DRC's immunity claim by 13 votes to 3 and stated that the arrest warrant was a violation of the immunity from criminal jurisdiction and personal inviolability which an incumbent foreign Minister enjoys under international law while referring to the Vienna Conventions.

⁵⁰³ Article 37(3).

⁵⁰⁴ Article 39(2).

an English court held that an arrest warrant could not be issued against Robert Mugabe on account of presidential immunity.⁵⁰⁵

Nevertheless, *ratione materiae* and *ratione personae* immunities are not absolute because once the accused has left his office, he /she may be prosecuted for crimes committed before or after his/her term in office or for crimes committed whilst in office in his/her personal capacity, subject to the jurisdictional and municipal law requirements. Likewise, international law provides that offences that are *jus cogens* in nature may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution".⁵⁰⁶

This thesis uses the persuasive value of the minority judgment in *Yerodia's* case and argues that universal jurisdiction can be invoked in the Burundi's case to try perpetrators of gross violations of human rights and reinforce individual responsibility and accountability. Similarly, as demonstrated in the *Pinochet's* case,⁵⁰⁷ the accused was arrested and charged with genocide because Chile and the UK had both signed and ratified the UN Convention Against Torture.

3.3.4 Chile

Like Burundi, there have been systematic mass killings of civilians in Chile. In the 1960s, the Chilean military was influenced by the National Security Doctrine (American- inspired Cold War principles) which advocated that threats to Chilean security was more internal than external.⁵⁰⁸ Accordingly, counter-insurgency policies and laws were articulated and implemented which targeted insurgent groups or subverted geo-political policies in order to align Chilean priorities with the international agenda of fighting against communism. Hence,

⁵⁰⁵ An application was made at Bow Street Magistrates' Court on 7 January, 2004 under section 134 of the English Criminal Justice Act, 1988 and UN Convention Against Torture which obliged the UK to institute criminal proceedings against Mugabe by issuing an extradition warrant against him. Judge Workman in rejecting the application held that Mugabe had immunity as a serving Head of State under Customary International Law and English Common Law provides for absolute immunity to any Head of State and State Immunity Act 1978.

⁵⁰⁶ See generally the cases of *Demjanjuk v Petrovsky* (1985) 603 F.Supp.1468, 776 F.2d 571 and *Attorney-General of Israel v Eichmann* (1962) 36 I.L.R 5.

⁵⁰⁷ The *Pinochet* case concerns an attempt by the Government of Spain to extradite the accused Pinochet from England to stand trial in Spain for crimes he committed mostly in Chile during the period Pinochet was head of state in Chile.

⁵⁰⁸ Hierbert, M.S. and Policzer, P. "Genocide in Chile? An Assessment" in Esparza, M. "Globalizing Latin American Studies of State Violence and Genocide" in Esparza, M. Huttenbach, H. R. and Felerstein, D.; (ed) (2010) **State Violence and Genocide in Latin America**: Routledge, Taylor and Francis Group, London at p. 70.

the focus of security and development policies shifted towards industrialisation and business growth.⁵⁰⁹

History shows that since the turn of the twentieth century, there had been uninterrupted mass killings in Chile and other countries in Latin America that have claimed many lives of *el pueblo* (indigenous Latin Americans), mostly in disputes over land or natural resources.⁵¹⁰ Surprisingly, for the last two decades of the last century as Esparza contends, ⁵¹¹studies on genocide have been focusing on investigating the extermination of Armenians under the Ottoman Empire, the Jewish Holocaust and mass killings of Rwanda. Like Burundi, no equivalent scholarly studies have been conducted to see whether or not genocide was committed in the Latin American countries against left-wing groups during the Cold War period from mid-1940s to early 1990s. Occasionally, some scholars as Esparza contends, have been adopting the narrow definition of the Genocide Convention by excluding certain categories like political groups to be under the protection of the Genocide Convention. ⁵¹²

In 1998, a Spanish Judge, Baltasar Garzon, in order to reinforce the notion of universal jurisdiction employed a broader interpretation of the Genocide Convention that allowed him to issue an arrest warrant against the Chilean General, Augusto Pinochet, on account of crimes against humanity, genocide, widespread forced disappearances, systematic mass killings and torture that were committed against political opponents.⁵¹³

Garzon's broader interpretation of the Genocide Convention laid down a foundation for future indictments of perpetrators of genocide and other serious international crimes committed in other countries like Burundi where scholars have been silent on the genocide issue. Therefore, the criminal charges against perpetrators of genocide and other serious crimes can be invoked based on the notion of universal jurisdiction. As evidenced in Pinochet's detention, the Chileans and non-Chileans who were killed in 1973-1990 have been considered as political victims although they did not meet the classical conventional definition of "protected group".⁵¹⁴

This study compares mass killings in Latin America with those in Burundi and limits itself to the cases of Chile, Argentina and Guatemala to see whether there are lessons that can be drawn from the Latin American experiences as briefly discussed hereunder. Chile is discussed in details on limitation of genocide definition and later under transitional justice section. The cases

⁵⁰⁹ Hierbert and Policzer, *ibid.*

⁵¹⁰ Esparza, M. "Globalizing Latin American Studies of State Violence and Genocide" in Esparza, *et al op cit* n. 508 at p.7.

⁵¹¹ Esparza, *ibid* at p. 1.

⁵¹² Esparza, *ibid* at p. 1.

⁵¹³ Esparza, *ibid* at p. 1.

⁵¹⁴ Article 2 of the Genocide Convention.

of Argentina and Guatemala on the other hand suggest that a broader interpretation of the Genocide Convention is called for in order to deal with systematic gross violations of human rights.

Having National Security Doctrine in mind, Chile and other countries in Latin America formed regional armed forces which resolved to deal with their domestic issues including the threat posed by the Marxist- inspired political parties or groups.⁵¹⁵ Although anti-communism had deep roots in Chilean security and armed forces as it was the case with other countries in the region, the National Security Doctrine was reinforced through purposeful military actions which resulted into grave human rights violations. For example, on 11 September 1973, a right-wing coup removed the left-wing regime of President Salvador Allende. The coup was led by a military *junta* under the then General Pinochet. It has been argued that the aim of such military dictatorship in Chile was to "extirpate the Marxist cancer" from the Chilean politics.⁵¹⁶

It is imperative to point out that during 1978 -1989 period, military rule was consolidated and institutionalized. In 1988, there was a referendum and the majority of Chileans voted for democratic elections which brought Patricio Aylwin into power as the new President. However, members of the armed forces who were involved in the human rights violations under the previous military regime remained powerful, including Pinochet who kept his position of Commandant-in-Chief of the Army and a Head of State.⁵¹⁷ The Pinochet regime remained in power until 11 March 1990 when Pinochet resigned from his presidential responsibilities.

During the Pinochet regime of 1973 -1990, there had been gross violations of human rights which were committed inside and outside Chile. These human rights violations included torture, mass murders, extra-judicial executions of political opponents and the unprecedented forced disappearance of individuals, all intensified on a large scale.⁵¹⁸ Before leaving office, Pinochet and his agents enacted several laws to ensure that the administrative structure would remain the same and allow the army to be in control including retaining army officials' benefits and privileges of political influence and decision-making.⁵¹⁹

⁵¹⁵ Hierbert and Policzer, *op cit* n. 508 at p.71.

⁵¹⁶ Hierbert and Policzer, *ibid* at p. 71.

⁵¹⁷ Lira, E. "The Reparations Policy for Human Rights Violations in Chile" in De Greiff, P.; (ed)(2006) **The Handbook of Reparations** at p. 55.

⁵¹⁸ For details on Chilean atrocities, see Hierbert and Policzer, *op cit* n. 508 at pp. 71-75.

⁵¹⁹ See the Chilean Truth and Reconciliation Report, 1990 which states that Chile's efforts towards constitutional reform was hindered by the institutions loyal to former President Pinochet, in particular the military, the legislature and the judiciary at p. 9. Available at: <http://www.usip.org/publications/truth-commission-chile-90> [accessed on 27/07/2013].

Although, the Chilean Constitution of 1980 distinguished between various matters to be regulated by law, obstacles relating to constitutional reform were unavoidable because the military *junta* of the previous regime deemed certain administrative structures to remain unchanged.⁵²⁰ Like Burundi, the judiciary remained loyal to the previous regime and did not respond vigorously to human rights violations.⁵²¹ In this perspective, a percentage of representation in the National Congress was guaranteed and nine senators were appointed by the Supreme Court, Council of National Security and General Pinochet in his capacity as President of the Republic.⁵²² This prevented the new government of Aylwin from having an absolute majority in Parliament.⁵²³ Additionally, the Pinochet regime passed an amnesty law,⁵²⁴ which the Aylwin's government was unable to repeal without a legislative majority.

Despite of administrative hurdles that faced Aylwin's new democratic government, one month after the establishment of the Aylwin government, a National Truth and Reconciliation Commission, *Comisión Nacional de Verdad y Reconciliación* commonly known as the "Rettig Commission" was established.⁵²⁵ This Commission was established in order to reveal the truth on allegations of grave human rights violations committed by the military *junta* and its agents or individuals who were responsible for the deaths, torture and forced disappearances of political opponents and civilians. Most of the forced disappearances committed by the Pinochet government took place between 1974 and August 1977 as a planned and co-ordinated strategy by the Pinochet government. The National Intelligence Directorate or *Direction de Inteligencia Nacional* (DINA) and National Centre for Information or *Centro Nacional de Información* (CNI) were responsible for a significant amount of political repression during this period.⁵²⁶

Unlike Burundi, truth-telling in Chile was considered as an essential component of the Rettig Commission because it provided for, *inter alia*, measures of reparation for the victims and prevention of future recurrence of the outrages of the military regime.⁵²⁷ The Commission Report stated clearly that truth should be known to the public on what ought to be repaired and prevented. Furthermore, the Chilean society could not simply erase a chapter of its history

⁵²⁰ Chilean Truth and Reconciliation Report, *ibid* n. 519 at p. 9.

⁵²¹ See, the Truth and Reconciliation Commission Report, *ibid.* at p. 140- 151.

⁵²² See Quiroga, M.; "National Law and Practice: The Experience of Chile" in Boven, T.; *et al.* (eds) (1992) **Seminar on the Right to Restitution, Reparations and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms**: University of Limburg, Maastricht at pp.146-149.

⁵²³ Quiroga, *ibid* at pp.146-149.

⁵²⁴ The Amnesty Law which was promulgated by the military government in 1978.

⁵²⁵ Named after the former Senator Raúl Rettig who chaired the Commission.

⁵²⁶ The Rettig Commission Report, *op cit* n. 519 at pp. 7- 8.

⁵²⁷ See Part Four of the Rettig Commission Report, *ibid.*

because it would result into Chileans being misled with lies or conflicting versions. The Rettig Commission emphasized that Chilean national unity and identity depended largely on a shared memory of the past that could help to bring about social purification and prevent past human rights abuses from recurring.⁵²⁸

Certainly, the Rettig Commission's major task was to draw up a complete picture of the alleged human rights violations which were committed by security, armed forces and government officials as way of gathering evidence. Based on the Commission's findings, it would have been possible to identify the victims and compensate them, uncover the truth concerning detainees and forced disappearances and recommend reparation and restoration of Chileans' dignity as it deemed just. The measures that would be adopted, would aim to prevent future human rights abuses.⁵²⁹ The Commission's Report contained a chapter on reparations that was to be understood through a series of actions and phases that were expressly acknowledged and accepted in Chile. For example, individuals' criminal responsibility, forgiveness and public apology were suggested while criminal justice was proposed to be dealt with under international law, hence, prosecution was not part of the Rettig Commission's mandate.

Evidently, the findings of the Rettig Commission has been considered as a cornerstone of judicial investigations on forced disappearances, political assassinations inside and outside Chile including the landmark *Letelier* case.⁵³⁰ In this case, Orlando Letelier, a former Foreign Minister was assassinated in Washington, D.C. in September of 1976 by the DINA agents. This led the serious investigation done by the United States' government and a civil case was instituted in 1978. The court held, among other things that Chile government was in breach of international law.

Although criminal justice was limited to crimes committed after the 1978 cut-off date, the most salient Amnesty Law which was proclaimed by the military *junta* government in 1978 following the dissolution of the DINA remained an obstacle against proper criminal investigations. Consequently, with the exception of the *Letelier* case, all penetrators of human rights violations committed prior to 1978 would have not been prosecuted and gone with complete impunity. Pinochet's famous Amnesty Law of 1978 was a major obstacle which prevented successive democratic governments from opting for criminal prosecution, therefore, the post-conflict government's resolve to focus on truth and reconciliation processes instead of prosecution.⁵³¹ A

⁵²⁸ The Rettig Commission Report, *ibid*.

⁵²⁹ The Rettig Commission Report, *ibid* at p. 21.

⁵³⁰ *De Letelier v Republic of Chile*, 567 F. Supp. 1490 - Dist. Court, SD New York 1983.

⁵³¹ Requa, M. A.; (2012) "A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court" *Human Rights Law Review*: Oxford University Press at p. 80.

small number of military officers were convicted in the 1990s for human rights abuses. Jurisprudential change in domestic courts prior to Pinochet's detention in London from 1998 to 2000 resulted in the indictment of other perpetrators. But, in the immediate aftermath of the dictator's release after the UK Pinochet case the courts failed to realize the government's promises of local remedies.⁵³²

Although the ruling in the *Pinochet*'s case that Pinochet could not be extradited from the UK to Chile, the Rettig Commission's findings were used as foundation on revealing truth on past human rights abuses which encouraged some enthusiastic judges to continue with investigations of specific cases.⁵³³ The *Pinochet*'s case suggests that universal jurisdiction which equally advocates for the traditional legal principle of *opinio juris*, does not give clarity on the concept. Instead universal jurisdiction tends to be undermined by the notion of immunity in terms of the diplomatic laws.

In spite of criminal prosecution challenges in Chile, yet, ongoing national and international pursuit for justice confirmed that impunity can be confronted. For example, in 1993 the Supreme Court in Chile sentenced a retired general Manuel Contreras and former Head of the DINA and another army official to seven years imprisonment for the assassination of Letelier. Similarly, in March, 1994, fifteen former policemen were sentenced to long prison terms for their involvement in the commission of international crimes in the *Degollados* case after eight years of investigation. In the *Degollados* case,⁵³⁴ the victims who were active members of the Communist Party were taken captive by Pinochet's secret police agents, tortured and taken to the outskirts of Santiago, slit-opened the victims' throats, hence referred to as "Case of the Slit Throats" or "*Degollados*" and their bodies deserted in a remote location.⁵³⁵ Based on the grave human rights violations in the *Letelier* and *Degollados* cases prosecution of the perpetrators was essential.

Furthermore, under customary international law, Pinochet was arrested in 1998 in Great Britain for violating international law. His arrest opened the door for amnesties of other accused perpetrators to be challenged as a way of dealing with impunity. Consequently, Pinochet's credentials diminished especially under the Eduardo Frei regime (1994-95). Frei who succeeded Aylwin, began to reduce the military's influences in the Chilean government. For instance, Pinochet lost legitimacy when his parliamentary immunity was waived by the Chilean

⁵³² See *Pinochet* 3, the Home Secretary ruling that Pinochet would not be extradited.

⁵³³ The Rettig Commission Report, *op cit* n. 519 at p. 16.

⁵³⁴ *Degollados* case, No 31.030-1994 of 27/10/1995.

⁵³⁵ See The Santiago Times "Chile's Bachelet Commemorates "Degollados" Human Rights Case, 30 March, 2006, available at: <http://santiagotimes.cl/content/chiles-bachelet-commemorates-degollados-human-rights-case/> [accessed on 27/09/2013].

Supreme Court in August 2000 and indicted together with other military officials for their role in mass killings following the 11 September 1973 coup. Subsequently, numerous indictments followed and Pinochet was put under house arrest in 2004 on charges of tax fraud, money laundering and enrichment from arms deal until when he died in December 2006.

In describing and analyzing the diplomatic immunity this thesis notes a positive development in international law in observing, protecting and promoting human rights. As Evans has pointed out, the scope of international law has been broadened to impose obligations upon individuals who are criminally responsible for serious crimes they have committed. Crimes which offend public international community can limit individual's diplomatic immunity.⁵³⁶ For example, in the *Pinochet's* case the extent of immunity in terms of the Vienna Conventions was subject to scrutiny.⁵³⁷ In the *Pinochet III* case for instance, it was confirmed by the English Court that Pinochet was not entitled to state immunity. It was clarified that the acts committed outside of British territories could be prosecuted under national law if committed after the passing of section 134 of the Criminal Justice Act 1988, hence the mantra that there "can be no immunity for genocide".

This thesis notes the constitutional and judicial reforms in Chile and argues that there is an emerging trend of applying the International Bill of Rights when there are no remedies under municipal laws in order to deal with the problem of impunity. For example, two judges of the Santiago Court of Appeal in September 1994, applied the principles of international law strictly to waive immunity under the infamous Pinochet's 1978 Amnesty Law. The Chileans judges based their decision on Chile's adoption of the Geneva Convention and the ICCPR and stated that international obligations superseded domestic legislation like the Amnesty Laws. Although the Court of Appeal's decision was in conflict with the Supreme Court's ruling of 1991 on upholding the Amnesty Law, the Supreme Court in 2000 overruled its previous decision of 1991 and upheld the Santiago Court of Appeals' decision.

⁵³⁶ Evans, *op cit* n. 498 at p.400.

⁵³⁷ In the case of *R v Bow Street Metropolitan Stipendiary Magistrates, Ex Parte Pinochet Ugarte* 3, *op cit* n. 461, an arrest warrant was issued against Pinochet by a Spanish Judge for international crimes he committed in Chile. It was alleged that these crimes could be prosecuted in any country under the doctrine of universal jurisdiction. Pinochet's legal representatives contended that Pinochet who was a Head of state during the commission of alleged crimes was immune from prosecution and the British courts had no jurisdiction to prosecute Pinochet. The Divisional Court (*Pinochet I*), held that Pinochet had state immunity. On appeal to the House of Lords in the (*Pinochet II*), a majority judgment by 3 - 2 (Lord Nicholls, concurring with Lords Hoffmann and Steyn while Lords Slynn and Lloyd dissenting) held that Pinochet did not have immunity. Due to controversial nature of the *Pinochet's* case, the judgment was set aside on the grounds that there was the possibility of bias. However, the majority decision was confirmed in the (*Pinochet III*) that Pinochet had no immunity.

It must be pointed out that like Burundi, the crime of genocide in Chile case is still ambiguous.⁵³⁸ In contrast with Argentina where the claim of genocide has gained official recognition, the case of Chile has been understood in the context of mass killings and political violence which may justify scholarly inquiries. In other words, in spite of the limited constitutional reforms in Chile as stated above, there is still a dilemma on how to deal with the legacy of the military regime especially, how to bring to justice the perpetrators of mass killings due to divisions that have been created among the Chileans.⁵³⁹

It must be acknowledged however that amnesty was at the heart of the Chilean transitional justice initiatives. For example, under the amended Amnesty Laws, perpetrators of human rights violations could be exempted from prosecution. Nonetheless, such exemption was subject to the accused's co-operation in criminal investigations relating to past human rights violations and charges would be withdrawn upon confession to the past wrongs as provided for in the Rettig Report.

3.3.4.1 Chilean transitional justice model

Unlike Burundi, there are positive aspects of the Chilean transitional justice model. The prominence of the Chilean reparations model remain due to the fact that it had an image of sustainability in terms of implementation and monitoring mechanisms. For example, the *Corporación Nacional de Reparación y Reconciliación* (National Corporation for Reparation and Reconciliation) was created⁵⁴⁰ to implement the Rettig Commission's recommendations.⁵⁴¹ The Chilean model had an ongoing support system to the survivors and victims' families including judicial and extra-judicial investigation to trace the families of the forced disappeared victims as it considered and promoted the right to know the whereabouts of the victims or forced disappearances. The involvement of survivors in the reparation programmes to design comprehensive reparatory projects was among the features of true reconciliation.

A large number of the beneficiaries of reparation programmes claimed further the recognition of harm they had suffered including the vindication of the dignity and reputation of their families.⁵⁴² This thesis acknowledges positive aspects of the Chilean model which have been

⁵³⁸ Hierbert and Policzer, *op cit* n. 508 at p. 75.

⁵³⁹ Hierbert and Policzer, *ibid* at p. 77.

⁵⁴⁰ Under Law No. 19.123 of February 8, 1992.

⁵⁴¹ *Amonacid-Arellano et al v Chile*, Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs).

⁵⁴² See the ICTJ Reparation Report, available at: <http://ictj.org/our-work/transitional-justice-issues/reparations>. [accessed on 26/10/2013].

adopted in other countries like South Africa.⁵⁴³ It has been revealed that from 1996 to 2008, the Chilean government paid more than \$1.6 billion in pensions to certain victims of the Pinochet regime and established a specialized health care program for survivors of violations. These were accompanied by an official apology from the President. These initiatives can be utilized by Barundi in terms of reparations and restitution which may include public apology as one way of showing remorse.

Despite of the comprehensive nature of the Chilean resolve to confront impunity, this study has noted also some negative aspects of the Chilean transitional justice model as explained herein. Following the establishment of the aforementioned Rettig Commission, there was a limited number of civil actions which were instituted between 2002 and 2003 when the higher courts dismissed the case against Pinochet on compensation awarded by lower courts which were higher than the amounts of reparations pensions.

3.3.4.2 Judicial interpretation

Although the Chilean legislation allowed for civil actions to be instituted,⁵⁴⁴ its restrictive interpretation by the Supreme Court was an obstacle in the equitable administration of justice. However, in 2002 the Court in Santiago held that the statutory limitations to grant compensation on account of the claimants who had received reparation pensions were unlawful.⁵⁴⁵ The Supreme Court on other hand, upheld these arguments and set aside lower court's decision that ordered the payment of compensation.⁵⁴⁶ The judicial inconsistencies on reparation to the victims of human rights violations in Chile was contrary to the notion of justice. The shortcomings in the Chilean transitional justice were noted by the Inter- American Court of Human Rights (IACtHR) in the *Hermosilla* case.⁵⁴⁷ The IACtHR held that in obstructing investigation and preventing the victims and their next of kin from knowing the truth and receiving the corresponding reparations, Chile had violated the right to a fair trial and the right to judicial protection enshrined in the Convention.⁵⁴⁸ The IACtHR stressed that Chilean government must ensure that amnesty laws did not continue to hinder the investigation and prosecution of those responsible of violations in Chile.⁵⁴⁹

⁵⁴³ See *AZAPO and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) 1095 at p. 1030.

⁵⁴⁴ Under the Amnesty Law Decree No. 2.191 of 1978.

⁵⁴⁵ Judge Ruben Palma Mejias's view.

⁵⁴⁶ The Supreme Court interpreted this Decree as preventing the judge to pursue an investigation. This interpretation has been declared as constituting a violation of the right to indemnification by the Inter American Court of Human Rights in the case of *Garay Hermosilla et al v Chile*, Case 10.843, Report No. 36/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997).
Garay Hermosilla et al v Chile, *ibid*.

⁵⁴⁸ *Garay Hermosilla et al v Chile*, *ibid* at paras 59-93.

⁵⁴⁹ See the case of *Amonacid-Arellano et al v Chile*, *op cit* n.584 paras. 127, 129.

Furthermore, inadequacies of the Amnesty Law Decree 19.123 on the establishment of a national authority for reparation and reconciliation were not amended.⁵⁵⁰ For example, unmarried partners of the disappeared detainees and survivors of political executions were excluded from the list of reparation beneficiaries. Moreover, some regarded the money received as a "privilege" and detached the benefits from their background and reparative perspective.

Like Burundi, there is still a pending issue of accomplices and beneficiaries of the Pinochet's regime which has not been raised yet. For example, the individuals or group of individuals or juristic persons such as companies which might have done business with Chile between 1973 and 1990 have not been investigated on whether or not they were involved in or benefited from the gross violations of human rights in Chile.⁵⁵¹

3.3.4.3 Monitoring and legal reforms in Chile

Monitoring programmes were designed to reinforce the Rettig Commission's recommendations on Chile. For example, the Ministry of the Interior initiated national dialogues between 1999 and 2000 including the 2003 government's proposal to solve the pending issues that related to Pinochet's regime.

The Commission's recommendations were implemented by a public institution, the National Corporation for Reparations and Reconciliation (NCRR).⁵⁵² Thus, the four steps followed under Chilean reparation model were:

- establishment of Truth and Reconciliation Commission,
- creation of the NCRR to implement the Rettig Report's recommendations,
- national Dialogue Roundtable established in 1999 when General Pinochet was no longer Commander-in-Chief of the Army. During this dialogue, the army acknowledged its involvement in the death of Chileans who were thrown into the sea or secretly buried, and,
- establishment of another Commission (National Commission on Political Imprisonment and Torture was established) known as the Valech Commission.⁵⁵³

⁵⁵⁰ *Amonacid-Arellano* case, *ibid* par. 71.

⁵⁵¹ Nibogora, *op cit* n.16 at p. 40.

⁵⁵² Created by Law 19.123.

⁵⁵³ On August 12, 2003, Chilean President Ricardo Lagos appointed a second commission, the National Commission on Political Imprisonment and Torture, also known as the "Valech

The Corporation under the NCRR also continued investigations that the Rettig Commission was unable to complete.

This study acknowledges that the legal reforms in Chile could inspire Burundi in ensuring accountability and responsibility. These include amendments to the Amnesty Law of 1978,⁵⁵⁴ abolishment of death penalty,⁵⁵⁵ establishment of the Office of Public Defender or an Ombudsperson to deal with allegations of human rights,⁵⁵⁶ amendments to the Constitution⁵⁵⁷ and criminal law, including law on establishing criminal responsibility of legal persons for money laundering and financing of terrorism, establishment of Human Rights institute⁵⁵⁸ and the law concerning the implementation of the Valech Commission's Report.⁵⁵⁹ In October 2004, the Amnesty Law of 1978 was amended⁵⁶⁰ to broaden and add new benefits for the next of kin of the victims, including a 50 percent increase in the amount of the monthly pension, the empowerment of the President to grant a maximum of 200 non-contributory pensions broadening the scope of the health benefits.

All above Chilean transitional justice efforts aimed at seeking truth, justice and reparations to the victim survivors in a comprehensive manner in order to bring about national healing and reconstruction. Amongst the reparations programmes, the most visible was the comprehensive healthcare for victims of human rights violations and reparation for refugees who returned in Chile from exiles including their re-integration. Furthermore, there was rehabilitation of former of political prisoners and land restitution for peasants who were excluded from agrarian reform or evicted from their original lands before.

The following section discusses the Argentina case.

3.3.5 Argentina

As stated in the Chilean case above, reinforcement of the National Security Doctrine culminated into military repression in Argentina as way of fighting against "Peronism,"⁵⁶¹

Commission to document additional abuses, including torture, committed under the military dictatorship. The Valech Commission Report was published in November 2004.

⁵⁵⁴ Decree Law 2.191 of 1978 (Amnesty Law).

⁵⁵⁵ Law Abolishing the Death Penalty, 2000.

⁵⁵⁶ Law Creating the Office of the Public Defender in Criminal Matters 2001.

⁵⁵⁷ Law on Amendments to the 1980 Constitution of 2005.

⁵⁵⁸ Law Establishing Criminal Responsibility of Legal Persons for Crimes of Money Laundering and Financing of Terrorism 2009 (Law 20393), Law No 17-798 on Arms Control as amended in 2005.

⁵⁵⁹ Supreme Decree No. 43 of 2010 Concerning the Valech Commission.

⁵⁶⁰ Law 19.980 of 2004.

⁵⁶¹ An Argentine political ideology that was formulated by President Juan Domingo Peron which advocated social justice. This ideology rejected the extremes of capitalism and communism and promoted corporatism in order to minimize the tensions among the society. For example,

especially in the 1974 - 1984 period. Armed forces were used to fight against Peronism or communism by eliminating political opponents and subversion of democratic processes.⁵⁶² Due to the Cuban Revolution of 1959, the US strategic plan was to encourage Argentina and the rest of Latin American region to think in ideological boundaries than territorial and used military regimes for that purpose. Hence, armed forces were trained and counter-methods used by the French in Algeria and US in Vietnam were preferred.⁵⁶³ In what was referred to as the "dirty war" or mass killings in Argentina started in 1974 and reached its peak between 1976 -1979 when Juan Peron's widow, Isabel Martinez de Peron, was overthrown on March, 1976 by Jorge Rafael Videla and many lives were lost associated with gross violations of human rights.

Under Videla's military rule, hundreds of thousands of Argentine civilians were killed, tortured, detained, abducted and humiliated in what was referred to as "rectoscope"⁵⁶⁴ by the right-wing military regimes as a part of the US anti-communist movement. Although gross violation of human rights in Argentina went beyond the Nazi Holocaust as Feierstein has contended,⁵⁶⁵ yet, the extermination of political groups in Argentina was not initially characterised as genocide.

Like Chile and Burundi, Amnesty Laws were enacted under the Argentine military regime and used to ossify impunity. Courageously, the Argentine post-military regime leaders' priority was to repeal the Amnesty Laws of the previous military regime. For example, Amnesty Law of 1973 which provided that amnesty should be granted for crimes committed before 25 May 1973 and political, social, trade union or student activities, and for acts committed by individuals who had been prosecuted by military courts or military commanders.⁵⁶⁶ Under the Amnesty Law, 1973 all sentences for such acts had to be discontinued.

Argentina's Self-Amnesty Law 1983 provided for the armed confrontations which occurred in the fight against "subversive terrorism" to be discontinued and the punitive actions for crimes committed for the purpose of terrorist or subversive activities between 25 May 1973 and 17 June 1982 to be withdrawn. It also applied to all unlawful acts undertaken for the

trade unionism was promoted and the state was responsible to mediate conflicts between employers and employees.

⁵⁶² Feierstein, D. "Political Violation in Argentina and its Genocidal Characteristics" in Esparza *et al*, *op cit* n. 508 at p. 44.

⁵⁶³ Feierstein, *ibid* at p. 45.

⁵⁶⁴ Inserting tubes in the victims' private parts.

⁵⁶⁵ Feierstein, *op cit* n. 562 at p. 45.

⁵⁶⁶ ICRC "Argentina: Practice Relating to Rule 159, Amnesty for Participation in Non-international Armed Conflicts" **Customary IHR**, available at: http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ar_rule159 [accessed on 30/09/2013].

purpose of developing measures to prevent, thwart or put an end to "terrorist" or "subversive" activities.

However, the Self-Amnesty Law of 1973 was declared unconstitutional and unlawful. In the *Cavallo* case in 2001, in 1987 an Argentine Federal Judge nullified the 1973 and 1983 laws which granted amnesties to hundreds of military officers who were responsible for human rights violations during the country's 1976-1983 dictatorship period. The judge stated that these laws did not respect Argentina's obligations under international law on investigating and punishing perpetrators of human rights violations and crimes against humanity.⁵⁶⁷

The Constitution of Argentina of 1996 provides that among the functions of the head of government of the autonomous City of Buenos Aires (Argentina) shall include the authority to "pardon or commute penalties individually and in exceptional cases following a plea by a competent court. However, the Head of State shall not pardon or commute, *inter alia*, penalties for crimes against humanity, or crimes committed by public officials during the course of their duties". Moreover, Argentina's Draft Code of Military Justice of 1998, provided that, in no case shall amnesty or pardon be granted with respect to the offences contained in Chapter I of the Code that deals with offences against protected persons and objects in the event of armed conflicts. Clearly, there have been a commitment in Argentina to confront impunity through its legal reforms.

This thesis refers to the Argentine's developments in criminal justice and notes that unlike Burundi there was a resolve to confront impunity. For example, the extradition of an Argentine national, Ricardo Miguel Cavallo "Serpico" to Spain for crimes of terrorism and genocide committed in Argentina supports this view.⁵⁶⁸ Cavallo who was part of the intelligence group known as "GT 33/2 of the ESMA", one of the most brutal clandestine detention centers of the Argentine military regime of 1976-1983, was arrested in the southern Mexico and extradited to Spain to answer allegations on human rights violations. Cavallo was accused of forced disappearances of 248 persons and kidnapping of 128 persons of whom 16 were pregnant women who gave birth at the ESMA Center. In 1999 Baltasar Garzon, a Spanish judge requested for the extradition of Cavallo from Mexico to Spain based on universal jurisdiction principle.⁵⁶⁹

⁵⁶⁷ See generally Feierstein, *op cit* n.562 at p. 47.

⁵⁶⁸ International Federation of Human Rights Leagues (FIDH) "First Extradition Based on Universal Jurisdiction" **FIDH - Worldwide Human Rights Movement**, available at: http://www.fidh.org/IMG/article_PDF/article_a279.pdf [accessed on 10/011/2013].

⁵⁶⁹ FIDH, *ibid*.

In arriving at its decision in the *Cavallo* case, the Court enunciated the following important legal principles by confirming that:

- National courts may have jurisdiction to prosecute non-citizens for international crimes even if these crimes were committed elsewhere, thus, the jurisdiction of the Spanish courts was extended to prosecute Cavallo for alleged genocide and terrorism.
- An accused person can be extradited on the principle of universal jurisdiction to face criminal charges for crimes he/she has committed.

The cases of Chile and Argentina demonstrate that there are limited criminal sanctions emanating from transitional justice arrangements which can be utilized to confront impunity.

3.3.6 Guatemala

Guatemala's case is another example where gross violations of human rights were committed in the Latin American region where the National Security Doctrine had been used to fight against "communism".

This section evaluates the case of Guatemala with specific reference to state responsibility. There had been debate on the genocide of Mayan descendants in Guatemala committed by the Portuguese and Spanish *conquistadores* or "conquerors"⁵⁷⁰ including measures taken by *criollos*⁵⁷¹ involving the forced displacements of the Mayan indigenous communities in Guatemala in 1871. Although there has been scholarly inquiry on systematic human rights violations and crimes committed by the *conquistadores* and *criollos*, international crimes committed by the state and armed forces against civilians are rarely characterised as genocide.⁵⁷² Undeniably, heinous crimes committed against Mayan indigenous communities and "ideological enemies" in 1978 in Guatemala can be classified as genocide.

This study uses Guatemalan case as an example of truth-telling in respect of past wrongs and criminal accountability of Heads of State and government officials. Reference is made to the *Montt's* case where a Guatemala's former President, Efraín Ríos Montt was convicted of genocide by the Constitutional Court.⁵⁷³ Ríos Montt came to power in a military *coup d'état* and

⁵⁷⁰ A group of soldiers, explorers and adventurers who worked under the Spanish and Portuguese Empires. See Mejía, R.M. "Bringing Justice to Guatemala" in Esparza *et al*, *op cit* n. 504 at p. 209.

⁵⁷¹ Spanish descendants.

⁵⁷² Mejía, *op cit* n. 570 at p. 209.

⁵⁷³ See Doyle, K.; "Guatemala's Genocide on Trial" *The Nation*, May 22, 2013. Available at: <http://www.thenation.com/article/174488/guatemalas-genocide-trial#> [accessed on 01/10/2013].

ruled Guatemala from 1982 to 1983. Under Montt's military regime, there was grave human rights violations. For example, crimes committed by Montt's army in the Ixil Region of the Department of Quiché, where 1771 indigenous Mayans were killed and some 29 000 displaced in a strategic plan that was designed to destroy the Ixil Mayan communities once and for all.

During the Montt's trial, it was revealed that the army's strategies of exterminating the Ixil Mayans were planned, co-ordinated and carried out according to a set of strategic and operational documents issued by the Ríos Montt regime commonly known as the "Plan Victoria 82".⁵⁷⁴ Plan Victoria 82 which was issued as an internal military command in June 1982 by the Guatemalan authorities called for the "annihilation" not only of the armed insurgent groups but also the Mayan people who assisted them with food, shelter and information.⁵⁷⁵ In the context of the regime's extreme anti-communist ideology, the Mayan population was identified as an "internal enemy" and therefore a legitimate target for military attacks.

The Constitutional Court of Guatemala held that the Ixil Mayan communities were subjected to mass killings, forced disappearances, systematic rape, killing of the children, women and the elderly, burning of their homes, slaughtering of their animals, destruction of their crops, massive internal displacements, starvation, deliberate exposure to diseases and bombing when they sought refuge in the mountains.⁵⁷⁶ The Court held further that systematic destruction of Mayan communities was the most radical expression of possible racism, social exclusion and abuse that Guatemala's indigenous people had endured for hundreds of years. In the premise, criminal prosecution in the *Montt's* case was intended to deal with among other things, the past injustices and restore a sense of dignity to the victims and survivors by recognizing the totality of the Guatemalans' historical experiences beyond mass killings, pain and loss that each victims endured.

It is submitted that in contemporary societies, there has been a paradigm shift to improve criminal justice systems in terms of punishment to be imposed.⁵⁷⁷ Transitional justice practices in Chile, Argentina and Guatemala have revealed that criminal investigations and prosecutions can be pursued to deal with gross human rights violations. Literally, in transitional criminal sanctions the elements of establishing and punishing the perpetrators of past wrong-doings can be separated which may be detrimental to a given effective transitional justice model. For

⁵⁷⁴ Similar to the Plan Simbananiye of Burundi.

⁵⁷⁵ Doyle, *op cit* n. 573.

⁵⁷⁶ Doyle, *ibid*.

⁵⁷⁷ See Teitel, R. G.; (2000) **Transitional Justice**, Oxford University Press at p. 230. Teitel uses examples from Europe, Latin America, the former Soviet Union and Africa to demonstrate how modern societies have dealt with past wrongs of regimes and resorted for freedom and democracy at pp. 46-47.

example, the transitional justice modes in Argentina and Guatemala emphasized prosecution while other aspects of reparations and forgiveness have not been dealt with the necessary rigour. Hence, Argentina and Guatemala, like other countries such as Burundi which have emerged from armed conflicts, are still struggling to overcome the legacies of the previous regimes. However, unlike Burundi, Argentina and Guatemala have shown some degree of resolve to deal with the legacy of systematic human rights violations which can be attributed to individual or state responsibility depending on the merits of the case as underscored in the case of Guatemala.

3.3.7 South Africa

Having analyzed the cases of Rwanda, Sierra Leone, DRC and the Latin America, this section evaluates the transitional justice mechanisms in South Africa in an historical context and analyses the legal framework, success and challenges of that country with a view to drawing possible lessons for Burundi.

3.3.7.1 Contextual background

When the National Party came to power in 1948, it adopted a policy of Apartheid with legally enforced racial segregation, discrimination against and limitations of the basic rights of the majority of South Africans, especially non-whites until 1990. Laws such as the Suppression of Communism Act, 1950, Public Safety Act, 1953, Unlawful Organisations Act, 1960 and the Terrorism Act, 1960, Immorality Act, 1957, Group Areas Act, 1950 and Prohibition of Mixed Marriages Act, 1949, were used to criminalise certain forms of conduct and suppress the opposition or liberation movements.⁵⁷⁸ Blacks were discriminated against in many areas like education, employment, territorial separation, separate development, whites only franchises, race classification and sexual separation. Internal resistance was suppressed with brutality, detentions, torture and limitation or no freedom of expression at all. Liberation movements like the African National Congress (ANC)⁵⁷⁹ were banned. Following a bitter liberation struggle that was closely followed by intensive negotiations towards majority rule, South Africa became a democratic state in 1994 which adopted measures to promote truth and reconciliation.

The South African peace negotiating process to end Apartheid was locally-driven with specific reference to the political unrest during 1980s-1990s period. A widespread and state-sponsored

⁵⁷⁸ See for example, the case of *S v McBride* 1988 (4) SA 10 (A), unreported, at pp. 1-21. Available at: <http://www.saflii.org.za/za/cases/ZASCA/1988/40.html>

⁵⁷⁹ The current ruling party which but has been criticized over: corrupt members, wasteful expenditure and Secrecy Bill. See National Post News "South Africa's troubled ANC facing criticism on 100th anniversary" available at: <http://news.nationalpost.com/2012/01/08/south-africas-troubled-anc-facing-criticism-on-100th-anniversary/>. [Accessed on 08/01/2012].

violence perpetrated by the Apartheid regime culminated in formal negotiations which started in the 1990s after the release of all political prisoners and unbanning of anti-apartheid organisations.⁵⁸⁰ Apartheid, which was an institutionalised racist regime in both physical and structural inter-racial violence in form of killings, torture, forced disappearances, exploitation, systemic subjugation, land dispossession, population transfer, categorisation in racial groups where white were legally assured of domination, and other forms of discrimination on racial and ethnic grounds, has been qualified as a crime against humanity.⁵⁸¹

The legal framework that was enacted in South Africa after the attainment of majority rule, intended to recognise gross and systematic violations of human rights which were committed by the Apartheid government and the negotiations towards peace, reconciliation and reconstruction as a form of transitional justice. The Truth and Reconciliation Commission or transitional justice model which was adopted in South Africa was influenced by the African philosophy of *Ubuntu*. In the context, forgiveness was preferred instead of revenge. As The Most Reverend Desmond Tutu and Nelson Mandela have emphasised, *Ubuntu* means the interconnectedness of human beings.⁵⁸² Like South Africa, the *Hutus*, who are Bantus, have belief systems akin to *Ubuntu* in terms of group solidarity, social cohesion and transitional justice that value forgiveness and not revenge. *Ubuntu* as an African philosophy, put emphasis on the humanity of others and it remains relevant for Burundi's initiatives towards establishing a transitional justice model that can bring about national reconciliation and healing.

3.3.7.2 Legal framework in South Africa

While reparations were not a major concern for the parties to the peace negotiations aiming at the end of Apartheid, the Interim Constitution of 1993 (the Interim Constitution) contained provisions for reparations in abstract terms.⁵⁸³ The Interim Constitution laid down the foundation for South Africans to transcend the divisions and outrages of the past Apartheid regime which generated gross and systematic violations of human rights. As articulated in the Interim Constitution, the aim of reparation was to understand the nature of South African conflicts, not

⁵⁸⁰ See Colvin, C.J.; "Overview of the Reparations Programmes in South Africa" in in De Greiff, *op cit* n. 517 at p. 177.

⁵⁸¹ See Article 1 of the General Assembly Resolution 3068(XXVIII), Appendix 94 to Chapter 4 of the SATRC Report, Article 7 (1) j of the ICC Rome Statute.

⁵⁸² *Ubuntu* means I am what "I am because of who we all are". See Mandela and Reverend Tutu's definition of *Ubuntu* at <http://www.orphanbracelet.org/the-meaning-of-ubuntu.html>. See also Sachs, *op cit* n. 417 at pp. 100-101. In Kirundi language, *Ubuntu* means, among others, human generosity as well as "humanity" or have consideration and be humane towards others.

⁵⁸³ Preamble to the Interim Constitution, 1993.

as vengeance and retaliation, but rather as an incorrigible ingredient of *Ubuntu* instead of victimization.⁵⁸⁴

Subsequently, the Promotion of National Unity and Reconciliation Act (the Reconciliation Act)⁵⁸⁵ was enacted which defined gross human rights violation as:

the violation of human rights through the killing, abduction, torture or severe ill-treatment of any person; or any attempt, conspiracy, incitement, instigation, command or procurement to commit these acts, which emanated from conflicts of the past and committed during the period 1 March 1960 to the cut-off date of 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.⁵⁸⁶

The Reconciliation Act provided for, *inter alia*, the establishment of a Truth and Reconciliation Commission (the SATRC), comprising Committees on Human Rights Violations, Amnesty and Reparation and Rehabilitation and conferred certain powers or assigned certain functions or imposed certain duties upon the Commission and those Committees to provide for matters connected therewith.⁵⁸⁷

The language which has been used in the Reconciliation Act to describe gross human rights violations intentionally avoided the use of terms found under South African criminal law. For instance, "killing" in terms of section 1 of the Act was used instead of "murder" which is the unlawful and intentional causing of the death of another human being, in order to allow the SATRC to examine the aforementioned violations without having to consider legal justifications or defences that could be used by the perpetrators of such conduct as envisaged in criminal law perspectives.⁵⁸⁸

In October 1998, the Amnesty Committee submitted an Interim Report to the SATRC which formed part of the Final Report that was handed over to President Mandela on 29 October 1998. The Final Report contained a broad overview of the functions of the Amnesty Committee. Additionally, the Report elaborated on the SATRC's mandate, concepts and principles of

⁵⁸⁴ See the Preamble to the Interim Constitution which provides that:
[I]n order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under the Constitution shall adopt a law determining a firm cut-off date which shall be a date after 8 October 1990 and before 6 December 1993, providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

⁵⁸⁵ No. 34 of 1995.

⁵⁸⁶ Section 1 of the Reconciliation Act.

⁵⁸⁷ Chapters 2, 3, 4 and 5 of the Reconciliation Act.

⁵⁸⁸ See the SATRC Final Report, available at: <http://www.info.gov.za/otherdocs/2003/trc/>.

complete understanding of the Amnesty processes.⁵⁸⁹ Chapter 4 of the SATRC's Final Report for instance, described how the SATRC was established and outlined the scope of its mandate, including the prescriptions governing the granting of amnesty. It also discussed how the Commission would interpret its mandate and how it would identify criteria derived from just war theory and other international human rights principles. The mandate and criteria were to guide the Commission in determining what constituted gross human rights violations and who or what entities could be held accountable as envisaged in its founding Act.⁵⁹⁰

The main objective for establishing the SATRC in South Africa was to promote national unity, reconciliation and reconstruction in the spirit of understanding which surpasses the conflicts and divisions of the past.⁵⁹¹ Thus, the SATRC was empowered to pursue that objective through establishing and giving a complete picture of the nature, root causes and extent of the aforesaid gross human rights violations which were committed during the Apartheid regime between 1 March 1960 and the "cut-off date".⁵⁹² In other words, the SATRC was obliged to consider the perspectives of the victims, motives behind such violations and the persons responsible for the commission of the alleged violations.⁵⁹³ It was also required to facilitate the granting of amnesty to persons who would make full disclosure of all the relevant facts relating to acts associated with a political objective.⁵⁹⁴

Furthermore, the SATRC was entrusted with the duty of establishing and to revealing the whereabouts of victims or forced disappearances, restore the human and civil dignity of the victims by affording them an opportunity to narrate their own accounts of human rights violations and recommend reparation measures in respect of such violations.⁵⁹⁵ Finally, the SATRC was required to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the re-occurrence of such violations.⁵⁹⁶

This thesis refers to cases of *Azapo*, *McBride*, *Du Toit* and *Apartheid Reparations* to demonstrate how South Africa confronted impunity in the course of advancing individual and state or collective responsibility as described hereunder. It is recommended that there are lessons that Burundi could learn from South African jurisprudence, pertaining to truth-telling,

⁵⁸⁹ Chapters 4 of Volume 5 of the SATRC Final Report.

⁵⁹⁰ The Reconciliation Act.

⁵⁹¹ See the Preamble to the Constitution, 1996 and section 3 of the Reconciliation Act.

⁵⁹² Cut-off date is defined under section 1 of the Act to mean, a latest date allowed as the cut-off date in terms of the Constitution or the date of the conclusion to the Interim Constitution on 8 October 1990 and before 6 December 1993.

⁵⁹³ Section 3(1) (a) of the Reconciliation Act.

⁵⁹⁴ Section 3(1) (b) *ibid.*

⁵⁹⁵ Section 3(1) (c) *ibid.*

⁵⁹⁶ Section 3(1) (d) *ibid.*

amnesty, and reconciliation, reparations in a broader context as elaborated in selected case law, national unity and re-construction.

The application and judicial interpretation of the Reconciliation Act in South Africa are demonstrated in selected cases below.

3.3.7.3 South African case law

3.3.7.3.1 AZAPO Case⁵⁹⁷

In this case the Applicants, (Azania People's Organisation or AZAPO, a political organisation and three individuals who had lost their relatives in unexplained circumstances), sought an interdict against the Respondents (the President of Republic of South Africa, the Government, Minister of Justice, Minister of Safety and Security, the Chairperson of the SATRC and the SATRC) from granting amnesty to any person in terms of the Reconciliation Act, pending the decision of the Constitutional Court on the validity of certain sections of the Act. The First Respondents who had concurred with the decision of the Court *a quo*,⁵⁹⁸ were members of the Amnesty Committee established in terms of section 16 of the Reconciliation Act.

The Applicants contended that if amnesty was to be granted to the perpetrators in respect of their alleged violations of human rights, the victims of such a violation or their dependents' right to reparations would be violated. Furthermore, it would be perceived as a barrier towards prosecution of the perpetrators, in the event of declining prosecution. Equally, the victims or their dependents would lose their right to institute private criminal action against the perpetrators.

Although the application was dismissed due to the Applicants' failure to establish a clear or *prima facie* right, injuries sustained by the victims and the absence of other ordinary remedies, the trial Court held that the Reconciliation Act constituted an infringement of the right of access to the courts contained in section 22 of the Interim Constitution. However, this infringement was justified by the need for reconciliation and reconstruction in South Africa, as set out in the Preamble to the Interim Constitution. Likewise, in considering the meaning of the word "amnesty",⁵⁹⁹ the Court differentiated between the concepts of "amnesty" and "pardon". The Court held that, "amnesty" in the context of the Preamble was not used as a synonym for "pardon". The Court elaborated further that the word "pardon" was confined to the liberation of an offender from his criminal liability and did not deprive an injured party of his/her claim for

⁵⁹⁷ *AZAPO and Others v Truth and Reconciliation Commission and Others* 1996 (8) BCLR 1015 (CC).

⁵⁹⁸ The High Court (Cape of Good Hope Provincial Division).

⁵⁹⁹ *AZAPO case*, *op cit* n. 597 at p. 1035.

damages. It concluded that there was no peremptory rule of international law which prohibited the granting of the broadest possible amnesty in the case of South Africa.⁶⁰⁰

The Court stressed that the word "amnesty" in the Postamble ought to be given a broad meaning such as to include immunity against civil actions in respect of acts, omissions and offences for which the legislature intended to confer amnesty in respect of criminal liability, or it would not have been possible to achieve the reconciliation and reconstruction intended if the amnesty were limited to criminal liability the perpetrators would not seek immunity in the knowledge that they would be exposed to civil proceedings which would defeat the purpose of the amnesty provisions of the Postamble. As underscored by the former President Thabo Mbeki, the SATRC was established to confront the ugly past and sought to help South Africa to advance beyond conflicts and divisions that had brought pain and suffering among South Africans. In Mbeki's view granting amnesty for revealing the truth and reparations to the victims of gross human rights violations were inevitable.⁶⁰¹

Returning to the Constitutional Court's ruling in the *AZAPO* case, the issue was whether certain provisions of the Reconciliation Act were unconstitutional. Reference was made to section 20 (7) of the Act that grants amnesty to the perpetrators. The Court upheld the constitutionality of the section and acknowledged that section 20 (7) limited the applicants' right in terms of section 22 of the Interim Constitution "to have justiciable disputes settled by a court of law, or other independent or impartial forum."⁶⁰² However, in terms of s 33(2) of the Constitution, violations of rights were permissible if sanctioned by the Constitution or if justified in terms of section 33(1) of the Constitution (the limitation clause).⁶⁰³

It is submitted that the granting of amnesty to the perpetrators of gross violations of human rights in South Africa encouraged truth-telling and opened the door for broader reparations to the victims including individual and state or collective responsibility and accountability. In a separate concurring judgment, Didcott, J. in the *AZAPO* case held that:

Reparation is customarily payable by the states, hence, there is no reason to doubt that the postscript envisages our own state shouldering the

⁶⁰⁰ See the definition of amnesty and pardon given by Friedman, J.P. and Farlam, J. in *AZAPO and Others v Truth and Reconciliation Commission and Others* [1996] 3 ALL SA 15 (C), at pp. 22-25, see also Mbeki, T. (2007) "Unfinished Business of the TRC" **ANC Today**, volume 7, no. 46, pp. 23-29, available at: <http://www.anc.org.za/docs/ancctoday/2007/at46.htm#preslet>

⁶⁰¹ Mbeki, *ibid* n. 596.

⁶⁰² Echoed in section 34 of the Final Constitution, 1996.

⁶⁰³ Section 36 of the Final Constitution, *ibid*.

national responsibility. It therefore does not contemplate that, the state will go scot-free.⁶⁰⁴

The Constitutional Court's reasoned that the limitation on the right of access to court was permitted by legislation, and without it, there would be no incentive for perpetrators to disclose the truth about past atrocities.⁶⁰⁵ As such, the truth would unfold by granting amnesty in assisting in the process of reconciliation and reconstruction. It was noted further that such an amnesty was an essential component of the negotiated settlement itself, without which the Constitution would not have come into being. Hence, the amnesty provisions were consistent with international norms and did not breach any of the country's obligations in terms of public international law instruments. The reasoning of the Constitutional Court on the limitation on the right of access to court and granting of amnesty in exceptional cases are relevant for truth-telling.

As indicated in the Interim Report of the Amnesty Committee,⁶⁰⁶ applications for amnesty increased exponentially when the deadline for amnesty application approached. The Interim Report of the Amnesty Committee specified that the initial cut-off date for submitting amnesty applications was 14 December 1996.⁶⁰⁷ However, the deadline was extended to 10 May 1997 to coincide with the extension of the Commission's mandate period. This necessitated the extension of the Amnesty Committee's mandate and increased the number of Committee members. Consequently, the Reconciliation Act was amended to provide for the appointment of a larger number of committee members.⁶⁰⁸

The Commissioners on the Committee assumed the responsibility of communicating the amnesty application process, in particular, the procedural requirements to the public. The Committee's duty extended to visit various centres, including several prisons and engaging in public discussions. Emphasis was placed on issues such as individual persons who might qualify for amnesty, how application forms should be completed and where assistance could be obtained in completing application forms. Generally, these initiatives contributed in a great

⁶⁰⁴ *AZAPO and Others v Truth and Reconciliation Commission and Others*, *op cit* n. 600 at p. 62. See also SATRC Report, Chapter V, para 71, Sachs, *op cit* n. 417 at pp. 35-38.

⁶⁰⁵ See Mahomed, C.J as he then was in the *AZAPO's* case, *op cit* n. 597 at pp 1019-1020.

⁶⁰⁶ Interim Report of the Amnesty Committee at p. 115 as appears in the SATRC Final Report, 1988, Vol. 5, chap. 3 par. 30, available at: <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>

⁶⁰⁷ Interim Report of the Amnesty Committee, *ibid* at p. 115.

⁶⁰⁸ Section 17 of the Reconciliation Act.

measure towards enhancing the formal quality of applications received, although a large percentage of applications did not meet the formal requirements.⁶⁰⁹

Pursuant to representations by some political parties, particularly the Freedom Front and the Pan Africanist Congress, and other political parties and delays in enacting the constitutional amendment required to extend the mandate period, which was eventually done on 29 August 1997, the deadline was further extended to 30 September 1997 to allow more amnesty applications after the constitutional amendment.⁶¹⁰

It must be pointed out that the validity of the amnesty provisions which were approved by the South African Constitutional Court can be regarded as a foundation for reparations in South Africa.⁶¹¹In Mahomed, D.P's observation: "[t]he epilogue of the Interim Constitution was to permit legislature to favour reconstruction of South African society by allowing a wider concept of reparations, which would allow the state to take into account the competing claims on its resources".⁶¹²

Clearly, the Constitutional Court's interpretation of amnesty and reparation under the Reconciliation Act anticipated individual and state or collective responsibilities. Therefore, without granting amnesty to the perpetrators, bodies, organisations or other persons who were responsible for grave human rights violations, or who would otherwise have been vicariously liable for omissions or acts they had committed in the past, the truth might not have been told if these organisations or individuals were not given amnesty. Similarly, the Constitution itself might not have been negotiated had this amnesty not been given to the perpetrators of the past grave human rights violations.⁶¹³ Furthermore, amnesty for civil liability was also permitted by the law as the absence of such an amnesty would have constituted some disincentive for revealing the truth. It must be acknowledged also that granting amnesty in South Africa remains a contentious issue which has revealed judicial discrepancies as shown in the *McBride* case hereunder.

⁶⁰⁹ Interim Report of the Amnesty Committee, Vol. 5 chap 3 at p. 111.

⁶¹⁰ Interim Report, *ibid* at p. 111.

⁶¹¹ Per Mahomed, DP's judgment as concurred by Chaskalson P, Ackermann, Kriegler, Langa, Madala, Mokgoro, O'Regan and Sachs JJ in *AZAPO's case op cit*, n. 596 at p. 45.

⁶¹² *AZAPO and Others v Truth and Reconciliation Commission and Others Case CCT 17/96* at par. 51.

⁶¹³ Refer to Langa, CJ's opinion while referring to section 20(10) of the Reconciliation Act, stated that it was inconceivable conceptualise that the Act intended to undo the past to a limitless degree as for past factual events cannot be undone in the *Du Toit's case, op cit* n. 418 at pp. 1177-1178.

3.3.7.3.2 McBride's Case⁶¹⁴

The *McBride's* case has evaluated the effect of amnesty granted under the Reconciliation Act as discussed above in the *AZAPO's* case. Although the Act provides that once a person convicted of an offence with a political objective can be granted amnesty, and any entry or record of the conviction shall be deemed expunged from all official documents as such conviction must be deemed not to have taken place, this perception has been challenged in the case of *The Citizen 1978 (Pty) Ltd and Others v McBride*.⁶¹⁵ What is clear from section 20(7) which must be read with sections 20(8), (9) and (10) of the Reconciliation Act, is that, once a person has been granted amnesty in respect of an act, omission or offence, the offender may no longer be held "criminally liable" for such offence and no prosecution in respect thereof can be maintained against him or her.

In the *Citizen* case, Mr Robert McBride, was a candidate to head the Ekurhuleni Metro Police. While working as an operative of the armed wing of the African National Congress, *Umkhonto we Sizwe*, he was convicted of murder following the bombing of a bar in the 1980s. The respondent carried out a car bomb attack outside the Magoo's Bar and Why Not Restaurant on the Durban beachfront.⁶¹⁶ The explosion killed three young women and injured 69 other people. Mr McBride was found guilty of murder by the court *a quo* and sentenced to death.

In 1997, McBride applied for amnesty, pursuant to the Reconciliation Act which was granted to the applicant on 19 April 2001. During the period of September and October 2003, the *Citizen* newspaper published a number of articles and editorials questioning Mr McBride's suitability for the post of Metro head. It expressed the view that Mr McBride was unsuitable for the post because he was a "criminal" and a "murderer". The articles referred to the 1986 bombing and also to what the *Citizen* described as Mr McBride's "dubious flirtation with alleged gun dealers in Mozambique" in 1998. The first two articles mentioned that Mr McBride received amnesty for the crimes for which he had been convicted. The *Citizen* later published editorials that referred to Mr McBride a "murderer" and a "criminal" without mentioning amnesty. The *Citizen* also claimed that he was not contrite or remorseful for the deaths he had caused.

Mr McBride instituted a delictual action for defamation against the *Citizen* and the journalists.⁶¹⁷ He contended that receiving amnesty meant that the label "murderer" did not apply to him. Additionally, the *Citizen's* coverage was malicious because the articles published

⁶¹⁴ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (8) BCLR 816 (CC).

⁶¹⁵ *McBride* case, *ibid* n. 600 at p. 33.

⁶¹⁶ *McBride* case, *ibid* at p.3.

⁶¹⁷ *McBride v The Citizen 1978 (Pty) Ltd and Others*, Case No. 03/15780, 6 February 2008, South Gauteng High Court, Johannesburg, unreported.

by the Citizen would be understood by its readers to mean that Mr McBride was a criminal because he had made common cause with gun dealers in Mozambique.

According to the Gauteng High Court decision, Maluleke, J. decided in favour of Mr McBride and awarded him R200 000 in damages.⁶¹⁸ On appeal, the majority of the Supreme Court of Appeal (SCA) upheld the High Court's ruling on defamation.⁶¹⁹ The SCA held that to call Mr McBride a "murderer" was incorrect because the applicant had received an amnesty under the Reconciliation Act.⁶²⁰ But, the SCA reduced the damages to R150 000 because the Court found that Mr McBride had not established defamation with respect to the allegations of "dubious flirtation with alleged gun dealers" in Mozambique.

The High Court and the Supreme Court of Appeal in considering the amnesty provisions held that the Reconciliation Act which provided for the granting of amnesty expunged criminal conviction as if the criminal acts amnestied did not occur and required such conviction to be expunged from the state's records.⁶²¹ Furthermore, it was held that the intention of amnesty was to advance reconciliation and reconstruction of the South African society, thus there was no need for retribution or victimisation. To the contrary, the Citizen and the journalists applied for leave to appeal to the Constitutional Court to challenge the amnesty law. Equally, Mr McBride sought leave to cross-appeal against the reduced damages award. *Amici curiae*, including the South African Coalition for Transitional Justice - SACTJ - South African National Editors' Forum, the Freedom of Expression Institute and relatives of Victoria and Griffiths Mxenge and the "Mamelodi Four" supported the Citizen's argument.

The SACTJ, in supporting the Citizen, contended that the lower courts failed to take into account the impact of its decision on freedom of expression. Its interpretation ousted the expressive conduct of the Citizen, despite the fact that section 20(10) did not expressly predict this. They argued further that revealing of truth is one of the primary values underlying freedom of expression. Hence, it would be contrary to the purpose of the Reconciliation Act to require the suppression of truth and expression.

⁶¹⁸ *McBride v The Citizen 1978 (Pty) Ltd and Others, ibid*, at paras 11-12.

⁶¹⁹ See an overview of the case as set out in *S v McBride*, *op cit* n. 578. The then Appellate Division of the Supreme Court (now Supreme Court of Appeal) ruling, Per Corbett, C.J, Viljoen, Hefer, Grosskopf and Vivier J.J.A concurring on the High Court's decision, but, dismissed an appeal against McBride's death sentence which had been imposed by the court *a quo*.

⁶²⁰ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2010 (4) SA 148 (SCA).

⁶²¹ Sections 20(7)-(10) of the Reconciliation Act. See *The Citizen 1978 (Pty) Ltd and Others v McBride*, *op cit* n. 614 at pp. 826 and 827. Per Streicher J.A, Ponnann J.A, Mhlantla J.A and Tshiqi A.J.A concurring, however, Mthiyane JA in dissenting judgment, held that, the amnesty provisions tend to protect perpetrators from state-sanctioned penalties.

Similarly, Joyce Mbizana, the sister of Justice Mbizana, one of four youths who were killed by Apartheid security police commonly known as “the Mamelodi Four,” and Mbasa Mxenge, the son of Griffiths and Victoria Mxenge, victims of the apartheid death squads, also challenged the SCA decision and urged that the Supreme Court of Appeal’s decision should be reversed. Mbizana and Mxenge contended that freedom of expression was constitutive of dignity. To deny persons in their position the right to speak the truth without fear of being sued for defamation stripped them of their dignity and the effect of amnesty could not alter the historical facts.⁶²² Furthermore, the victims contended that individuals had a “right to truth,” which was recognized as an emerging right in customary international law. They asserted that the constitutional protection of the right to truth and the ability to engage with the truth emerged from the values of human dignity, equality, the rule of law, free expression and access to information.

On appeal to the Constitutional Court, the judges expressed diverse opinions. The Constitutional Court held that the full disclosure of the truth, as a means to pursuing national transition and reconciliation, was the basis of the moral and operational structure of the TRC law. It held further that the decisions of the lower courts were in conflict with the Reconciliation Act’s context and historical setting, and at odds with one of the moral impulses of the reconciliation process itself. The Court stated that it was hardly conceivable that the Reconciliation Act’s provisions could muzzle truth and reverse true statements about South African history.” Cameron, J. writing on behalf of the majority, held that proscribing the truth would be antithetical to the adequate compilation of the collective memory of South Africa’s past.

In a majority judgment, the Court held that the Reconciliation Act did not make the fact that Mr McBride committed murder untrue. Therefore, the Act did not prohibit fair comments about McBride’s acts as a “murderer”, nor prevented him being described as a “criminal”. The Court emphasised that protected comment needed not be “fair or just at all”, in any sense in which these terms were commonly understood. Criticism was protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest. The Citizen was thus entitled to express views on Mr McBride’s suitability for the post. Despite the harshness of the Citizen’s coverage, it was entitled to legal protection. The majority also found out that the phrase “dubious flirtation with alleged gun-dealers” could not reasonably be interpreted so as to mean that the respondent was involved in criminal activities although his activities were suspicious.

⁶²² *The Citizen 1978 (Pty) Ltd and Others v McBride*, *ibid* at p. 831.

Ngcobo, C.J. and Khampepe, J. in concurring with the majority in their separate judgment, held that the Reconciliation Act did not make the facts of the commission of the murders untrue. However, Ngcobo, C.J. opined that the balancing of the right to freedom of expression, on the one hand, with human dignity on the other, required the facts upon which the Citizen's comment was based to include reference to amnesty having been granted to Mr McBride. It was held further that since the Citizen failed to make reference to the circumstances under which McBride was ultimately released from detention in Mozambique, the statement amounted to a half-truth and was therefore untrue and that McBride's cross-appeal should succeed. This study refers to the McBride's case and argues that in dealing with cases in post-conflict society like South Africa which had a history of deep rooted inequalities and hatred, reasonable care must apply in order to augment the principles of true reconciliation and reconstruction.

Similarly, Mogoeng, J. agreed with the majority and with Ngcobo, C.J. on the issue of contrition and concurred with Ngcobo, C.J.'s finding on the question of "dubious flirtation with alleged gun dealers in Mozambique. However, he would have dismissed the Citizen's entire appeal and upheld Mr McBride's cross-appeal as he found that the statements that referred to Mr McBride as a "criminal" and "murderer", was malicious and part of a well-orchestrated character assassination campaign waged by the Citizen against the respondent.⁶²³

In particular, the Constitutional Court recognized that family members have a right to describe with truth and accuracy, the perpetrators of the gross wrongs inflicted on their loved ones. They were entitled, despite the amnesty granted, to continue to call the killing of their loved ones "murder," and those who perpetrated the killings "murderers". The Court upheld the Citizen's main appeal and dismissed Mr McBride's cross-appeal, but found that the Citizen had defamed Mr McBride by claiming falsely that he was not contrite. The Court awarded Mr McBride R50 000 for this claim, reducing Mr McBride's damages from R150 000.⁶²⁴

The Court underlined the fact that the process of reconciliation in South Africa was still unfolding. The question remained one of finding a balance between amnesty and justice. As stated in the case of *Du Toit v Minister for Safety and Security and Another*,⁶²⁵ the Constitutional Court has noted and emphasised that while the Reconciliation Act sought to advance reconciliation and national unity, it could not undo what had happened in the past. As

⁶²³ *The Citizen 1978 (Pty) Ltd and Others v McBride*, *op cit* n. 614 at pp. 873-883.

⁶²⁴ *The Citizen 1978 (Pty) Ltd and Others v McBride*, *ibid* at p. 855. Cameron, J judgment was concurred by Froneman, Nkabinde, Yacoob J.J. and Brand, A.J. concurred in the judgment of Cameron, J.

⁶²⁵ *Du Toit's case*, *op cit* n. 418, pp. 1178-1180.

such, the Reconciliation Act could not restore to the victims that which they had lost, it did not also restore the perpetrator in every respect to his or her position before the commission of the offence, since to undo all the consequences of a conviction would be endless and unduly burdensome.

The judicial uncertainties are predicated on the fact that the fragilities of reconciliation cannot be precisely prescribed by law. The Constitutional Court has noted that the best chance for successful reconciliation lies in fostering open public discussions which lie at the heart of participatory democracy. The legal framework regarding amnesties under international law depends on the nature of the crimes committed. It is widely considered that, amnesties are illegal with respect to crimes giving rise to an obligation *aut dedere aut judicare* (prosecute or extradite). Such obligation arises under international law with respect to the contravention of the provisions of the Geneva Conventions, Apartheid Convention,⁶²⁶ Torture Convention and Slavery Convention.⁶²⁷

It is also important to point out that allowing the perpetrators of heinous crime to come forward and confess their crimes before the SATRC within the transitional justice legal framework was not intended to shield the criminals from prosecution.⁶²⁸ This view has been supported by Sachs while citing Mahomed, J. that: "the amnesty contemplated is not a blanket against prosecution".⁶²⁹ But, the legal framework that was enacted in South Africa was to ameliorate hardship for the perpetrators of human rights abuses and to provide these perpetrators with amnesties as required by the Constitution which obliges the courts and other adjudicative organs to promote the values that underlie an open democratic society based on human dignity, equality and freedom.⁶³⁰

The decisions in the *AZAPO*, *McBride* and *Du Toit* cases have indicated that there are judicial inconsistencies relating to the interpretation of amnesty provisions in South Africa. But, the Courts have emphasised national reconciliation and reconstruction. Accordingly, it has been argued that the granting of amnesty to the perpetrators can help to establish an environment of truth-telling and lay down the foundation of the moral and operational structure of the Reconciliation Act and the SATRC. Similarly, the courts have demonstrated that amnesty

⁶²⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

⁶²⁷ United Nations 1956 Supplementary Convention on the Abolition of Slavery.

⁶²⁸ See generally, *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (5) BCLR 391 (CC), *The Citizen 1978 (Pty) Ltd and Others v McBride* 2010 (4) SA 148 (SCA) at p. 177.

⁶²⁹ Sachs, *op cit* n. 417 at p. 38.

⁶³⁰ Section 39 (1) of the South African Constitution, 1996.

provisions have no inherent textual or contextual meaning. As such, their application depends on a combination of the historical context and statutory wording. It has been emphasised that the implementation of amnesty provisions must reflect the delicacy of the constitutionally-inspired values imbedded in the legislation.⁶³¹

Despite of judicial uncertainty on the meaning of amnesty provisions in South African case law, it is acknowledged that South Africa's transitional justice model is far-reaching in terms of truth-telling, national reconciliation and reconstruction and reparation for victims. At the same time individual and stated responsibility have been advocated as means of effective reparation as discussed in the *Apartheid Reparations* case below.

3.3.7.3.3 *Apartheid Reparations case*⁶³²

The *Apartheid Reparations* case concerns legal actions which were instituted against multinational corporations for human rights violations during the apartheid era.⁶³³ In November 2002, for example, many delictual claims were filed in the Southern District Court of New York, for their direct support of the Apartheid security agencies. It was alleged that the corporate defendants had either directly or through their South African subsidiaries, provided the equipment used by the South African Apartheid security agencies in committing violations of customary international law.

Initially, complaints which were filed in 2002 against the defendants were dismissed by the District Court in 2004.⁶³⁴ On appeal to the US Second Circuit District, the trial court's decision was reversed in 2007 and accepted the aiding and abetting claims under the Alien Tort Act

⁶³¹ See the *The Citizen 1978 (Pty) Ltd and Others v McBride*, *op cit* n. 614 at pp. 883-884.

⁶³² *In re South African Apartheid*, 617 F. Supp. 2d 228, 2009 U.S. Dist. LEXIS 47490 (S.D.N.Y., May 27, 2009).

⁶³³ Daimler A.G., Ford Motor Company, International Business Machines Corporation, General Motors Corporation and Rheinmetall. See for example, *Balintulo v Daimler AG*, No.02-md-1499 (S.D.N.Y. May 19, 2009), ECF No. 162, *Ntsebeza, et al v Daimler AG, et al (In re S. African Apartheid Litigation)*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), *In re South African Apartheid Litigation.*, 346 F. Supp.2d 538 (S.D.N.Y. 2004), *Khulumani v Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *Ntsebeza v Daimler AG*, No. 02-mdl-1499 (S.D.N.Y.Oct 27, 2008), Brief of Appellees, *Khulumani v Barclay Nat'l Bank*, Nos. 05-2141, 05-2326 (2d Cir. 2005), Brief for the United States as *Amicus Curiae* In Support of Affirmance, *Khulumani v Barclay National Bank Ltd.*, Nos. 05-2141-cv, 05-2326-cv (2d Cir. 2005), Brief for the United States as *Amicus Curiae* In Support of Petitioners, *Am.Isuzu Motors, Inc. v Ntsebeza*, No. 07-919 (S. Ct. 2008), Letter from Radebe, J. T., Minister of Justice and Constitutional Development, to Judge Scheindlin, S.A U.S. District Court, Southern District of New York (Sept. 1, 2009) and Plaintiffs-Appellees' Brief, of 24 May, 2013, available at: <http://hrp.law.harvard.edu/wpcontent/uploads/2011/01/FinalLettertoSecondCircuitMay24th2PM.pdf> [accessed on 25/10/2013].

⁶³⁴ See Human Rights @ Harvard Law "In re South African Apartheid Litigation" at: <http://hrp.law.harvard.edu/areas-of-focus/alien-tort-statute/in-re-south-african-apartheid-litigation/> [accessed on 25/10/2013].

and afforded the plaintiffs with an opportunity to amend their original complaints. Following the appellate ruling, the Harvard Law Clinic joined the case as Co-counsel and opposed the defendants' petition for *certiorari* in 2008.⁶³⁵ The Supreme Court could not grant the petition, instead it confirmed the Second Circuit's ruling and directed the amendments to the Complaint. An amended complaint was filed in October 2008.

In November, 2009, the International Center for Transitional Justice (ICTJ), filed an *amicus* brief in the US Court of Appeal to support a decision made by the South African Government not to oppose legal action against five international companies which had been accused of aiding and abetting crimes committed by the Apartheid government.⁶³⁶

On appeal, it was acknowledged that the respondents (Daimler A.G., Ford Motor Company, International Business Machines Corporation, General Motors Corporation and Rheinmetall) were responsible for aiding and abetting the violations hence, liable to pay compensation to the victims and survivors.⁶³⁷ Although the respondents contended that the applicants' claim erroneously mixed reconciliation and justice, they argued further that the SATRC processes removed the basis for accountability by exempting the respondents from responsibility to pay compensation, the Court held that truth and reconciliation processes were premised on an acknowledgement that individuals or juristic persons who might be complicit in human rights violations were responsible for reparations in terms of the Basic Principles.⁶³⁸ Therefore, respondents could not raise the reconciliatory initiatives and deny accountability, instead, the SATRC laid down the foundation for the pursuit of justice for crimes committed. It was acknowledged further that international corporates played a major role in designing and implementing Apartheid policies.

The Court referred to the Basic Principles,⁶³⁹ and confirmed that reparation must be proportionate to the gravity and harm suffered by the victims. Furthermore, in accordance with municipal and international laws, State Parties are under an obligation to provide reparations to the victims for the acts or omissions which are attributable to a given state for grave violations of international human rights and humanitarian laws. Subsequently, if natural or juristic person (s) or other entities are liable for reparations, such person (s) or entity must compensate the victims or state if the state in question had already compensated the victims

⁶³⁵ Human Rights @ Harvard Law, *ibid*.

⁶³⁶ *Brief of Amicus Curiae: ICTJ v Daimler AG Others*, 09 – 2778- CV, An Appeal from the District Court, Southern New York.

⁶³⁷ *Apartheid Reparations* case, *ibid*, at p. 4.

⁶³⁸ *Apartheid Reparations* case, *ibid*, at p. 3

⁶³⁹ Part IX of the Basic Principles.

as approved by the USA Courts in the cases such as *In re Holocaust Victims Assets Litigation*⁶⁴⁰ and *Ken Saro-Wiwa*.⁶⁴¹ In upholding the *Apartheid Reparations*' claim on abetting and aiding the violation of international law, the District Court held that there was no distinction between individual person (s) and corporations or entities when it comes to the issue of accountability for gross human rights violations.⁶⁴²

Following the US Supreme Court of Appeals' decision in the case of *Kiobel v Royal Dutch Petroleum Company*,⁶⁴³ the Second Circuit Court of Appeal dismissed the South Africa's Apartheid Reparation claim,⁶⁴⁴ on account of the US Alien Tort Statute which does not cover extra-territorial conduct. The dismissal in question which was pronounced after more than 10 years since the aforementioned cases which were filed in 2002, has been criticised for limiting international law and failure to hold transnational corporations accountable for their complicity in the perpetration of gross human rights violations, such as, extra-judicial killings, torture, persistent and arbitrary detentions, indiscriminate shootings, rape and the racial exclusion in South Africa.⁶⁴⁵

According to the Khulumani Support Group, one of the respondents, General Motors, made a small contribution to set up an Apartheid Reparations and Rehabilitation Trust Fund for the benefit of the claimants, however, the dismissal of the *Apartheid Reparations* claim has left open and unresolved issues, including the unfinished business of the Truth and Reconciliation Commission.

The decisions in *McBride* and *Apartheid Reparations* cases remind us that in order to meet the ends of truth, justice and reconciliation all parameters of the human rights and humanitarian laws must be looked at. Therefore, in order to resolve conflicts in cases like Burundi and bring about healing, it is essential to look for durable solutions to the problems without ignoring the past, particularly, the root causes to those problems and if necessary to follow examples from other jurisdictions.

⁶⁴⁰ 105 F. Supp. 2nd 139 (E.D. NY. 2000).

⁶⁴¹ *Ken Wiwa v Royal Dutch Petroleum Company*, 226 F. 3rd 88 (2nd Cir. 2000).

⁶⁴² *Apartheid Reparations* case, *op cit* n. 632, at p. 6.

⁶⁴³ *Kiobel v Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013).

⁶⁴⁴ ICTJ "US Circuit Court Dismisses Apartheid Litigation", available at: <http://ictj.org/news/us-circuit-court-dismisses-apartheid-litigation> [accessed on 25/10/2013].

⁶⁴⁵ See Khulumani Support Group "Joint Press Release: US Circuit Court Dismisses Apartheid Litigation" Johannesburg, 22 August 2013. <http://pressoffice.mg.co.za/khulumanisupportgroup/PressRelease.php?StoryID=242251> [accessed on 25/10/2013].

3.3.7.4 Positive and negative aspects of the South African transitional justice model

As stated in section 3.1 of this chapter and the previous chapters one and two, legal framework and case law on truth and reconciliation, the preference for amnesty in South Africa indicates that the transitional justice model in South Africa was based on a political compromise. This thesis has identified some positive and negative aspects of South African transitional justice model as follow.

Largely, the positive aspects that have been identified in this study suggest that the system of reparations in South Africa was designed to recognize individual reparations as demonstrated in the SATRC Report and case law in terms of acknowledging individuals' rights and choices by giving agency to victims and survivors of past grave human rights violations to have the right of access to the courts, narrate their painful stories and get reparations. For example, the SATRC Commissioners were empowered by law to conduct investigations through interviews and visiting sites including access to public documents or files and previous government officials were under an obligation to provide information required.⁶⁴⁶ The South African model favoured the approach of giving amnesty to the perpetrators in order to mitigate criminal responsibility since the victims' right to justice (access to court) was, to some extent limited, hence, the government undertook responsibility to repair the damage or harm suffered by the victims. Henceforth, it was acknowledged that without reparation, there would be no true national reconciliation nor reconstruction.⁶⁴⁷ Subsequently, five principles or components of reparations were considered, namely, redress, restitution, rehabilitation, restoration of dignity and re-assurance of non-recurrence.

These principles were incorporated into the Reparations and Rehabilitation Committee's Policy and Recommendations that provided reparation and rehabilitation options at the individual, community and national levels. Furthermore, the proposed reparations included monetary compensation, provision of social and medical services (which included health and mental care services, housing and education subsidies), symbolic reparations and memorialization, organizational transformation, and community based reparations. The integrated principles took forms of an interim reparation, individual reparation grants, symbolic reparation, legal and administrative measures and institutional reforms. The main objective of reparations in South

⁶⁴⁶ See Cuevas, V.E., Rojas, M.L.O and Baeza, P.R.; (2002) "Comparative Study on Truth Commissions in Argentina, Chile, El-Salvador, Guatemala and South Africa from the Perspectives of Victims, their Relatives, Human Rights Organisations and Experts" **Association of Prevention of Torture**, Switzerland, pp. 10-11.

⁶⁴⁷ Chap V of the SATRC Report, 1998.

Africa was understood in the context of repairing the damage caused by the Apartheid regime and help to restore the victims' dignity not only in theoretical but also practical terms.

Apart from the positive aspects of reparation mentioned above, this study has also noted negative aspects of the South African model. Although there was a comprehensive reparation design as presented in the SATRC Final Report of 1998, the government contended that no reparations policy could be adopted until the Final Report of the Truth and Reconciliation Commission was completed in 2003.⁶⁴⁸

As such, the implementation of interim reparation was not complied with in the way it was proposed by the SATRC'S Reparations and Rehabilitation Committee (RRC). The SATRC's interim reparation proposal was implemented only when the victims pressurized the ANC government to pay interim reparations to the victims who were identified and needed an urgent intervention. However, a minimal number of victims benefited from the interim reparation after more than seven years from the beginning of the truth and reconciliation processes in 1996 until 2003.

Thus, many victims such as the elderly, were forced to wait for a long period while the perpetrators benefited from the TRC's amnesty process with immediate effect. These delays led to increased friction between Non- Governmental Organizations (NGOs) and the ANC government which became reluctant to comply with the SATRC's recommendation on reparations. It has been noted that, as stated in the Final Volumes of the SATRC Report of 1998, the monetary compensation paid was less than the amount recommended by the RRC and could not take into consideration whether or not the amount paid could meet other needs related to disability, loss of a breadwinner, medical assistance or any other specific need. Hence, the government's delay and reluctance to implement the SATRC's recommendations and its neglect in consulting the victims in a meaningful way has justified criticisms on South African transitional justice model.

Similarly, the SATRC has also been criticized for not identifying all victims entitled to reparations and not making provision for the applications for the victims or survivors who could not attend SATRC hearings for whatever reasons such as lack of access to information, ongoing security concerns, lack of trust in the truth and reconciliation process, ignorance of the SATRC on factors that might have contributed towards late submissions of applications for amnesties and political interference.⁶⁴⁹ The SATRC which was vested with wide amnesty-

⁶⁴⁸ See "Traces of Truth", available at: <http://truth.www.wits.ac.za/howto.php> [accessed on 26/10/2003].

⁶⁴⁹ Traces of Truth, *ibid* n. 648.

granting powers, has been criticized for limiting the powers of the RRC on gathering information, identifying victims qualified for reparations and making only recommendations of reparations policy to the President. This has made SATRC's truth and reconciliation processes look more perpetrator-orientated than victim-centered. Subsequently, anger and unhappiness have been evidenced in the victims' community⁶⁵⁰ while the amnesty provisions in terms of the Reconciliation Act, have been subjected to constitutional scrutiny and diverse interpretations as demonstrated in a number of the High Court, Supreme Court of Appeal and the Constitutional Court judgments.⁶⁵¹

During the transitional period the government also began to mix reparations with developmental programmes. For example, the government argued that government's provision of socio-economic services and improving infrastructure to the poor community members constituted reparations.⁶⁵² This argument has been criticized by the Khulumani Support Group on account that individual reparations are undermined if they do not take place in a context of broader programmes for social justice and national rehabilitation,⁶⁵³ but, the service delivery programmes are not directly targeting individual victims or address their personal needs, nor fulfilling the obligations for reparation under international law as envisaged in the AZAPO case. Although, service delivery programmes through various government departments have been the ANC government's major focus, however, these have been implemented wrongly without effective monitoring mechanisms in place, yet, their sustainability remains uncertain.

Additionally, the SATRC proposed reparations focused on individuals rather than victims and perpetrators as groups of the Apartheid constitutional order. As such, it could not address the deep roots of Apartheid policy in order to ensure an effective transitional justice model. As

⁶⁵⁰ Traces of Truth, *ibid* n. 648.

⁶⁵¹ See few examples from: *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* [2001] 3 All SA 442 (A), on refusal of application for amnesty based on conclusion that Applicant's actions were not politically motivated, *Du Toit v Minister of Safety and Security* [2009] 1 All SA 322 (SCA), unsuccessful application on re-instatement of the applicant to the police force in terms the South African Police Service Act, No 68 of 1995 where the court held that, the amnesty which was granted under section 20 (10) of the Reconciliation Act, did not intend to operate retrospectively to undo consequences that came into effect before the granting of such amnesty, *Stopforth v The Minister of Justice and others, Veenendaal v The Minister of Justice and others* [1999] 4 All SA 383 (A), it was held that, if the amnesty was granted by the SATRC, the Appellants would not be extradited and *AZAPO and Others v President of the Republic of South Africa and Others* which challenged the constitutionality of the amnesty provisions.

⁶⁵² See Department of Justice and Constitutional Development (2012) "Justice on Track with its Work to Assist Apartheid Victims", available at:
<http://www.justice.gov.za/docs/articles/2012-trc-reparation.html>

⁶⁵³ Traces of Truth, *op cit* n. 648.

Nibogora citing Mamdani, has contended, the SATRC has failed to capture the real feature of Apartheid which sought to reproduce two distinct identities through its legal and institutional device: a racial identity amongst whites who were the beneficiaries of Apartheid and cultural particularism amongst black majority and victims of the same regime.⁶⁵⁴

It must be emphasized that racial classification that was created under the Apartheid regime needed a similar approach to designing adequate reparations policy. For example, collective reparations could have been an appropriate approach to compensate the victims in proportion to the injustices suffered by blacks (Africans, Coloureds and Indians) under the Apartheid regime.⁶⁵⁵ In the meantime, urgent interim reparations could have been extended to the largest number of victims and rescue those victims who were unable to wait for a comprehensive reparations plan.

Lastly, the ANC government has been criticized by the SACTJ for failing to hold to account individual and corporate beneficiaries of the Apartheid regime.⁶⁵⁶ This is contrary to the SATRC findings that suggested that there was a strong legal case against corporate institutions in terms of international law as demonstrated in the *Apartheid Reparations* case.⁶⁵⁷

Despite of the defects in the South African transitional justice model, its effectiveness in terms of documentation and analysis of the nature of the conflicts is far-reaching. For example, the SATRC findings and recommendations have validated the necessary resolve to deal with the legacy of the past regime as shown in the Final Report of 2003.⁶⁵⁸ The priority that has been

⁶⁵⁴ Nibogora, *op cit* n. 16 at p. 31.

⁶⁵⁵ See section 35 of the Black Administration Act, No 38 of 1927 as amended,
⁶⁵⁶ ICTJ "South Africa: Constitutional Court Upholds Right to Express the Truth", 4 August, 2011, available at: <http://ictj.org/news/south-africa-constitutional-court-upholds-right-express-truth>

⁶⁵⁷ *In re South African Apartheid*, *op cit* n. 632.

⁶⁵⁸ For example, the Final Report which is divided into five volumes may inspired Burundi's transitional justice mechanisms. Volume One - contains important discussion of key concepts and debates within the Commission itself and in society at large. It provides the basis and rationale for the work, methods used and mandate of the Commission. Volume Two - addresses the gross violations of human rights committed by all parties to the South African conflicts (the Apartheid government and liberation movements). It deals with the human rights violations committed between 1960 and 1990, while a separate chapter is dedicated to the unique political environment of the 1990s. The role of the state in the perpetration of gross violations of human rights committed outside South Africa and inside South Africa. The homelands and their unique circumstances are described, as well as, the role of the liberation movements. Volume Three- addresses gross violations of human rights from the perspective of the victims which complements Volume Two. The accounts which are explained in detail in Volume Two are frequently referred to in Volume Three. A reflection of the regional structure which allowed for a targeted focus on distinct geographical area and detailed examination of variations between different parts of the country. Volume Four - seeks to address the nature of the society in which gross violations of human rights took place, reporting on a series of "institutional hearings" which sought to explore the broader institutional and social

given to the promotion of openness, truth and reconciliation, progressive realization of socio-economic rights in respect of addressing the past injustices. South Africans' initiatives to deal with the legacy of Apartheid are relevant for Burundi's case in order to deal with the human rights violations of successive *Tutsi*-led military regimes.

It is submitted that reparations if pursued without other forms of justice can attract justifiable criticisms and may be perceived as an attempt to buy victims' silence as demonstrated in the case of South Africa. However, the International Centre for Transitional Justice (ICTJ) has stressed that reparation initiatives that come from sound and faithful consultations with victims, have the best chance of being fair and effective. That means linking reparation remedies with other forms of recognisable justice and guarantee of non-recurrences of human rights violations as stipulated in the Basic Principles may be perceived as effective transitional justice model.

The notion of truth in South Africa was preferred to encourage forgiveness (a moral and religious obligation) and national healing. The South African Truth Commission, for instance, has been cited as a good example of a non-judicial body that has executed its mandate of reaching the truth with admirable impartiality, independence and integrity.⁶⁵⁹ More importantly, it must be elucidated that the amnesties which were granted in South Africa were conditioned on truth-telling, openness and honesty. In order to reach a validated version of the truth, it was agreed that the truth-telling process would not be one-sided story, rather it would involve perpetrators as well as victims. Hence, perpetrators needed some incentive to come forward and tell the truth by getting amnesties so that they could give a full and honest version of the facts. As a result, the SATRC did not prefer trials,⁶⁶⁰ but adopted a compromise approach with the Truth Commission serving as a gesture to the amnesties given, but also recognizing the need to take notice of the nature of the crimes and the victims when national prosecutions seemed to be impossible.

environment. In the process of conducting these hearings, the Commission sought to provide opportunities for self-examination by the various sectors, as well as discussion of their possible role in the future hearings. Additionally, Volume Four includes reports on three special hearings: compulsory military service, children and youth and women and Volume Five - contains the conclusions reached by the Commission, including analysis of the findings and recommendations. It also includes the Minority Position of Commission, Wynand Malan and the Commission's response.

⁶⁵⁹ McDonald, *op cit* n. 485 at p. 146.

⁶⁶⁰ Pretoria News 18 August 1997 at p.5.

Apart from South Africa and other examples referred to earlier, other examples from the Djibouti, Gambia, East Timor, Guyana and Cambodia have been considered in this thesis to evaluate further the notions of immunity, individual and state responsibility and accountability.

3.3.8 Djibouti

It must be pointed out further that there are uncertainties relating to the application of immunity pursuant to the Vienna Conventions. This study refers to selected cases of Djibouti, Gambia and East Timor to demonstrate judicial inconsistencies in the application of the Vienna Conventions. For example, the ICJ in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ⁶⁶¹ held that Heads of State enjoy full immunity from criminal jurisdiction and inviolability which protects them against any act of authority of another state which would hinder them in the performance of their duties.

The Court referred to the rule of Customary International Law and Article 29 of the Vienna Convention and held that they were applicable to diplomatic agents and Heads of State. Furthermore, the Court found that an invitation to a Head of State to testify in criminal proceedings without any suspicion attaching to him did not violate his inviolability. The Court found also that had the French authorities passed confidential information regarding the witness summons to the Press in the context of an official visit by the Djiboutian Head of State that have could constituted a failure in her obligation to protect such Head of State's honour and dignity. This view was followed in the case of *Aziz v Aziz and Others* ⁶⁶² where the English Court of Appeal rejected an application by the Head of State's information to be kept secret in order to avoid the disclosure of his personal information.

3.3.9 Gambia

In the case of *Jawara v The Gambia*, ⁶⁶³ an application was brought before the African Commission of Human and Peoples' Rights by the former Gambian President, Sir Dawda Jawara, who was removed from power by a military *coup d'état* in July 1994. The Commission held that military *coups* constituted grave violations of the right to freely choose a government. On the issue of immunity, it was held that the obstacle that stood when the sending state did not waive the *ratione personae* or *ratione materiae* immunities afforded to the serving Heads of States, Ambassadors and Ministers. Thus state officials enjoy *ratione materiae* and "*ratione personae* immunities.

⁶⁶¹ Judgement of 4 June 2008 paras. 170 and 174.

⁶⁶² [2007] EWCA Civ 712.

⁶⁶³ 2000) AHRLR 107 (ACHPR 2000) paras. 72-73.

Referring to the *Djibouti v France* and *Jawara* cases above, “*ratione materiae*” and “*ratione personae*” immunities can be allowed as defences depending on circumstances of each case, particularly if it was for the protection of interests of the state, an individual or group of individuals. Equally, an incorrect application of immunity provisions encourages impunity, contrary to the UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, 2005 which define impunity as:

the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their arrest or trial and if found guilty, be sentenced to appropriate penalties and make reparations to the victims.⁶⁶⁴

Although the *Djibouti v France* and *Jawara* cases favoured the notion of absolute immunity of the Heads of States, on the other hand the case of *Armando Dos Santos v Prosecutor General* (*Santos's case*),⁶⁶⁵ below, on criminal responsibility of perpetrators of heinous crimes suggests that charges for these crimes can be instituted and immunity be waived against state officials.

3.3.10 East Timor

In *Armando Dos Santos v Prosecutor General* (*Santos's case*) the Portuguese left East Timor, a former Portuguese colony together with the Indonesia territory of West Timor. Indonesian entered into an agreement with East Timor which was proclaimed as a part of Indonesia. The UN General Assembly did not recognise the incorporation of East Timor into Indonesia and continued to treat East Timor as a non-autonomous territory of Portugal. In 1999 the majority of the population in East Timor voted for independence. On 25th October 1999 the Democratic Republic of Timor-Leste was proclaimed.

The UN Transitional Administration in East Timor (UNTAET) was established to act as a transitional government under Regulation 1999/1 of 27 November which provided that, the laws which applied in East Timor before 25 October were still applicable. The Constitution of the Democratic Republic of Timor-Leste came into force on May 2002 whose section 165 provided that laws and regulations in force in East Timor should continue to be applicable to all matters except if they were inconsistent with the Constitution. At the time of the referendum in 1999, there was violence in East Timor perpetrated by some militia opposed to the independence. These acts of violence included systematic attacks on defenceless civilians.

⁶⁶⁴ Principle 1 of the UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity of 8 February 2005.

⁶⁶⁵ (2009)138 ILR 604.

The accused, Mr Dos Santos, a farmer who was a part of the militia, was accused by the Public Prosecution Service for committing crimes against humanity because he participated in various attacks in 1999 that resulted into mass killings of civilians. He was charged before the Dili District Court with two killings under UNTAET Regulations 2000/15 and found him not guilty of crimes against humanity on the ground that the accused was not aware that his conduct constituted crimes. The Public Prosecution Service appealed to the High Court and the accused was found guilty. The accused appealed to the Court of Appeal but the appeal was dismissed and the accused was convicted of murder and one crime against humanity under the Portuguese Penal Code. He was sentenced to 10, 12, 12, and 15 years' imprisonment reduced to a single penalty of 22 years' imprisonment.

Using the *Santos's* case as a persuasive authority for Burundi, this thesis emphasises that there shall be no immunities for an individual or a group of individual persons if there are criminally responsible. In principle, *ratione materiae* and *ratione personae* immunities are granted for the benefit of the state or international organisation which the state officials represent but not for individuals' interests. Thus, the state or an international organisation as an employer, can waive immunities found under the diplomatic laws and accept the jurisdiction of the courts over an individual or group of individuals who have been granted *ratione personae* or *ratione materiae* immunities as stipulated in the Genocide and Torture Conventions.⁶⁶⁶ Hence, the official position of any accused person, whether as Head of State or Government or as a responsible Government Official, cannot exonerate such person from criminal responsibility on the authority of the *Pinochet's* case.

According to Sir Arthur Watts, an international conduct which is serious and contaminated with criminality must not be regarded as attributable only to an impersonal state, but to the individuals who order or perpetrate crimes because it is both unrealistic and offensive to the common notion of justice.⁶⁶⁷ For that reason, there is a collective international determination to deal with impunity by invoking extra-territorial jurisdiction and the establishment of international criminal tribunals and the ICC. The Office of the UN High Commissioner for Human Rights has pointed out that regional human rights systems have reinforced international standards and machinery by providing means by which the human rights

⁶⁶⁶ Article 4 of the Genocide Convention, states that:

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

⁶⁶⁷ Watts, A.; (1994) **The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers: Collected Courses of the Hague Academy of International Law**: Martinus Nijhoff Publishers at p. 21. See also Harris, *op cit* n. 172 at p. 337.

concerns can be addressed within the particular social, historical and political contexts of the region concerned.⁶⁶⁸

Recent developments in international law have suggested that although immunities for state officials may be available as a defence against prosecution for local or domestic crimes or civil liability, however, these immunities are not justifiable defences for international crimes such as genocide, crimes against humanity and war crimes. As underlined in the case law of the ICC, and *ad hoc* tribunals such as the ICTY, particularly, the *Karadzic*, *Milosevic*, and *Furundzija* cases,⁶⁶⁹ it must be emphasized that reasonable care should be taken into account when considering the tribunals' jurisprudence because of their *Ad-hoc* nature. This was the position taken in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* judgment.⁶⁷⁰

It is submitted that there are reasons commonly given to disregard immunity as a justifiable defence for the perpetrators of gross violations of human rights as elaborated in the aforementioned *DRC Arrest Warrant* case as follows:⁶⁷¹

- genocide, war crimes and crimes against humanity are not acts of state,
- these acts in question are committed by human beings and not the state, and,
- *jus cogens* must not be allowed to erase the nature of international crimes, hence, international crimes may not be eroded easily by diplomatic immunities.

When a person who enjoys a personal immunity and has committed a criminal act covered by functional immunity (*ratione materiae*) and leaves office, the personal immunity (*ratione personae*) is usually stripped away. This was demonstrated in the *Pinochet* case before the House of Lords when the Court held that Pinochet had no immunity in terms of the Vienna Convention.⁶⁷²

The following section discusses criminal responsibility and accountability in Guyana.

⁶⁶⁸ Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights, April 1993, available at: <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> [accessed on 24/09/2013].

⁶⁶⁹ *Prosecutor v Karadzic*, Case No.IT-95-5/18-PT, *Prosecutor v Slobodan Milosevic* IT-02 54-A-R77.4 and *Prosecutor v Anto Furundzija (Trial Judgement)*, IT-95-17/1-T.

⁶⁷⁰ I.C.J. Reports 2002, p. 3.

⁶⁷¹ *DRC Arrest Warrant* case, *ibid* at p. 4.

⁶⁷² See the *Pinochet III* s case, *op cit* n. 537.

3.3.11 Guyana

Guyana v Suriname (Suriname's case)⁶⁷³ is a case where an international tribunal had an opportunity to deal with the issue of state responsibility in a maritime delimitation dispute. Although the *Suriname* case is not a genocide related case, it has been cited in this thesis as a persuasive authority on state responsibility and accountability whereby reparation in terms of compensation may be awarded for violations of human rights by armed forces. Among other issues in the *Suriname's* case was the jurisdiction of the Arbitral Tribunal over Guyanese submission that Suriname was internationally responsible for violating its obligations under the Law of the Sea Convention, the UN Charter and general international law to settle disputes by peaceful means.

The *Suriname's* case which was decided by an Arbitral Tribunal in accordance with the Annex VII of the 1982 UN Convention on the Law of the Sea⁶⁷⁴ (the LOS Convention), relating to the disputes arising from maritime delimitation,⁶⁷⁵ emphasizes the importance of State Parties' obligation to respect and observe human rights. The parties, Guyana and Suriname, are situated on the northeast coast of the South American continent. Their coastlines are adjacent and meet at or near the mouth of the Corentyne River. Guyana and Suriname were colonies of the United Kingdom and the Netherlands respectively and achieved their independence in 1966 and 1975 respectively.⁶⁷⁶ Efforts to establish a border between Guyana and Suriname dated back to colonial times.

In 1989, the Presidents of the applicant and respondent agreed that modalities for the joint utilization of the border area should be established pending determination of the border. The 1989 Agreement led to the 1991 "Memorandum of Understanding-Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname" (the 1991 MOU), which provided

⁶⁷³ (2010) 139 ILR 566. See the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. These Draft Articles sought, by way of codification and progressive development, to lay down the basic rules of international law concerning the responsibility of states for their internationally wrongful acts. The emphasis was put is on the rules of state responsibility relating to the general conditions under international law for the state to be held responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.

⁶⁷⁴ United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982 and entered into force on 16 November 1994, 1833 UNTS 397, reprinted in 21 ILM 1261 (1982) (www.un.org/depts/los).

⁶⁷⁵ Arbitral Tribunal Constituted pursuant to Article 287, and in accordance with Annex VII of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname (*Guyana v Suriname*), Award of 17 September 2007. The Award and pleadings are available at www.pca-cpa.org.

⁶⁷⁶ See *Guyana v Suriname*, Award paras. 127-130.

that the representatives of both governments would meet within 30 days to conclude discussions on modalities for the joint utilization of the disputed area. The 1991 MOU, however, was never implemented by Suriname and the negotiations on joint utilization did not progress any further.

During the conclusion of the 1991 MOU, Guyana issued several concessions for oil exploration in the disputed area. The CGX Resources Inc. (CGX), a Canadian company, was granted a concession by Guyana in 1998 and the eastern border of the concession area was the 34° Line. In 1999, the CGX arranged for seismic testing to be performed over the entire concession area which involved exploratory drilling on the seabed and the drilling plans became known in Suriname via the grapevine. On 3 June 2000, two patrol boats from the Surinamese navy approached CGX's oil rig and drill ship, the C.E. Thornton. Suriname ordered the ship and its service vessels to leave the area within 12 hours otherwise Guyana would be held accountable. The crew members boarded the C.E. Thornton, detached the oil rig from the sea floor and withdrew from the concession area. The Surinamese patrol boats followed them throughout their departure.⁶⁷⁷

On 24 February 2004, in view of the lack of progress in diplomatic negotiations, Guyana initiated arbitration proceedings under Annex VII of the LOS Convention. Guyana contended that Suriname was internationally responsible for violating its obligations under the LOS Convention, the UN Charter and general international law to settle disputes by peaceful means because of its use of armed forces in the CGX incident and that Suriname was under an obligation to pay compensation. Van den Wyngart J. discussed the issue of immunity under international law and held that a minister's immunity is not extended to war crimes and crimes against humanity. Although Suriname challenged Guyana's submission on the ground of good faith and clean hands doctrine by arguing that "the clean hand doctrine" had been adopted by the international courts and tribunals, the judge held that there was no general rule that accepts clean "hands doctrine" that has been elaborated in international law.⁶⁷⁸

Although Guyana's claim for compensation was rejected it was held that both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of the LOS Convention which conduct could attract state responsibility.

⁶⁷⁷ *Guyana v Suriname*, *ibid* paras. 150-151, 436, 475.

⁶⁷⁸ *Guyana/ Suriname (Award)* 2010 139 ILR 685.

3.3.12 Cambodia

Like, the case studies of Rwanda, Sierra Leone, Chile, Guatemala, South Africa and East Timor, Cambodia has struggled for decades to find out a lasting solution to the crimes committed by the Khmer Rouge regime. Cambodia got independence from France in 1953 and elected a Prime Minister who was overthrown by General Lon Nol in a *coup d'état*. The genocide and human rights violation which began in 1975 when the Khmer Rouge overthrew Lon Nol were carried out until the Vietnamese invasion in 1978. The Khmer Rouge movement under the leadership of Pol Pot (1975-1979), armed forces in Cambodia committed gross violations of human rights against civilians.⁶⁷⁹

The Khmer Rouge, a guerrilla movement, was founded in 1960 under Pol Pot's leadership with communist ideology. The aim of the Khmer Rouge was to deconstruct Cambodia wherein all citizens would participate in collective rural-based projects that aimed at removing any Western inventions or interferences. Pol Pot who imported Chinese and Viet Cong military training methods succeeded in producing a military force that was responsible for carrying out extermination plans against civilians. In 1970, the Khmer Rouge went to civil war with the US supported "Khmer Republic," under Lieutenant-General Lon Nol which adopted an anti-communist standpoint and demanded the withdrawal of North Vietnamese and Viet Cong forces from Cambodia.

In order to achieve the "ideal" Communist Model, the Khmer Rouge government believed that all Cambodians must work in a huge federation of collective farms and any opposition to the ideology was to be eliminated. Thus, the potential "opposition" or antagonism included intellectuals, doctors, teachers, professionals, monks, Buddhists, Muslims, Christians, Chinese, Vietnamese, Thai and Cambodians with Chinese, Vietnamese, or Thai ancestry. The Khmer Rouge vigorously interrogated its members and frequently executed members on suspicions of treachery or sabotage. Survival in Khmer Rouge Cambodia was to be determined by one's ability to work.⁶⁸⁰

The Cambodian genocide of 1975-1979 which claimed approximately 1.7 million people's lives (21% of the country's population), is amongst the worst human rights tragedies of the last century. As in the Ottoman Empire during the Armenian genocide, Nazi Germany, East Timor, Guatemala, Yugoslavia and Rwanda, the Pol Pot's Khmer Rouge regime combined extremist

⁶⁷⁹ See the Cambodian Genocide, 1975-1978, available at: <http://worldwithoutgenocide.org/wp-content/uploads/2010/01/Cambodian-Genocide-World-Without-Genocide.pdf> [accessed on 07/10/2013].

⁶⁸⁰ The Cambodian Genocide, 1975-1978, *ibid*.

political ideology with ethnic animosity and a deliberate disregard for human rights such as life, expression, movement and dignity to suppress the opposition forces, real or imagined that culminated into mass murders and despair on a massive scale.⁶⁸¹

Cambodia's case is an example that has demonstrated controversies on transitional justice on the issues of forgiveness, reparation and retribution. In 2007, following the adoption of its Internal Rules, the Extraordinary Chambers in the Courts of Cambodia (ECCC) began prosecuting individuals who were accused of serious crimes committed during the Khmer Rouge regime of 1975-1979.⁶⁸² The ECCC had jurisdiction over senior leaders of Democratic Kampuchea and were responsible for serious crimes and violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia.⁶⁸³ Five former top Khmer Rouge officials were held in the custody of the Court, subject to an international agreement between the United Nations and Cambodia.⁶⁸⁴

Article 12(1) of the UN-Cambodia Agreement obliged the ECCC to follow the procedures in accordance with Cambodian law. However, Cambodia's French colonial past as well as the political compromises preceded the ECCC creation, as such, procedures had to differ in a number of respects from previous international and hybrid criminal courts.⁶⁸⁵ Two important differences concerned a broad focus on national reconciliation and the role of victims in the proceedings, including their right to claim moral and collective reparations.⁶⁸⁶ Based on the dynamics behind the Cambodian's case, Cambodian and international officials struggled with the question of which route to follow. It appears that the ECCC's commitment to prosecution combined with its endorsement and expansion of victims' rights illustrated a unique approach

⁶⁸¹ The Cambodian Genocide, 1975-1978, *ibid.*

⁶⁸² Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules, as revised on the 1st of February 2008, available at; www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf. [accessed on 08/10/2013].

⁶⁸³ Donovan, D. K.; (2003) "Joint UN-Cambodia "Efforts to Establish a Khmer Rouge Tribunal", **Harvard International Law Journal**: Harvard at p. 551, McGonigle, B. N.; (2009) "Current Legal Developments, Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles", **Leiden Journal of International Law**, pp. 127-149.

⁶⁸⁴ The UN-Cambodia Agreement of 6 June 2003. Five former top Khmer Rouge officials who were held in the custody including Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea, Khieu Samphan, former Minister of Foreign Affairs, Ieng Sary and his wife former Minister of Social Affairs Ieng Thirith and former commandant of the notorious Tuol Slen interrogation centre, Kaing Guek Eav. See also the pending trial in Case 002, which focuses on crimes against humanity allegedly committed in the course of two population movements and executions of members of Lon Nol regime at Tuol Po Chrey in Pursat.

⁶⁸⁵ McGonigle, *op cit* n. 683 at p. 128.

⁶⁸⁶ McGonigle, *ibid* at p. 128.

to post-conflict justice. The ECCC approach also has highlighted an important issue arising more and more often in international criminal law, namely how to combine successfully, traditional retributive procedures with restorative or victim centred processes.⁶⁸⁷

The ECCC⁶⁸⁸ ordered symbolic and collective reparations in the court's first conviction for crimes against humanity. This was in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights and Humanitarian Laws.⁶⁸⁹ The Court ordered that the names of victims of a notorious prison be listed in the Court's website as well as apologies to the victim survivors which was to be made by the convicted persons.⁶⁹⁰ Equally, the ECCC Trial Chamber proposed reparations and specified seven reparation projects under three categories: "Remembrance and Memorialization", "Rehabilitation" and "Documentation and Education".⁶⁹¹

Among these seven projects were the:

- establishment of a public holiday of remembrance,
- provision of an opportunity for civil society members to address their psychological suffering through the NGO project "Testimonial Therapy" and
- construction of a permanent exhibition showing photos, documents and other displays of survivors' experiences.⁶⁹²

3.4 REPARATION IN GENERAL TERMS

The right to reparation as a part of broader concept of transitional justice, as shown in the abovementioned case studies, covers different forms that may not be widely explored in a single study. As such, reparation can be understood in both broad and narrow perspectives.⁶⁹³ First reparation means where international law considers and gives reparation a broad legal significance that incorporates different forms of transitional justice mechanisms. Secondly, reparation means programmes which are designed to benefit directly or indirectly the victims of international crimes by compensating these victims in patrimonial or non-patrimonial damages on individual or collective basis. These may include, monetary

⁶⁸⁷ Mcgonigle, *ibid* at p. 128.

⁶⁸⁸ Extraordinary Chambers in the Courts of Cambodia available at <http://www2.ohchr.org/english/law/remedy.htm>.

⁶⁸⁹ The Basic Principles, *op cit* n. 18.

⁶⁹⁰ The ECCC Report, September, 2013, available at: http://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20Sept%202013_Final.pdf [accessed on 07/10/2013].

⁶⁹¹ The ECCC Report, *ibid*.

⁶⁹² The ECCC Report, *ibid*.

⁶⁹³ De Greiff, P. "Justice and Reparations" in De Greiff, *op cit* n. 517 at p. 452.

compensation, land restitution, public apology, rehabilitation for the victims and prosecution of perpetrators of serious crimes.

3.4.1 Types of reparations

There are many reparations approaches that can be designed to compensate the victims of genocide and gross human rights violations. They may include financial compensation to individuals or groups; guarantees of non-repetition; social services such as healthcare or education; and symbolic measures such as formal apologies or public commemorations.

This thesis refers to transitional justice mechanisms in South Africa and Chile as best examples although Guatemala, Sierra Leone and Cambodia can be insightful for their judicial methods of reparations.⁶⁹⁴ This chapter has discussed how the historical factors in the selected countries dealt with the legacy of the past dictatorial regimes. After depicting the political and legal framework, this chapter has discussed their relationship in a new political order and how an effective legal framework can support reparation initiatives so that victims and survivors of gross human rights violations can be compensated individually or collectively and states become responsive to such reparations. It has considered the question of whether or not, reparation policies in the abovementioned countries did give room for effective judicial remedies.

Unlike South Africa, the Chilean reparations process had an option for claiming reparations against individual perpetrators. But the nature of the violations complained of and the context were made clear that the chief perpetrator of the violations was the state as many human rights violations were committed by agents of the state, either in their official capacities secretly or these individuals did nothing to protect the victims. Therefore, the victims' reparation claims could be either instituted in civil or criminal litigations or through the administrative channel of pensions and other types of social benefits. Therefore, reparations involved mainly a vertical relation between the Chilean state and the beneficiaries or victims of human rights violations.

3.4.2 Lessons for Burundi in terms of accountability, monitoring and legal reforms

This study refers to the abovementioned cases and notes advantages and disadvantages in these jurisdictions. Taking the Chilean, Argentinian and Guatemalan models as examples, this thesis argues that unlike Burundi, these Latin American countries have moved a step ahead in dealing with the outrages of the previous military or repressive regimes. Likewise, the cases of South Africa, Cambodia, and Sierra Leone have demonstrated that past wrongs may not

⁶⁹⁴ Nibogora, *op cit* n. 16.

always go unpunished. For example, Chile through its Rettig Report of 1991 was understood in the series of actions that expressed the acknowledgement and acceptance of criminal responsibility and civil liability which were deduced from the state officials' actions under the Pinochet's military regime. The Rettig Commission identified different groups of victims of human rights violations such as 2298 individuals who were victims of politically motivated killings, 2130 victims of human rights violations, 168 victims of political violence, 979 persons who were listed as disappeared detainees and 634 cases for which no satisfactory conclusion was reached.⁶⁹⁵

Although Chile's constitutional reform was initially hindered by the institutions loyal to the former President Pinochet, particularly the military, legislature and judiciary, ultimately, the Truth and Reconciliation Commission's initiatives contributed towards implementing major national reforms. Notably, in 1998, a National Holiday, which celebrated the 1973 coup was abolished. In 2005, a comprehensive constitutional reform process resulted into legal reforms that allowed, among others, the President to dismiss the senior military officials.⁶⁹⁶ The National Security Council, a military-dominated body, was stripped of all advisory powers.

Additionally, there was political will of the new democratic governments of Patricio Aylwin and Eduardo Frei to deal with the past wrongdoings of the previous military regime.⁶⁹⁷ For instance, the Rettig Report recommended three categories of reparations, symbolic reparations, legal and administrative reforms and financial reparations. The financial reparations included the payment of pension, social benefits such as healthcare services and educational assistance and other social needs. The Commission justified the social benefits on account that many individuals who were killed or disappeared might have qualified for social benefits, which their relatives had never received or had received partially. The Rettig Commission was empowered also to validate new cases of victims and to investigate the whereabouts of the victims who disappeared after being arrested and of those whose bodies had not been found, although they could have been legally recognised and declared as dead.

As noted also in the Guatemalan case, it is generally argued that to have international or regional interventions in transitional justice processes where there have been armed conflicts

⁶⁹⁵ Lira, E. "The Reparations Policy for Human Rights Violations in Chile" in De Greiff, *op cit* n. 517 at p. 59.

⁶⁹⁶ See Truth Commission: Chile, available at: <http://www.usip.org/publications/truth-commission-chile-90>, [accessed on 08/10/2013].

⁶⁹⁷ The Rettig Report was fully endorsed by President Aylwin. When presenting the Report to the nation, he apologized to victims and their families on behalf of the state also Pinochet and the leaders of the previous armed forces criticized its findings.

that have polarized its society like Guatemala is unavoidable.⁶⁹⁸ Having an international or regional intervention in Guatemala was necessary as well as in situations where the state and civil society are extremely weak like the case of Sierra Leone or where the state that previously existed has disintegrated as in the case of the former Yugoslavia.

Based on the principles formulated in the Nuremberg and Tokyo Trials, there is an international duty imposed upon State Parties founded on the conscience of humanity and international legal norms to prosecute and punish perpetrators of international crimes such as genocide, crimes against humanity and war crimes. Additionally, it is necessary to adopt collective preventive measures to preserve collective memories and build effective deterrent policies as demonstrated in examples from the Latin American countries. Although countries like Chile, Argentina and Guatemala have succeeded to some extent on individual criminal responsibility, the gap is still evident on the issues relating to accountability of accomplices and beneficiaries of previous military regimes which may include companies and state responsibilities.

The relevance of state responsibility is shown in the ongoing judicial and scholarly inquiries.⁶⁹⁹ Although the Genocide Convention imposes a number of obligations in respect of state accountability for the crimes of genocide and aggression,⁷⁰⁰ there have been debates on whether state criminal responsibility is equal to state civil liability.⁷⁰¹ For example, there have been arguments that state liability is different from criminal responsibility because a state may not be punished in a criminal law sense, but, can only be held liable to pay material reparations.⁷⁰² Consensus has been reached that opposes state criminal responsibility but equally support state civil liability.⁷⁰³ In this context, criminal and civil actions can be brought against states for the commission of genocide and aggression.

This thesis notes incidents of stringent application of the principles of state responsibility as demonstrated in case law in the cases like *Pakistan v India*,⁷⁰⁴ in 1973, *The Application of the*

⁶⁹⁸ See generally, Kaye, M.; (1997) "The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: The Salvadorian and Honduran Cases", **Journal of Latin American Studies**.

⁶⁹⁹ See Schabas, *op cit* n.362 views on debates on state criminal responsibility and civil liability at pp. 491- 499.

⁷⁰⁰ Article 4 of the Genocide Convention that excludes official capacity as a defence for senior Heads of the States and Parliamentarians.

⁷⁰¹ Schabas, *op cit* n.362 at p. 494.

⁷⁰² See the arguments raised by Syria and Venezuela during the debate on Drafting the Genocide Convention, UN Doc.A/C.6/SR.95.

⁷⁰³ Schabas, *op cit* n.362.

⁷⁰⁴ [1973] ICJ Reports 347, an Interim Protection Order of 15 December, 1973

*Genocide Convention (Bosnia and Herzegovina v Yugoslavia*⁷⁰⁵ in 1993, *Armed Activities (DRC v Rwanda)*⁷⁰⁶ in 1999 and 2002 and *Bosnia and v Serbia* in 2007 where the ICJ considered the drafting history of Article 9 of the Genocide Convention.⁷⁰⁷ The ICJ in *Bosnia and v Serbia* case referred to drafting history of Article 9 and held that a state could be held responsible for committing genocide as the Article was enacted to effect state criminal responsibility.⁷⁰⁸

In the comments submitted to the International Law Commission, Denmark on behalf of the Nordic countries was of the view that, "if one looks at the nature of the crimes of genocide or aggression, such crimes are perpetrated by individual human beings but at the same time are imputable to states insofar as they are normally carried out by state organs implying criminality".⁷⁰⁹ After the attempts to outlaw war and aggression by states in the late 19th and early 20th century, there has been a paradigm shift towards individual responsibility for violation of international law.⁷¹⁰

Articles 5 and 7 of the Genocide Convention require State Parties to adopt appropriate legislation within their criminal law and extradition of perpetrators of genocide, while Article 6 establishes courts' jurisdiction over crime of genocide. Since the principles established by Nuremberg and Tokyo Trials, ICTY, ICTR tribunals and ICC, an important legal issue has been whether a state can commit genocide? Although there have been some legal developments attributing breaches of international law by individuals and prosecuting individual perpetrators of gross violations of human right, the criminal tribunals and courts like the ICJ have been reluctant to clarify the issue of state responsibility for genocide.

The close relationship between state and individual responsibility for genocide as Schabas has contended, manifests itself in the analysis of criminal intent to commit a crime.⁷¹¹ Criminal intent emanating from national and international laws can be linked to state responsibility. Under

⁷⁰⁵ [1993] ICJ Reports 325 at pp. 332-333, Further Requests for Indication of Provisional Matters.

⁷⁰⁶ Application Instituting Proceedings of 23 June, 1999 and New Application of 28 May, 2002, pp. 22-23.

⁷⁰⁷ Article 9 deals with state responsibility for injuries sustained by nationals of the complaining state on violation of principles of law.

⁷⁰⁸ *The Application of the Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro*, judgement of 26 February, 2007, paras. 175-178.

⁷⁰⁹ The first Report on State Responsibility by the UN Special Rapporteur James Crawford, UN Doc. A/CN.4/490/Add. I, para. 43.

⁷¹⁰ Hüls, V.; (2004) "State Responsibility for Crimes under International Law Filling the Justice Gap in the Congo", available at:

⁷¹¹ <http://www.lawanddevelopment.org/docs/justicegapcongo.pdf> [accessed on 04/10/2013].

Schabas, *op cit* n.362 at p. 517.

national criminal law, the intent of a corporation is merged with the intent of its guiding mind or *alter ego*.⁷¹²

This thesis has examined the question of intent from the viewpoint of state policy. Reference is made to states 'extermination plans or/and policies' which courts and criminal tribunals have been considering in dealing with genocide cases. For example, the ICTY in examining General Krstic's individual criminal liability in the *Krstic* case, considered the plan and policy which were implemented for the Srebrenica massacre.⁷¹³

Criminal courts or tribunals in genocide cases have to evaluate State Plans or Policies, rather than an "intent" element to commit genocide. It must be emphasised that allegations of state responsibility have been put forward before the international human rights tribunals or regional adjudicating bodies. For example, allegations of genocide of the Mayan community in 1982 in Guatemala was considered and admitted by the Inter-American Commission of Human Rights in 1999 which were reinforced by the Inter-American Court of Human Rights in the *Case of Plan de Sánchez Massacre v Guatemala*.⁷¹⁴ Moreover, the same approach has been followed by the African Commission on Human and Peoples' Rights in the *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* case.⁷¹⁵

It has been demonstrated in the examples mentioned earlier that Truth and Reconciliation Commissions have been complimented with individual criminal prosecutions in the aftermath of repressive regimes in the Latin American Countries. Furthermore, there have been a sense of public satisfaction pertaining truth-telling on past wrong-doings of the past regimes. In the case of South Africa which opted for a transitional model that concentrated on truth-telling, forgiveness and administrative reparations, prosecutions was not highly favoured. Countries like Chile and Argentina utilised both Truth and Reconciliation Commissions and prosecution processes which complemented each other to deal with the past human rights abuses in a comprehensive manner.

Transitional justice initiatives, whether in South Africa, Latin America or other countries were appropriate measures in post-conflict reconstruction of these countries by their successive

⁷¹² A person's secondary or alternative personality.

⁷¹³ *Prosecutor v Krstic* (Case No. IT-98-33-A), ICTY Judgment of 19 April, 2004 at para. 101. See also the UN Commission of Inquiry Report, 2005 on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc.S/2005/60, para 518.

⁷¹⁴ Merits Judgment of 29 April, 2004, see a Separate judgment of Judge Antonio, A. Concado-Trinidad at para. 2.

⁷¹⁵ *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, *op cit* n. 333.

governments. It is acknowledged that there are difficulties that can be associated with addressing human rights violations especially in cases where crimes are linked to the previous regimes. In other words, if the alleged perpetrators are still in control or have political, economic and judicial influences in the new governments, transition initiatives may be obstructed as shown in the cases of Chile and Burundi.

This thesis underlines the gaps in international law on state responsibility by looking at the example of the Great Lakes Region with specific reference to Burundi and argues that contrary to what the International Bill of Rights demands, attribution of international crimes to states which may be implicated in human rights violations is still elusive. Mass killings including ethnic cleansing equal to genocide have been extensively addressed by the Nuremberg and Tokyo Trials, ICTY, ICTR and Inter-American Court of Human Rights. Yet, state responsibility for these crimes has not been addressed adequately or setting up a tangible judicial precedent in this regard.

The ICC has shown its commitment to investigate the allegations of international crimes in cases like Sierra Leone, DRC, Libya, Sudan and Kenya including responsibility of private companies that may be implicated in the perpetration of such atrocities.⁷¹⁶ However, there have been delays in transitional justice arrangements while other cases like Burundi have been ignored in the course of fossilising impunity.

As underscored in the case law, there are two approaches which can be utilised to claim compensation against the states for their wrongfulness or harms committed under international law, namely, state criminal responsibility and civil liability. While state criminal responsibility requires a state to engage in an internationally recognisable wrongful conduct before being required to compensate the victims, state civil liability is designed to capture those situations where a state has harmed another state, even if such state has not yet engaged directly in wrongful conduct against the claimant state.

It is imperative to point out that States Parties as juristic persons are under obligations to act diligently in order to prevent substantial harm against individuals, other State(s) or juristic person(s). State liability essentially is strict liability in terms of the law of delict where state actions and while not often invoked, can be considered as subsidiary delictual liability that

⁷¹⁶ See the ICC Prosecutor's statement in 2003 while referring to the Nuremberg Trials as precedent for cases against private enterprises ("The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC").

could compensate harms or damages which are not expressly covered under general state criminal responsibility including environmental degradation resulting from armed conflicts.

3.5 SUMMARY

This chapter has compared Burundi with other countries with respect to transitional justice mechanisms. Based on the legal principles which were established and applied in Chile, South Africa, Argentina, Guatemala, Rwanda, DRC, Sierra Leone, Gambia, Djibouti, East Timor, Guyana and Cambodia, it has been revealed that immunity for state officials can be waived in the cause of reinforcing individual and collective responsibility. In the process, perpetrators and their accomplices to genocide and other serious international crimes can be held to account as demonstrated in the *Apartheid Reparation* and *Guyana* cases.

Unlike transitional justice initiatives in the above selected countries there have been unnecessary delays in the establishment of transitional justice mechanisms in Burundi. This chapter concludes by evaluating the strengths and weaknesses in the selected case studies and emphasises that there lessons which Burundi can learn from the aforementioned transitional justice models should Burundi resolve to follow examples from other jurisdictions. Hence, cases of Rwanda, Sierra Leone, DRC, Djibouti, Gambia, East Timor, Chile, Argentina, Guyana, Guatemala and Cambodia have been cited and considered as examples of criminal responsibility for serious international crimes. Additionally, the examples of South Africa, Chile and Cambodia are used as success stories of transitional justice models in terms of truth-telling, reconciliation and reparation for victims of genocide and gross violations of human rights and national reconstruction. The following chapter deals with research methodologies employed in this study to investigate the problems of human rights violations in post-conflict Burundi.

CHAPTER FOUR: RESEARCH FINDINGS COLLECTED THROUGH SELECTED PARTICIPANTS' RESPONSES

4.1 INTRODUCTION

The previous chapters have stated on how post-conflict Burundi is still confronted with, among others, the problems of refugees and IDPs, while the narrow definition of the crime of genocide has encouraged impunity. The focus of this thesis is limited to the issues of violations of human rights and transitional justice mechanisms in post-conflict Burundi, however, in a broader context it investigates other aspects of human rights of asylum seekers, refugees and IDPs because they are linked to the ongoing violations of human rights whose implications are not limited to Burundi but also other countries which have hosted Barundi refugees for many years.

The research findings relating to sections 2, 3, 4 and 5 of the questionnaires are evaluated hereunder. An overview of the protection of refugees, IDPs, women and minorities' rights under the refugee conventions and human rights instruments are critically analysed. Thus, chapter five deals with life experience of refugees in exile, awareness on human rights, returning and integration process in Burundi, trends in respect of applications for repatriation or local integration, time spent before receiving response on either local integration or repatriation in Tanzania and human rights in the repatriation process.

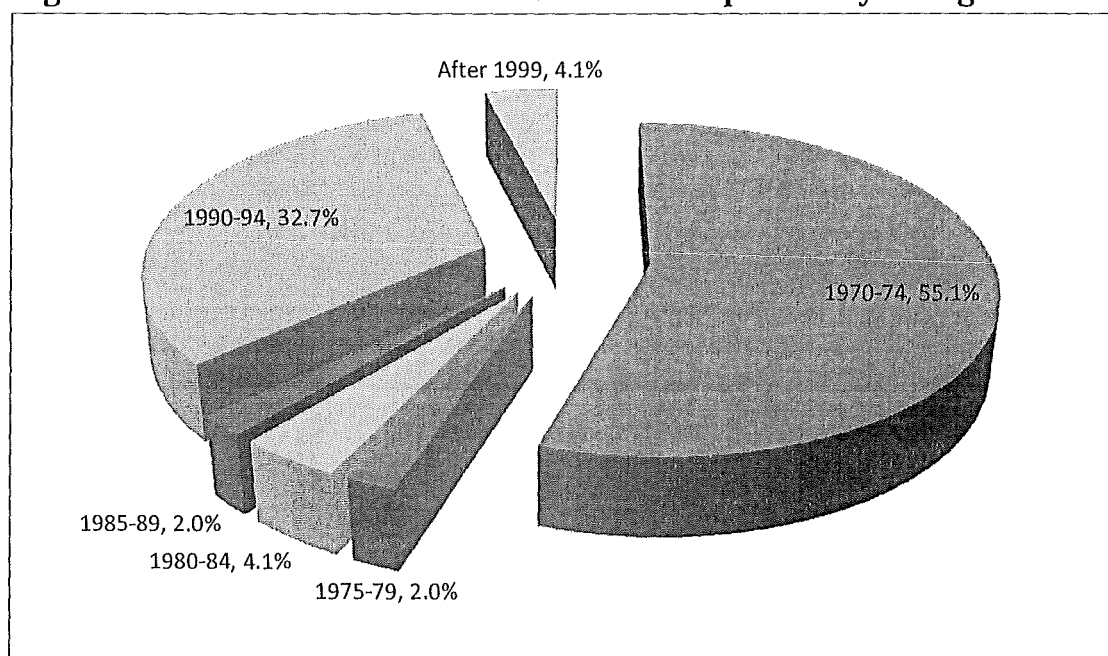
Specific reference is made to South Africa and Tanzania to demonstrate how refugees' rights including those of Barundi can be protected at national level. These countries have been chosen because they are among the host countries of Barundi refugees. Additionally, South Africa and Tanzania have played major roles in trying to resolve Burundi's conflicts and are relatively stable and have capacity to host refugees compared with DRC and Rwanda. The findings reveal that the criterion of "well-founded fear" articulated in the UN and OAU Refugee Conventions and re-iterated in the Refugees Acts in South Africa and Tanzania is still a prevalent phenomenon among Barundi refugees who are residing in exile. Nevertheless, the lack of transitional justice mechanisms in Burundi, has been reported and justified by respondents in this study to be among the major contributory factors that prevent a significant number of Barundi refugees and IDPs from returning to their original homes. Selected figures and respondents' opinions are used to buttress these findings.

4.2 BARUNDI LIFE EXPERIENCE AND DESTINATION

Out of 113 Barundi refugees interviewed, 80 (70.8%) had fled their country and lived in exile as refugees. The remaining 33 respondents who participated in this study were refugees born in exile after their parents had fled Burundi or internally displaced persons during wars in

Burundi. The majority of refugees who fled Burundi as summarized in Figure 4 below did so during 1970-74 as well as 1990-1994 periods although a few others also fled during other periods. For those who fled in 1970-74 period, more than 95% fled during the year 1972 following genocidal killings of *Hutus* by the mono-ethnic *Tutsi* army under the rule of the then President Michel Micombero.⁷¹⁷ During the 1990-94 period, the majority (62.5%) fled in 1993 following the killing of the first democratically elected Hutu President, Melchior Ndadaye, by the same army.⁷¹⁸ Refugees who fled Burundi destined to DRC, Rwanda, Tanzania and South Africa (as summarized in Figure 5 below). The majority of these refugees fled to Tanzania (67.5%) and DRC (22.5%).

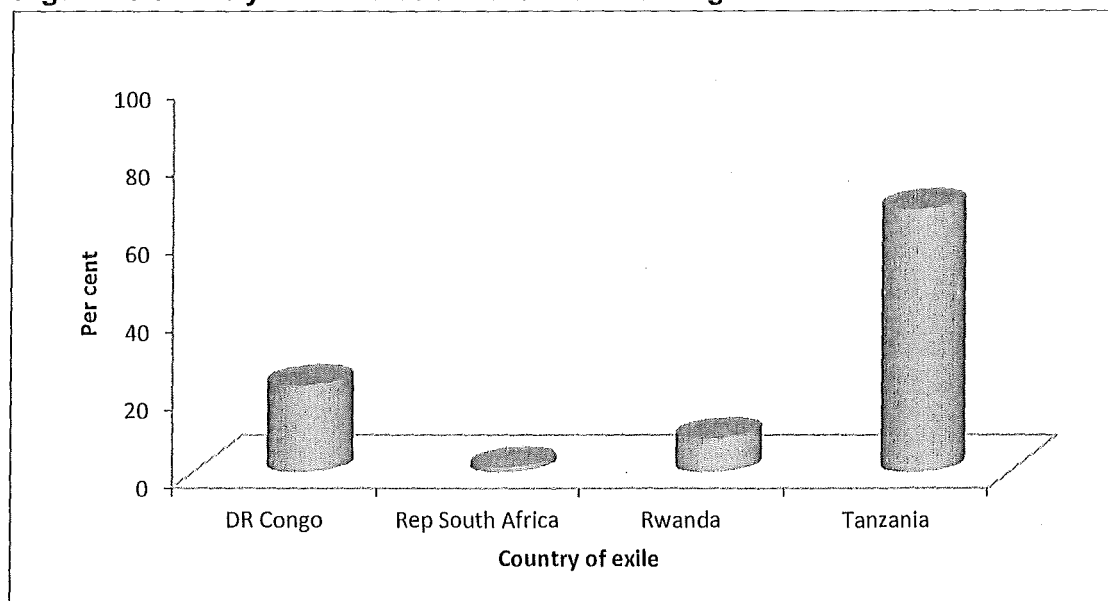
Figure 4: Year when First Fled Burundi as Reported by Refugees



⁷¹⁷ See Ndarubagiye, *op cit* n. 9 at p. 38.

⁷¹⁸ See Ndarubagiye, *ibid* at pp. 70-73, Krueger and Krueger, *op cit* n. 22 at p.32.

Figure 5: Country of Destination for Barundi Refugees



4.3 ANALYSIS OF FINDINGS

This section deals with the findings relating to the rights of Barundi refugees who fled the country especially since 1970s to 1990s. Henceforth definitions of an asylum-seeker, a refugee and an IDP are given in order to clarify the differences among these interrelated concepts.

4.3.1 Asylum seekers, refugees and IDPs

An asylum-seeker is a person who has fled his/her own country and applied for protection to become a refugee.⁷¹⁹ A refugee in terms of the UN Refugee Convention is a person who "owing to well-founded fear" has no protection of his/ her country of origin and he/she is unwilling to return to it. Usually the terms "asylum-seeker" and "refugee" are often being confused.⁷²⁰ Keeping in mind the definition above, an asylum-seeker is a person who declares himself/herself as a refugee but whose claim has not yet been evaluated by the receiving state. An IDP on the other hand, is a person who is forced to flee his/ her home but remains within

⁷¹⁹ For example section 1 of South Africa Refugees Act, 1998 defines an asylum seeker as a person who is seeking recognition as a refugee in the Republic of South Africa. Pursuant to the Tanzanian Refugees Act, 1998 asylum means, shelter granted by the government of Tanzania to persons qualifying for refugee status in accordance with the provisions of the Act. Thus, an asylum seeker means a person seeking refugee status in accordance with the provision of the Act and in accordance with other international conventions on matters relating to refugee of which Tanzania has acceded to.

⁷²⁰ UNHCR "Asylum-seekers" <http://www.unhcr.org/pages/49c3646c137.html> [accessed on 07/01/2013].

his/her country's borders.⁷²¹ Unlike asylum-seekers and refugees, IDPs do not cross an international border in order to find security in other countries.

Deng has rightly pointed out that the international community is confronted with the duty of protecting enormous number of persons forcibly displaced from their homes because of violent conflicts, gross violations of human rights and other traumatic events.⁷²² It must be stressed here that both refugees and IDPs as defined above leave their homes of origin for similar reasons such as armed conflicts, widespread violence and gross human rights violations. In legal terms, asylum-seekers and refugees do not have the protection of their own countries of origin but are legally protected in the receiving countries, IDPs on other hand, remain under the protection of their own country even if the same country might be the cause of their fleeing. Largely, in terms of the International Bills of Rights, asylum-seekers, refugees and IDPs as human beings have universal rights and protection.

At the national level, there are bodies which are established and empowered to decide which asylum-seekers who qualify for international protection as elaborated in the subsequent sections. National protection of asylum seekers and refugees is discussed later by using examples of South Africa and Tanzania. According to the UNHCR, applications for asylum or refugee status are determined through proper procedures where an efficient, expeditious and fair asylum system is required in order to protect the fundamental rights of the applicants.⁷²³ For example, during mass movements or fleeing of persons resulting from conflicts or widespread violence, applicants are often declared *prima facie* as refugees. In Burundi's case, the influx of Burundi in 1972, 1988 and 1993 to other countries forced the receiving countries such as Tanzania, DRC, Rwanda and South Africa as stated above to grant them refugee statuses. The granting of refugee protection thereafter was due to compelling evidence of mass killings which had been taking place in Burundi as discussed in the previous chapters, hence, Burundi were automatically deemed as refugees under the Refugee Conventions.

This study uses research findings and emphasizes that while the international community generally has responded positively to refugee crises over the past half century, recently some worrying trends have begun to emerge. For example, countries that once hosted refugees

⁷²¹ See UNHCR "Internally Displaced People: On the Run in Their Own Land", available at: <http://www.unhcr.org/pages/49c3646c146.html>. [accessed on 04/01/2013].

⁷²² Deng, F.; (2001) "An Introductory Note on the Guiding Principles on Internal Displacements **Office of Co-ordination of Humanitarian Affairs (OCHA)**", available at: <http://www.brookings.edu/fp/projects/idp/resources/GPsEnglish.pdf>. [accessed on 04/01/2013].

⁷²³ UNHCR, *op cit* n. 720.

have been tempted to shut doors for fearing or assuming open-ended responsibilities of assisting uncontrolled migration and human trafficking which may endanger national security.⁷²⁴ The result has been to encourage repatriation of refugees even when the environment is still not conducive in their countries of origin which contradicts the international protection of refugees. It is therefore submitted that the validity of international protection of refugees under international refugee laws like the UN and OAU Refugee Conventions must be examined not only in the substantive aspect but also in the adjective sense in terms of rationality and reasonableness. Receiving states are under an obligation to protect refugees who have been granted asylum and refugee statuses.⁷²⁵

4.3.2 Protection of refugees

Protecting refugees is primarily the responsibility of receiving states. Referring to the emerging trends of “shut doors” mentioned above, Fagen has pointed out that States Parties in partnership with the international community have been implementing programs to repatriate refugees to their original homes.⁷²⁶ These programs tend to leave returnees without a sustainable future. This section deals with protection of rights of Burundi refugees while IDP’s rights are discussed later in the subsequent section.

This thesis uses Burundi as an example to evaluate how the repatriation of Burundi refugees has complied with the requirements of international human rights and humanitarian laws. It examines the extent to which the protection of Burundi returnees’ basic rights have been promoted and respected at the same time finding durable solutions in terms of security, social stability and economic self-sufficiency.

For about fifty years, the UNHCR⁷²⁷ has been working in partnership with many governments in order to protect refugees, in other words, the UNHCR is empowered to lead and co-ordinate international activities to protect refugees who are faced with diverse problems worldwide.⁷²⁸ The UNHCR’s primary purpose is to safeguard the rights and well-being of refugees and strives to ensure that forcibly evicted persons in their countries of origin have the right to seek asylum and find safe refuge in other countries with the option to return home

⁷²⁴ See Jastram, K.; and Achiron, M.; (2001) “Refugee Protection: A Guide to International Law” **Inter-Parliamentary and UNHCR** at p.6. Available at: http://www.ipu.org/pdf/publications/refugee_en.pdf [accessed on 28/02/2012].

⁷²⁵ The UN 1951 Refugee Convention.

⁷²⁶ See Fagen, *op cit* n. 272 at p. 1.

⁷²⁷ The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. Available at: <http://www.unhcr.org/refworld/publisher/UNHCR.html>.

⁷²⁸ See Article 1 of the Statute of the UNHCR adopted by General Assembly Resolution 428 (V) of 14 December 1950.

voluntarily, integrate locally or resettle in a third country.⁷²⁹ Article 14(1) of the UDHR states that everyone has the right to seek asylum in other countries after fleeing from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the UN.⁷³⁰

It must be elicited and acknowledged that the protection of refugees under the UN 1951 Refugee Convention and regional treaties like the OAU Refugee Convention is not permanent or an absolute one. Refugee status, for instance, may be invalidated subject to the application of Article 1F of Refugee Convention (Exclusion Clauses) and of Ceased Circumstances Clauses⁷³¹ in order to limit the granting of asylum and refugee statuses. In terms of the Refugees Act in South Africa,⁷³² a person ceases to qualify for refugee status for the purposes of the Act if he or she becomes a citizen of the Republic of South Africa.

Although there are legitimate and justifiable reasons for limiting the granting of asylum by the receiving states in order to deal with serious international crimes such as terrorism and other crimes where the perpetrators of these crimes tend to seek asylum as a shield to avoid prosecution⁷³³ or to repatriate refugees when the conditions in the countries of origin permit or allowing local integration, in practice the application of "Exclusion and Ceased Circumstances Clauses" have been implemented wrongly at the expense of genuine applicants whose rights become easily violated.⁷³⁴

This thesis considers the application of "Cessation Clauses" under the 1951 and OAU Refugee Conventions from the perspective of the South African and Tanzanian refugee laws, policies and case law. After considering the nature and the purpose of the Cessation Clauses each country is examined separately. Particular attention is given to the tests and criteria that could be met before the clauses may properly be implemented. It proposes the model that can be designed in cases of cessation of refugee status to ensure the protection of refugees' rights as required by laws.

⁷²⁹ See the UNHCR Statute of 1950.

⁷³⁰ Article 14(2) of the UDHR.

⁷³¹ Article 1(C) of the UN Refugee Convention and Article I (4) of the OAU Refugee Convention.

⁷³² Section 5 (1)-a of Refugees Act.

⁷³³ See UNHCR (2009) "UNHCR Statement on Article 1F of the 1951 Convention", July 2009 at pp. 6-7, available at: <http://www.unhcr.org/refworld/docid/4a5de2992.html>. [accessed 8/01/ 2013], see also Report of the UN Secretary-General on Measures to Eliminate International Terrorism, A/63/173, 25 July 2008, at pages 18-27, available at: <http://www.unhcr.org/refworld/docid/48db911f2.html>.

⁷³⁴ Focus group interview with Barundi refugees in Tanzania in 2011.

Given the nebulousness of the provisions of refugee laws and lack of coherency in states' practices in dealing with refugees problems in Burundi, the Great Lakes Region and Africa in general, the protracted conflicts have created hostilities and resentments between refugees and local communities in the receiving states due to what Msoke has identified as the flaws in the international conventions and treaties.⁷³⁵In a group discussion with non-Barundi respondents from South Africa for example, it was reported as follows:

We don't blame refugees as such; rather we blame their countries for not respecting their rights. We are struggling, how can we tolerate and respect refugees' rights while we have poverty, corruption, high crime rate levels and unemployment around us? Their governments need to sort out their problems while we are sorting out ours. We don't want the history to repeat itself.⁷³⁶

In the light of the non- Barundi respondents' views above, it is argued further that the application of international refugee laws has created other type of conflicts which tend to aggravate the tension between refugees and local communities in the receiving states. Impliedly the indication thereof is that the international community has failed to put to an end to the protracted conflicts in many African countries such as Burundi due to geo-political and selective morality and double standards in the application of international human rights norms. For example, in post-conflict Burundi, the political and socio-economic problems which date back to the pre-peace agreement have causal linkages in creating and aggravating refugee problems in the country. Msoke has contended that the permissive refugee calamities in Burundi that have affected negatively not only Burundi but also the receiving states in terms of environmental and ecological degradation, security and socio-economic issues.⁷³⁷

As Brahim has elaborated while using Barundi refugees who fled to Tanzania in 1993 or "1993 case load" as an example, infrastructure and social security services in Tanzania have been affected severely while the influx of refugees have posed security risks and exasperating crimes such as murder, rape, armed robbery, illegal possession of firearms.⁷³⁸Rwegasira has

⁷³⁵ Msoke, I.; "The Impact of Refugee Crisis in Kagera Region: Local Community Responses and Government's Reaction" in Bunting, I.; and Ngonzi, K.; (ed) (1995) Summary Report From the International Workshop on Refugee Crisis in the Great Lakes Region, **East African Oxfam** at p.7, available at:

http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo%3A1461 [accessed on 08/01/2013]. Msoke has argued that the international refugee law was not formulated to eliminate or regulate the root causes that force people to seek refuge in other countries but the law focuses on helping people who are outside their countries of origin.

⁷³⁶ A Focus group interview in Port Elizabeth, South Africa on 13 January, 2011.

⁷³⁷ See Msoke, *op cit* n. 735 at p. 7.

⁷³⁸ Brahim, J.; " How Tanzania was Affected by Refugee Crisis in the Great Lakes Region

rightly observed that refugee problems in the Great Lakes Region are rooted in politics rather than humanitarian factors.⁷³⁹

This thesis critically interrogates the causes of refugee problems in Burundi and argues that there will be no durable solution to these problems if there are still ongoing human rights violations and mass killings. As Morel contends, various actors have acquired economic and political interests in protracted armed conflicts which complicate a search for durable solutions to refugee problems and voluntary repatriation of refugees.⁷⁴⁰ This is contrary to the spirit of the UN Charter and the UDHR as underlined in the Cairo Declaration of Principle of International Law on Compensation to Refugees (Cairo Declaration)⁷⁴¹ which affirms that since refugees are forced directly or indirectly out of their homes they are deprived of full and effective enjoyment of the rights enshrined in the UDHR that presupposes person's ability to live in a place chosen as home, thus, refugees need to be compensated by their countries.

The tendency of repatriating Burundi refugees, for instance, has grown during Nkurunziza's government since 2005. At the beginning of this study in 2010, some of Burundi refugees from the old refugee camps of Ulyankulu, Katumba and Mishamo⁷⁴² in Tanzania were still being repatriated whereas others opted for local integration and others were still in camps waiting for the final decision by the authorities.⁷⁴³ Ironically the commonly known new refugee camps such as Mtabila were being closed down.⁷⁴⁴ The closure of new refugee camps has raised matters of great concern because in the Tripartite Commission meeting between Tanzania and the government of Burundi with the UNHCR held in February 2012 in Bujumbura, it was revealed that some Burundi refugees were still in need of international protection.⁷⁴⁵ The Mtabila Camp

and Her Response to It" in Bunting, I.; and Ngonzi, K.; (ed) (1995) Summary Report From the International Workshop on Refugee Crisis in the Great Lakes Region, **East African Oxfam** at p.7, available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo%3A1461 [accessed on 08/01/2013].

739 Rwegasira, J.; "An Opening Address: International Workshop on Refugee Crisis in the Great Lakes Region" in Bunting and Ngonzi, *ibid.* at p. 4.

740 Morel, M.; (2009) "The Lack of Refugee Burden-sharing in Tanzania: Tragic Effects" **Afrika Focus** at p.109.

741 Declaration on the Protection of Refugees and Displaced Persons in the Arab World of 19 November 1992, available at: <http://www.unhcr.org/refworld/docid/452675944.html> [accessed on 09/01/2013].

742 These camps hosted Burundi refugees from 1972.

743 Refer Figure 8 in chapter Four.

744 Burundi Refugees in Mtabila resisted to return to Burundi due to security reasons despite the pressure from the government of Tanzania. See <http://www.refugeerights.org/Assets/PDFs/2011/ResistingRepatriation-FINAL2.pdf> [accessed on 01/02/2012].

745 <http://www.ipppmedia.com/frontend/index.php?l=38915>. [accessed on 28/02/2012].

closure illustrates how the repatriation of refugees in Burundi can be subjected to an inquiry under both UN and OAU Refugee Conventions.

This thesis critically evaluates the implementation of “Cessation Clauses” and suggests that when implementing repatriation of refugees’ processes, some questions to consider must include but not limited to: Has the well-founded fear factor articulated in the UN or OAU Refugee Conventions ceased completely so that returnees can feel safe and secure to re-settle again in their countries of origin? Are there any effective plans in place to receive returnees to ensure protection of their fundamental rights enshrined in the International Bill of Rights? Has the government established restitution and reparations programs to compensate returnees for their dispossessed properties? These are among the issues which Burundi in partnership with the international community ought to have considered before implementing the strategies of mass repatriation of Burundi refugees since 2008 to - date . For example, during interviews with Land Commissioners the following views were expressed:

We get frustrated when dealing with land disputes especially those relating to returning refugees who fled the country in 1972. The new occupiers would tell us they are the legal owners and produce the title deeds which were given by the former *Tutsi* military regimes. On the other hand the returnees come with valid evidence to prove the ownership. It is difficult to deal with these kinds of cases.⁷⁴⁶

Although a National Commission on Land was created in 2006 to deal with land disputes especially those relating to returnees, its work has been hampered by its lack of jurisdiction over a wide range of land disputes and the increasing number of complaints. Sometimes the land commissioners are forced to divide the disputed piece of land to the disputants equally as it has been a common practice in the southern parts of Rumonge and Nyanza Lac.⁷⁴⁷ However the resentments remain especially the returnee parties who do not agree with the decisions as they perceive them as unfair verdicts. The majority of returnee respondents in this study reported that their rights were not fully protected in Burundi and their pieces of land which were allocated to illegal owners had not been recovered.⁷⁴⁸

Regrettably, post-conflict Burundi has not done enough to protect Burundi refugees as revealed in the research findings. The majority of Burundi returnees, for example, are still fearful because there are no transitional justice mechanisms which have been established to

⁷⁴⁶ An interview with a Land Commissioner respondent in Bujumbura on 30/12/2010. The sentiments were dominant throughout the group discussion with Land Commissioner.

⁷⁴⁷ Focus group interviews with Land Commissioners in Bujumbura, Rumonge and Nyanza Lac in January 2011. For more detail see Fransen and Kuschminder, *op cit* n. 279 at pp. 14-15.

⁷⁴⁸ Focus group interviews in Gitaza and Rumonge in 2010 and 2011.

prosecute the perpetrators for the past international crimes committed during military regimes. Furthermore, the land question as stated above is a burning issue for returnees especially those returnees who fled Burundi in 1972 who have constantly been accusing the post-conflict government in Burundi of not honouring the promises it made to refugees in exile before the repatriation processes. The following section continues with my discussion relating to general trends with respect to refugee protection before proceeding with national protection in the subsequent section.

4.3.3 Emerging trends in refugee protection

The protection of refugees is a controversial subject. Refugees as defined earlier are among the most vulnerable persons in the world whose rights can be easily violated.⁷⁴⁹ Although the 1951 Refugee Convention and its 1967 Protocol were adopted to protect refugees, in practice their rights are continually being violated. Throughout the 20th century, the international community set guidelines, laws and conventions to ensure the adequate treatment of refugees and protecting their basic human rights. Protecting of refugees' rights can be traced way back to 1921 under the League of Nations with respect to international refugee problems arose after the WWI. In July 1951, the UN Geneva Conference adopted the 1951 Convention which was later amended by the 1967 Protocol. These legal instruments clearly define who refugees are and the kind of legal protection, other assistance and social rights refugees are entitled to as stated earlier. The 1951 Convention also defines refugees' obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status. In other words, receiving states must ensure that refugees' fundamental rights are respected and protected.

Initially the 1951 Convention was limited to protecting European refugees in the aftermath of WWII, but the 1967 Protocol expanded its scope as the problem of displacement spread around the world. The 1951 Convention has helped to motivate regions to enact instruments such as the 1984 Cartagena Declaration in Latin America, the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa. The OAU Refugee Convention in Africa and the development of a common asylum system in the European Union were among the initiatives designed to protect refugees. Thus, the 1951 Convention and 1967 Protocol supported by regional initiatives remain the cornerstone of refugee protection.

In Africa for example, the OAU Refugee Convention is regarded as a foundation of refugee protection because it remains as an essential legal instrument in providing protection to large

⁷⁴⁹ A Personal Appeal from the UNHCR of September, 2011, See also Kondile, J. remarks in *Refugee Women's case*, *op cit* n. 242 on the exclusion of refugees in private sector.

numbers of persons who are forced to flee their countries of origin due to extensive disruption of public order or violence. However the problems of protracted conflicts and persecution in Africa in general and Burundi in particular have continued to cause displacements. It is in this context where an important issue of effectiveness of the OAU Refugee Convention can be raised. As the UNHCR asserts,⁷⁵⁰ refugee protection remains an urgent imperative for those who are forced to leave their own countries. The 1951 Convention and its 1967 Protocol are the global legal instruments explicitly covering the most important aspects of a refugee's life. Pursuant to the UN Refugee Convention's provisions refugees deserve as a minimum the same standards of treatment enjoyed by other people like foreign nationals in a given country and in many cases the same treatment as nationals.⁷⁵¹ Furthermore, the Convention also recognises the international scope of the refugee problems and the importance of international solidarity and co-operation in trying to resolve them.⁷⁵²

4.3.4 Voluntary repatriation

Voluntary Repatriation is permissible under the refugee conventions. For instance, a person may cease to be a refugee when the conditions for his/ her refugee status cease to exist. This happens when refugees voluntarily return to their own countries of origin once the situation there permits or when refugees integrate or become naturalized in their host countries and stay permanently or through application of Article 1F. Article 1(C) of the 1951 UN Convention and Article I (4) of the OAU Refugee Convention provide for cessation of refugee status. The term "cessation" refers to the revocation or cancellation of refugee status. The cessation clause can apply following actions taken by a refugee voluntary repatriation or as applicable to the group of refugees when they may no longer qualify as refugees because the circumstances in connection with the recognition of persons as refugees have ceased to exist (application of Ceased Circumstances Clauses). That means, a recognised refugee may not continue to refuse to avail himself/herself of the protection of the country of his/her nationality.⁷⁵³

⁷⁵⁰ A Personal Appeal from the UNHCR of September, 2011, *ibid*, n. 745.

⁷⁵¹ See *Khosa v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (4) BCLR 569 at p. 609 paras 102-103. In elaborating on the social security rights Ngcobo J. has stressed that, exclusion of non-citizens such as refugees from the social security scheme noticeably implicates the right not to be discriminated against. In other words, under constitutional democracy which affirms the democratic values of human dignity, equality and freedom, socio-economic rights must be understood in the context of the founding values of our Constitution. Thus, access to socio-economic rights is vital to the enjoyment of the other rights mentioned in the Bill of Rights, in particular human dignity, equality and freedom. A denial of access to a social welfare scheme to persons like refugees therefore has an impact on more than one constitutional right.

⁷⁵² See Article 15 which can be read together with Article 34 of the Refugee Convention on favourable treatment of refugees as accorded to foreigners.

⁷⁵³ UNCHR Guidelines on International Protection: Cessation of Refugee Status Under Article 1C (5) and (6) of the 1951 Refugee Convention Relating to the Status of Refugees UN Doc No. HCR/GIP/03/03, 10 February, 2003.

In practice, the hosting countries rely on reports given by the countries of origin in order to apply the principles of "Ceased Circumstances Clauses". Subsequently, the hosting states take initiatives to repatriate refugees by entering into tripartite agreements. It must be pointed out here that a refugee can invoke compelling reasons arising out of previous persecution for refusing to avail himself/herself to the protection of the country of his/ her nationality. In other words, the cessation clauses do not apply automatically, but a refugee, for instance, who has reason to fear persecution or revenge killings, including deprivation of his or her land in his country of origin cannot be forced to return to the country. In the particular case of Burundi, there have been initiatives to apply the "Cessation Circumstances Clauses" as reflected in the following tripartite agreements:

- The Tripartite Agreement between Burundi, UNHCR and DRC of 2002.⁷⁵⁴
- Tripartite Agreement on the Voluntary Repatriation of Burundian Refugees in Rwanda of 2005.⁷⁵⁵
- The Tripartite Agreement between Burundi, UNHCR and Tanzania of 2007.⁷⁵⁶
- The Tripartite Agreement between Burundi, UNHCR and DRC of 2009⁷⁵⁷

This thesis critically evaluates the implementation of the "Cessation Circumstances Clauses" by using South Africa and Tanzania to demonstrate the challenges that can be associated therewith. For example, when Tanzanian President Jakaya Kikwete launched a landmark two-year programme to end one of the world's most protracted refugee situations in exile especially Burundi refugees who fled their country in 1972 after the Tripartite Agreement of 2007,⁷⁵⁸ there had been mixed feelings as reported by Burundi respondents who opted for either repatriation or local integration in the following examples:

⁷⁵⁴ http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-103323.pdf.

⁷⁵⁵ Signed at Kigali this 18th day of August 2005, available at: <http://www.unhcr.org/refworld/country,,,MULTILATERALTREATY,BDI,,44ae612dc6,0.html>. [accessed on 05/10/ 2010].

⁷⁵⁶ The UNHCR, Tanzanian and Burundi governments signed a Tripartite Agreement in 2007 under the Cessation Clause of the 1951 Refugee Convention which specifies six conditions for refugee status cessation. Among the conditions under Article 1 C (5) commonly known "ceased circumstances clause" and upon which the repatriation agreement is based on, a person ceases to be a refugee if the causes of flight in the home country have dramatically changed for the better.

⁷⁵⁷ See Radio France Internationale (2010) "Burundi Refugees go Home After Years in Exile" available at <http://www.english.rfi.fr/africa/20101005-burundi-refugees-go-home-after-years-exile> [accessed on 05/10/ 2010].

⁷⁵⁸ See UNHCR (2008) "UN Kicks off Repatriation Programme for Burundian Refugees in Tanzania" 12 March 2008.

When I heard about going to Burundi, I was excited to go back to my country of origin after a period of more than 30 years in exile. However I did not know what to expect because I was not sure whether we will be given support in terms of amenities of life such as food, shelter, medical services, education, employment and land. Mostly what I wanted was not dying as a refugee in exile as we have buried most of our people in Tanzania.⁷⁵⁹

To the contrary, a respondent from one of the old refugee camp in Ulyankulu reported that:

*Mimi nilijua tunaenda kuuawa kama walivyofanya mwaka 1993 wakati Ndadaye alivyoshinda uchaguzi. Waliorudi mwaka huo wakiwemo kaka zangu wawili na familia zao waliuwa wote baada ya kifo cha Ndadaye, sina hamu ya kurudi Burundi. Means - I knew we were going to be killed the way it happened in 1993 when Ndadaye won elections. Most people who returned including my two brothers were all killed after the death of Ndadaye, I have no desire to go back to Burundi.*⁷⁶⁰

The following example shows how Barundi respondents in general who have opted for local integration are still fearful in terms Article 1 C (5) of the 1951 Refugee Convention and do not have faith in The government of Burundi 's repatriation initiatives as reported by one respondent in the following scenario:

I knew Burundi authorities were deceitful to all of us including Tanzanian government which has given us an asylum for a long time. The government of Burundi has a hidden agenda because it has not prosecuted those who committed genocide in 1960s, 1972, 1988 and 1993. It claims that the army has been transformed but in reality, the so called transformation have happened at the lower level not at the higher level. The judiciary and justice system are still dominated by *Tutsis* and the key positions in both public and private sectors. Although the current President Pierre Nkurunziza is a *Hutu*, he is simply a puppet. I am educated and it is better for me to contribute towards building Tanzania because it has done so much to support us despite of its own domestic challenges, which is why I opted for local integration.⁷⁶¹

It is evident from the respondents' opinions that the application of the "Cessation Circumstances Clauses" under the UN and OAU Refugee Conventions can be perceived with diverse emotional and psychological viewpoints because the "well-founded fear" as stated in the definition of refugee is still dominant in Barundi survivors' minds. It is submitted further that the forced displacement that has created a significant number of refugees because of protracted conflicts in Burundi is a tragedy that has resulted into losing many lives, properties, identity, culture, family history, community togetherness and livelihood. The following example was given by a returnee respondent supports the view on how families were disintegrated during repatriation.

⁷⁵⁹ An interview with a returnee respondent in Rumonge on 22/12/2010.

⁷⁶⁰ An interview with a respondent in Ulyankulu Refugee Camp on 12/12/2010.

⁷⁶¹ An interview with a respondent in Dar-Es -Salaam Tanzania who opted for local integration, on 03/01 /2011.

I am a Burundian lady who was married to a Tanzanian man. During repatriation process my husband was reluctant to follow me back to Burundi. This resulted into separation with my family members. We decided that my husband would remain with our four elder children while I returned back to Burundi with our only two years old child. This is a moment I cannot forget.⁷⁶²

This thesis considers the challenges that are still facing Burundi refugees and argues that the envisioned repatriation processes based on above mentioned tripartite agreements must be implemented when specific basic needs of refugees are identified and prioritised. This entails the observing and respecting refugees' fundamental rights as of paramount importance. It must be pointed out further that repatriation of Burundi refugees must be voluntary and carried out when the conditions in Burundi permit and guarantee safety or security by ensuring that the basic human rights of returnees are respected and protected. On the other hand, the receiving states that decide to integrate refugees must do so with government and local communities' approval in order to avoid prejudice and the marginalisation of refugees who have opted to be integrated. Henceforth, to repatriate refugees or give them an option for local integration must be accompanied by effective measures and policies that aim to the progressive realization of the refugees' rights and dignity which had been taken away.

The UNHCR in terms of its Statute has been mandated to provide international protection to refugees who fall within the scope of the Statute and seek durable solutions to refugee problems.⁷⁶³ In other words, to safeguard the rights and well-being of refugees falls within the international community's agenda to ensure that persons who have fled their countries of origin have the right to seek asylum and find refuge in other countries and return home voluntarily when it is safe to do so. This mandate is guided by the 1951 Refugee Convention and its 1967 Protocol.

⁷⁶² An interview with a returnee respondent in Rumonge on 03/01 /2011.

⁷⁶³ Adopted by General Assembly Resolution 428 (V) of 14 December, 1950. The Assembly called upon the State Parties to co-operate with the UNHCR in dealing with refugees' matters falling under its jurisdiction. In accordance with the Statute, the functions of the UNHCR are entirely humanitarian and social with non-political character with devotion to solve refugee problems. See Articles 1, 2 and 4 of the UNHCR Statute. The UNHCR has to fulfil its mandate among others to promote the conclusion and ratification of the UN Conventions in order to protect refugees' rights including supervising and proposing amendments thereto. The supervisory duty is provided for under Article 35 of Refugee Convention and Article II of its Protocol of 1967. See also Article 21 of the European Council Directives 2005/85/EC on Minimum Standards on Procedures on Member States Granting and Withdrawing Refugees Status and Article 35 of the Geneva Convention Relating to Individual Applications for Asylum at any Stage of Procedure.

Although there is an international assurance of protecting refugees as stated earlier, internal weaknesses at national level in the countries of origin have hindered the protection of refugees' initiatives. For example, Burundi's ongoing conflicts between the *Tutsi*-led army and insurgent groups has played a major role in weakening the government in post-conflict Burundi which is characterised by incompetence, corruption, autocratic leadership that has employed and embraced mostly the colonial administrative techniques and failed to observe and promote human rights.⁷⁶⁴ The tensions among the warring parties have not only emerged along ethnic lines but rising patterns of discrimination against returnees and IDPs who are considered as "foreigners" or "*aba-UN*", to mean those who belong to the UN while Burundi who did not flee and are referred to as "*abasangwa*" or "residents are also discernible."⁷⁶⁵ Other ways of labelling returnees is according to the country they fled to, such as, "Tanzanians" for returnees from Tanzania, "Congolese" from DRC, "Rwandese" from Rwanda and the list is open-ended. The marginalisation and incomplete integration of refugees and IDPs (returnees) in Burundi have exacerbated enormous land disputes that tend to exacerbate a vicious cycle of reprisals and counter-reprisals among contemporary Burundi. Some respondents have classified Burundi as a failed state.⁷⁶⁶ Such failure in the respondents' viewpoint has been associated with non-observance of human rights, rule of law and good governance.

This thesis considers and argues that the atrocities in Burundi and concomitant gross violations of human rights are disallowed at international level. Article 2(4) of the UN Charter stipulates that "all Members States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the UN". For instance, parties to any dispute which is likely to endanger the maintenance of international peace and security are under a duty to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice without much success.⁷⁶⁷ In Burundi's case since 1990s the UN, AU and EAC have been trying to resolve Burundi's conflicts. This shows how the international community has been discharging, in part, a responsibility to react to Burundi's crisis, pursuant to numerous UN

⁷⁶⁴ Burundi respondents in the focus group discussions carried out in Bujumbura, Gitaza and Rumonge in January 2011.

⁷⁶⁵ According to Burundi respondents in the focus group discussions carried out in Bujumbura, Gitaza and Rumonge in January 2011, see Fransen and Kuschminder, *op cit*, n. 279 at p.3.

⁷⁶⁶ State failure is one of the root causes of internal conflict, according to Sriram, C.L.; and Wermester, K.; "Preventive Action at the United Nations: From promise to practice?" in Hampson, F.O.; and Malone, D.; (eds) (2002) **From Reaction to Prevention: Opportunities for the UN System**, Boulder Lynne Rienner Publishers) 381 at p. 384.

⁷⁶⁷ See Article 33(1) of the UN Charter.

Security Council Resolutions⁷⁶⁸ and the provisions of the UN Charter, human rights and humanitarian laws instruments.

However, Ipinyomi has contended that the definition of “international community” is largely obscure because of diverse stakeholders in international relations and politics.⁷⁶⁹ The contention is based on the fact that the international community consists of not only states but also inter-governmental organisations, civil society and trans-national companies who have diverse personalities and interests.⁷⁷⁰ It is common cause that the use of the word “community” disqualifies international community from being a single entity due to its diverse nature and interests but also these interests have an impact on policy-formulation and law-making. McGowan has posited that “[t]he export of primary commodities in exchange for core manufactures established in the colonial era in Africa for example remains in place”.⁷⁷¹ To this end, the international community ought to have sought speedy, inexpensive and non-military solutions to African tragedies. To the contrary, this study argues that the international community has also failed spectacularly to foresee the atrocities that are associated with gross human rights violations that continue to haunt Burundi and create refugees and IDPs in Burundi which have become a burden to the UN State Parties. Furthermore, persistent cycles of violence and systematic mass killings and human rights violations in Burundi have generated a significant number of Burundi refugees in exile whose burdens are not shared equally.⁷⁷²

The Tanzanian Government, for example, has been hosting Burundi refugees since the late 1960s but the number increased in 1972, 1988 and 1993. This means, an assistance to build a fair and an efficient asylum system consistent with international standards is crucial in order to avoid the risks of *refoulement* for refugees. According to the UNHCR, there is the need for capacity-building of immigration officials, border monitoring and detention visits, advocacy for access to asylum procedures and the search for durable solutions for refugees’ problems in Burundi and the Great Lakes Region at large.⁷⁷³ In partnership with the East African Community, the UNHCR has committed itself to the continued strengthening and regional co-

⁷⁶⁸ Refer the UN Security Council Resolutions, *op cit* n. 7.

⁷⁶⁹ Ipinyomi, F.; (2012) “Is Côte D'Ivoire a Test Case for Right to Protect? Democratization as Fulfilment of the International Community's Responsibility to Prevent” **Journal of African Law** at p. 162.

⁷⁷⁰ Ipinyomi, *ibid* at p. 162.

⁷⁷¹ McGowan, P.J.; (2005) “Coups and Conflict in West Africa, 1955–2004: Part I Theoretical Perspectives” **Armed Forces and Society** at p.6 cited in Ipinyomi, *ibid* n. 765 at p. 158.

⁷⁷² See Jastram and Achiron, *op cit* n. 724 at p.7.

⁷⁷³ See UNHCR Global Report, 2011, at: <http://www.unhcr.org/pages/49e45c736.html> [accessed on 15/01/2013].

operation in order to develop asylum, refugee and migration procedures in accordance with international law.⁷⁷⁴

Although the UNHCR has proposed an international partnership in resolving refugees' problems in the Great Lakes Region and East Africa under which Burundi falls, post-conflict Burundi is still lagging behind in putting in place a legal framework and policies that aim to enhancing political stability, the rule of law, good governance economic and social development and promoting human rights⁷⁷⁵ which were favoured by the majority of Barundi and non-Barundi respondents who participated in this study. Additionally, finding a durable solution to refugee and displacements problems in Burundi is *a sine qua non* to peace-making in Burundi. My research findings have indicated that since 2008, post-conflict Burundi has failed to adequately address human rights concerns of refugees and IDPs despite of Burundi's promises of taking action in this regard. The following section discusses the protection of Barundi refugees by using South Africa and Tanzania as examples.

4.4 LEGAL PROTECTION OF REFUGEES IN SOUTH AFRICA

The South African Constitution is crucial because it protects the human rights of every person in South Africa, including refugees. South Africa being a State Party to the 1951 UN Refugee Convention and the OAU Refugee Convention has committed itself to protecting the human rights of refugees. The Refugees Act sets out the procedure for applying for and the granting of asylum and refugee status in South Africa. Additionally, the Immigration Act of 2002 provides for not only the conditions for deportation, but also legal rights a refugee is entitled to such as the right to legal assistance.⁷⁷⁶ In terms of the Immigration Act, a police official is obliged to take

⁷⁷⁴ UNHCR Report, 2012 available at: <http://www.unhcr.org/pages/49e45c736.html>. [accessed on 15/03.2012].

⁷⁷⁵ See for example the 2005 World Summit which was held from 14 to 16 September 2005; it was a high level plenary meeting meant to be a follow-up meeting to the UN 2000 Millennium Summit at which a resolution on Millennium Development Goals was made. The agenda was extracted from proposals made by the then UN Secretary General Kofi Annan Report "In Larger Freedom" and the Report of the High Level Panel on Threats, Challenges and Change, "A more Secure World: Our Shared Responsibility". See "The 2005 World Summit: An overview", UN Doc A/Res/60/1. Available at: <http://www.un-ngls.org/orf/un-summit-overview.pdf> [accessed on 13/06/ 2012].

⁷⁷⁶ Section 34 (1) of the Immigration Act and section 35 (2) a-d of the Constitution, 1996. Section 34(1) of the Immigration Act, for example, provides that:

Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned -

a detainee who is a refugee to the Department of Home Affairs (DHA) to seek asylum. The detainee must clearly state whether he/she wants to seek asylum in order to stop the deportation procedure.⁷⁷⁷ Although the South African refugee protection system is still in its embryonic stage of development according to Schreier,⁷⁷⁸ having started in 1990s immediately after attainment of the majority rule, it is not something to be taken for granted because the legal framework in South Africa covers many aspects of refugees' well-being and human rights as elaborated in the following section.

4.4.1 Procedural matters

Under South African law a refugee is entitled to: an 'Asylum Seeker Permit',⁷⁷⁹ a 'Refugee Status Permit'⁷⁸⁰ and an implied 'Permanent Resident Permit'. The onus is on the applicant to prove to the South African government that he/she left the country because his/her life or freedom was in danger due to one of the following reasons: race, tribe, religion, nationality, political opinion or being a member of a particular social group or because of war in the country of origin.⁷⁸¹

Currently, the New Immigration Act Regulations of May, 2014⁷⁸² have added far-reaching implications on the application of the above mentioned permits. For example, Regulation 22

-
- (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
 - (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
 - (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
 - (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days and,
 - (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

⁷⁷⁷ Section 23 of the Immigration Act.

⁷⁷⁸ Schreier, T. H.; (2008) "An Evaluation of South Africa's Application of the OAU Refugee Definition" *Refugee*, at p. 53.

⁷⁷⁹ Section 22 of the Refugees Act.

⁷⁸⁰ Section 24 of the Refugees Act.

⁷⁸¹ Article 1A (2) of the UN Refugee Convention and Article 1 of the OAU Refugee Convention.

⁷⁸² Regulation No. 37679, under Proclamation No. R. 32 of 2014 on the Commencement of the Immigration Amendment Act, 2007 (Act No. 3 of 2007), see also South African Immigration TM "New South African Immigration Laws, Rules and Regulations with Amendments and Changes", available at: <http://southafricanimmigration.org/new-south-african-immigration->

(1) stipulates that “an asylum seeker contemplated in terms of section 23(1) of the Immigration Act, shall apply in person at a port of entry, for an asylum transit visa”. These requirements oblige a person who enters the Republic of South Africa through a port of entry (a land border post, airport or harbour) and claims to be an asylum seeker to be issued with a non - renewable “asylum transit permit”.⁷⁸³ The “asylum transit permit” authorizes the applicant to report to the nearest Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, however, its validity has been reduced from 14 to 5 days. In this context, if an asylum seeker application is not finalised within the prescribed period, such applicant can be easily deported back to his/her country of origin and be interpreted as *refoulement* and violation of refugees’ rights.

Upon arrival in the country, a person who claims to be a refugee must report and lodge an application to be a refugee with the Refugee Reception Offices or Asylum Determination Offices.⁷⁸⁴ If the application is successful, the applicant is given an asylum seeker permit in terms of section 22 of the Refugees Act. Having a “Section 22 Permit” as commonly known, is a proof of the success of refugee’s application and that he/she has legal recognition in the country. However, this permit does not yet give a refugee status. It is valid only for a short period, usually between one month and 3 months. Not surprisingly, the applicant needs to re-new the permit regularly until the refugee status is determined. After intensive interviews, a Refugee Status Determination Officer (RSDO) must decide whether the applicant qualifies for a refugee status.⁷⁸⁵ If the refugee’s application is successful he/ she is officially recognised as a refugee and given a Refugee Status Permit under section 24 of the Refugees Act. This permit is valid for 2 years and must be renewed 90 days before it expires. After five years of having Section 24 Permit, the applicant is entitled to apply for permanent residence status in terms of both the Refugees Act⁷⁸⁶ and Immigration Act.⁷⁸⁷ The applicant through intensive interviews

[lawsrules-regulations-with-amendments-changes-details-2013/79/#asylum-permits-issuance](#) [accessed on 31/07/2014] and DLA Cliffe Dekker Alert Hofmeyr “President of RSA Announces Commencement Date for New Immigration Amendment Act and Regulations Under that Act”, available at:

<http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2014/immigration/downloads/Immigration-Alert-30-June-2014.pdf> [accessed on 31/07/2014].

⁷⁸³ Regulation 22 is read together with sections 7(1)(g) and 23(1) of the Immigration Act.

⁷⁸⁴ These offices are located in Cape Town, Port Elizabeth, Durban, Pretoria and Johannesburg. The Lawyers for Human Rights (LHR) have criticised the closing of refugee offices across the country. See LHR (2012) “South Africa Government Facing Contempt Charges over Refugee Office Closures” available at: <http://www.lhr.org.za/news/2012/south-africa-govt-facing-contempt-charges-over-refugee-office-closures>. [accessed on 18/02/2019].

⁷⁸⁵ The RSDO considers all information provided from the beginning of application and the answers given during the interviews. He /she tries to check whether the information given by the applicant is correct.

⁷⁸⁶ Sections 4(1)-d and 5(1)-c.

⁷⁸⁷ Sections 10, 23 and 25.

must prove that he/she came to South Africa because he/she was in danger in his/her country of origin. Having the permits mentioned above, means a refugee has the protection of the South African government and cannot be forced to return to his or her own country until it is safe to do so or has opted to apply for permanent residency.

4.4.2 The challenges under South African refugee laws

Although refugee laws in South Africa cover many aspects relating to the legal protection of refugees as stated above, in practice there are problems that continue to face refugees as reported by Barundi respondents in South Africa who participated in this study.⁷⁸⁸ Some of these challenges may be associated with the legacy of Apartheid and bureaucratic processes. The Refugees Act sets out the procedures as to how to acquire refugee documents as required by both national and international human rights law in order to be legally recognised and protected. For example, section 22 and 24 permits allow applicants to access basic rights afforded to them under South African Constitution such as: equality, fair labour practices, education, health care services, social security and social assistance, movement ⁷⁸⁹ and housing.⁷⁹⁰ In practice research findings have revealed that the realisation of certain rights such as gainful employment, movement, social security services and tertiary education in South Africa are limited while detention and deportation threats are frequently used by immigration officials.⁷⁹¹

This study uses examples of refusal and delays in renewing and granting refugee documents and evaluates how this practices tend to minimise or take away completely other basic rights like, seeking gainful employment, studying, accessing health care and social security services, movement, housing and the list is open-ended. In this context, the constitutional protection of refugees' rights is impaired or is open to criticism. For example, in the *Port Elizabeth* case,⁷⁹² the Lawyers for Human Rights (LHR) and the Refugee Rights Project at the Nelson Mandela Metropolitan University (NMMU), on behalf of the Somali Association of South Africa (SASA) and the Project for Conflict, Reconciliation and Development (PCRD), challenged successfully, the Department of Home Affairs in the Eastern Cape High Court in Port Elizabeth concerning the closure of the Port Elizabeth Refugee Reception Office towards the end of 2011.⁷⁹³ Although the respondents contended that the decision taken was for good reasons, to the

⁷⁸⁸ Interviews with Barundi respondents in South Africa in February and March 2011.

⁷⁸⁹ Section 9, 23, 29, 27, 21 of Constitution of Republic of South Africa.

⁷⁹⁰ Section 26.

⁷⁹¹ A focus group interview in Port Elizabeth on 20/03/ 2011. Also an interview with Respondent 113 who reported that employment laws in South Africa are discriminatory in nature.

⁷⁹² *SASA and Another v Minister of Home Affairs and Others*, Case Number 3759/2011 (EC).

⁷⁹³ See Lawyers for Human Rights "PE High Court Hears Challenge on Closure of Port Elizabeth Refugee Reception Office" available at: <http://www.lhr.org.za/news/2012/pe-high-court-hears-challenge-closure-port-elizabeth-refugee-reception-office> [accessed on 15/01/2013].

contrary, the High Court granted an interim order to re-open the office at the regional immigration office and to continue to provide services to all asylum-seeker holders and refugee permits issued under the Refugees Act. Furthermore, the order stipulated that no applicant whose permit had expired between the period of 30 November 2011 and 14 December 2011 when the refugee office was non-functional would be subjected to a fine or any criminal sanction for such expiry. Pickering J. held that the closure of the refugee reception offices has had a severe prejudicial effect on the asylum-seeker community.⁷⁹⁴

The *Port Elizabeth* case referred to above aptly underscores the plight of asylum seekers and refugees and demonstrates the challenges associated with wrong application of refugee laws in South Africa. The South African Human Rights Commission (SAHRC) has noted a number of factors that militates against the effective application of the refugee laws including: financial constraints, incompetency in refugee reception centres and xenophobia.⁷⁹⁵ The SAHRC, while referring to public violence of May 2008 in South Africa, has revealed that human rights and constitutional principles have been violated on a massive scale following xenophobic attacks against non-citizens including refugees. In the premise, the realisation of refugees' rights is not as smooth as was intended to be by the legislators.⁷⁹⁶

Theoretically, section 22 permits are supposed be temporary (one to three months) to allow the RSDO to make determination of the refugee status permit. Accordingly, refugees are supposed to move forward to another level of getting section 24 permits which are renewable after two years before qualifying for a permanent resident's permits. To the contrary, there had been many complaints lodged against the Department of Home Affairs relating to the renewal of both sections 22 and 24 permits. For example, this thesis considers and uses the cases of *Aruforse v Minister of Home Affairs and Others*⁷⁹⁷ and *Ndikumdavyi v Valkenberg Hospital and Others*,⁷⁹⁸ to demonstrate the flaws in the interpretation and application of refugee law in South Africa.

In the *Aruforse's* case, the applicant from Burundi who was granted a "Section 22 Permit" in 2006 until 2008 challenged his detention and deportation extortions under section 34 (1) of the Immigration Act based on the respondents failure to renew his asylum-seeker permit in terms of s 22(3) of Refugees Act. Although the respondents contended that the "well-founded

⁷⁹⁴ The decision in the case of *SASA and Another v Minister of Home Affairs and Others* on 14 May 2012.

⁷⁹⁵ See South African Human Rights Commission (2010) "Report on the SAHRC Investigation into Issues of Rule of law, Justice and Impunity Arising Out of the 2008 Public Violence Against Non-nationals" at p. 5. Available at: <http://www.xenophobia.org.za/tolerance.pdf>. [accessed on 21/01/2013].

⁷⁹⁶ See Schreier, *op cit* n. 778 at p. 54.

⁷⁹⁷ 2010 (6) SA 579 (GSJ).

⁷⁹⁸ [2012] 8 BLLR 795 (LC) (23 April 2012).

fear” has ceased in Burundi and there was peace at the time of hearing the case, the court held *inter alia* that the detention of the applicant was unlawful and ordered his immediate release. Likewise, the *Ndikumdavvi*’s case concerned a refugee from Burundi who was granted a “Section 24 Permit”. The applicant trained and qualified in South Africa as a professional nurse. On 1 July, 2010 the applicant was offered a contract of employment by the respondents but such contract was terminated on 20 July the same year because the respondents’ contended that the applicant’s refugee status would expire on 24 December, 2010 and applicant’s permanent contract was void *ab initio* in the light of National Health Department Policy and Public Service Act. The Labour Court in Cape Town held that the applicant’s dismissal was procedurally unfair. Rabkin-Naicker, J. opined that “formal refugees must be the recipients of rights afforded to them under the Labour Relations Act.”⁷⁹⁹ On the constitutionality aspect, the Court referred to the *Refugee Women*’s case and considered section 3 of Refugees Act that has re-iterated the provisions of the UN and OAU Refugee Conventions and concluded that the problems in African countries like Burundi have resulted into many people becoming refugees who deserve legal protection.

The *Aruforse* and *Ndikumdavvi* cases above underscore the imperfections in applying the Refugees Act in South Africa. As reported by the majority of Barundi respondents, the asylum and refugee status processes are slow or sometimes the applications are turned down without sound and convincing reasons.⁸⁰⁰ In most cases refugees find themselves at crossroads, as some refugees may stay with asylum-seeker and refugee status permits for more than ten years.⁸⁰¹ This practice is contrary to the constitutional demands as laid down by the South African Constitutional Court in the case of *Khosa v Minister of Social Development*⁸⁰² which emphasised that the term ‘everyone’ as envisaged in the Constitution applies to everyone including foreigners who are permanent residents and refugees.⁸⁰³ The broader constitutional interpretation in the *Khosa*’s case justifies the protection of basic human rights not only to South Africans citizens but also non-citizens like refugees who reside in the country.

In situation of the RSDO’s errors in interpretation of refugee law or administrative irregularities, section 22 and 24 refugee permit holders can lodge applications for leave to appeal or

⁷⁹⁹ Act No 66 of 1995.

⁸⁰⁰ An interview with Barundi respondents in Port Elizabeth, Cape Town, Johannesburg and Durban in February and March 2011.

⁸⁰¹ A focus group interview with Barundi respondents in Port Elizabeth on 20/03/ 2011.

⁸⁰² *Khosa v Minister of Social Development and Others*, *op cit* n.751 par .111.

⁸⁰³ See the case of *Khosa v Minister of Social Development and Others v Minister of Social Development*, *ibid* and *Refugee Women*’s case, *op cit* n. 242 on the vulnerability of refugees in the South African society.

review.⁸⁰⁴ The application for an appeal or review is in line with the requirements of section 33 of the Constitution and the Promotion of Administrative Justice (PAJA)⁸⁰⁵ which both necessitate that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally and substantially fair. This thesis emphasises that determination of applications for asylum, refugee status and permanent resident permits which are administrative actions must meet the Constitutional and PAJA requirements so that justice and fairness principle are complied with and prevent unnecessary applications for leave to appeal and reviews.

Under section 26(1) of the Refugees Act, an asylum-seeker may lodge an appeal with the Appeal Board if the RSDO has rejected the application in terms of section 2(3)(c). As Schreier has noted, the Refugee Appeal Board (the Board) deems its hearings to be *de novo*, however, it is not possible when reviewing the Board's decision to assess the reasoning of the RSDO or basis of his/her negative decision.⁸⁰⁶ In most cases the Board also tends to dismiss the appeals on the grounds of the current conditions of the appellant's country of origin⁸⁰⁷ in the light of aforementioned "Cessation Circumstance Clauses" principle but forget an important aspect of "well-founded fear of being persecuted" in terms of section 3 (a) of the Refugees Act. In this regard, the Appeal Board uses documentary evidence or country reports to indicate that the conditions in the applicant's country of origin have changed based on what Schreier has called a forward-looking cessation concept in terms of sections 3(b)⁸⁰⁸ and 5(1) (e)⁸⁰⁹ of the Refugees Act.

Accordingly, the forward-looking analysis which suggests that the conditions which caused an asylum-seeker or refugee to flee his/her country of origin have ceased in line with the report given, is normally used to justify the Board's conclusion that it is safe for an asylum-seeker or a refugee to return to his/her country of origin. Yet, these practices do not consider the broader interpretation of refugee laws and the international protection of refugees' rights. For example,

⁸⁰⁴ See *Ndikumdavvi v Valkenberg Hospital and Others*, *op cit* n. 798.

⁸⁰⁵ Act No 3 of 2000, see section 3(1) of PAJA.

⁸⁰⁶ Schreier, *op cit* n. 778 at p.57.

⁸⁰⁷ Schreier, *ibid* at pp.57- 58.

⁸⁰⁸ Section 3 (b) stipulates that a person qualifies for refugee status owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.

⁸⁰⁹ Section 5 (1) (e) which deals with cessation of refugee status and provides that, a person ceases to qualify for refugee status if he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee. See Schreier, *op cit* n. 778 at p. 59

the implementation of the forward-looking cessation in the light of the *Aruforse's* case was unsuccessful because of politically-motivated killings which were still taking place in Burundi in 2008, hence, justified the "well-founded fear of the applicant being persecuted" if he was to be repatriated to Burundi.

It is submitted that the incorrect application of the "Cessation Circumstance Clauses" tends to violate asylum-seekers and refugees' rights. The result has been negative effects on refugees' well-being in terms of prejudice and marginalisation. For example Schreier, has criticized the Board's decision to reject Barundi refugee's application in 2007 based on the forward-looking principle.⁸¹⁰

The legal framework for "Cessation Circumstances Clauses" in South Africa re-iterates the requirements set out under provisions of the 1951 Convention, UNHCR Statute, OAU Convention and Refugees Act.⁸¹¹ It is acknowledged that the application of these clauses in South Africa is a complex issue because such application must consider not only national interests but also regional and international geo-political factors. Notably, the application of "Cessation Circumstances Clauses" must address salient contemporary issues concerning termination of protection of refugees. A critical component of Article 1C(5) of the 1951 UN Convention, for example, is the proviso which excludes refugees from losing their refugee status which they have obtained due to compelling reasons arising out of previous persecutions.⁸¹² Thus, any cessation initiative which relates to Article 1C(5) must differentiate between refugees who may be obliged to return home and those who have compelling reasons to remain refugees in the host states as demonstrated in Tanzania. In other words the interests of refugees who have had established strong social and economic links in the host country must be considered before repatriation initiatives. Nonetheless, there have been incorrect application of the "Cessation Circumstances Clauses by the RSDO."⁸¹³

As Fitzpatrick and Bonoan have observed,⁸¹⁴ the application of the cessation clauses which involves the loss of protection for previously recognized refugees, depriving them of existing rights and possibly resulting in their repatriation to their countries of origin which they had

⁸¹⁰ See Schreier, *op cit* n. 778 at p. 59.

⁸¹¹ Johnson, C. R. (2012) "Ceased Circumstances and the End of Refugee Status the Use of Article 1C(5) in South Africa", available at: <http://www.scalabrini.org.za/advocacy/current-issues/> [accessed on 27/07/2014].

⁸¹² Johnson, *ibid*.

⁸¹³ Amit, R.; (2012) "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Determination, **African Centre for Migration and Society**. Available at: <http://www.migration.org.za/uploads/docs/report-35.pdf> at p.27.

⁸¹⁴ See Fitzpatrick, J. and Bonoan, R. "Cessation of Refugee Protection", available at: <http://www.refworld.org/pdfid/470a33bc0.pdf> at p.542.

experienced persecutions must outline an exhaustive set of criteria which must determine on whether there is a fundamental and durable change in the conditions that led to the fleeing of such refugees.

4.4.3 Lesson from South African protection of refugees rights

In spite of the challenges still facing South Africa in protecting refugees' rights, the legal framework within which the protection operates is far-reaching. That means that the substantive aspect of refugee laws in South Africa cover many aspects of refugees' rights as discussed above. What needs improvement is the procedural aspect so that the requirements of national and international law are complied with. For example, after receiving many refugee complaints, the government enacted a law⁸¹⁵ to amend the Refugees Act by inserting and deleting certain definitions and to clarify how the rejected applications for refugee status as manifestly unfounded must be dealt with. The new law empowers the Director-General to establish a Status Determination Committee to revise the provisions relating to withdrawal of refugee status and to provide for matters that are connected thereto. These are developments in refugee law jurisprudence which other countries, especially from Africa may learn in order to enforce refugees' rights.

Equally, research findings have identified other issues which may force the South African government to make irrational decisions and find itself violating the refugee conventions. For example, in the case of *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others*⁸¹⁶ (*410 Voortrekker* case), the applicant sought orders declaring that the establishment and operation of the Refugee Reception Centre by the Department of Home Affairs at certain locations was unlawful on the grounds that it contravened the permissible land uses of the properties. In other words, it constituted a common law delict of nuisance and an infringement of the Applicants' constitutional rights, its employees, invitees and tenants such as equality, dignity, and freedom of movement, freedom of trade and personal security. The Court held that respondents were jointly and severally liable to pay damages including paying the applicant's costs. The *410 Voortrekker* case shows how the courts and the government are confronted with critical legal issues of balancing the protection of citizens' constitutional rights and those of refugees. This is not unique in South Africa but other countries like Tanzania as discussed herein face the same problems.

Nonetheless, the findings based on the views of Barundi respondents during the survey and focus group interviews offered some practical solutions which may be in line with the

⁸¹⁵ Refugees Amendment Act No 12 of 2011.

⁸¹⁶ 2010 (8) BCLR 785 (WCC).

requirements of the laws as reported in the following selected examples of respondents' responses. The reported solutions include:

"Protection of human rights must work in Burundi".⁸¹⁷

"Political parties should play a part in reconciling the citizens instead of serving to further personal and selfish interests. Healing of Burundians after the different mass killing events must be high on the agenda of the people in power".⁸¹⁸

"Parties should stop arming their members. Weapons owned illegally must be taken away. The army and police must serve the country and stop being loyal to the ruling party. The size of the army and police must be reduced and recruitment must be based on representativity of ethnic population. Civil servants, members of the police and military who participated in killing must be brought to justice".⁸¹⁹

"The international community must press Burundi to observe democratic leadership. The government must recognise wrong doings and compensate people who fled the country and returned from exile. It must also educate extremists on the question of human rights and how it is now difficult to expel others, lastly, people must be firm and resist tribalism".⁸²⁰

It is evident from the respondents' opinions above that a permanent solution to the refugees' problems in Burundi must be the primary duty of the post-conflict government in partnership with the international community in respect of their commitment to observe, respect and promote human rights. In responding to intimidations, mass killings and land-related disputes in post-conflict Burundi as mentioned earlier, mass influxes of refugees in other countries have not diminished while voluntary repatriation has not been the best option for the majority of Burundi refugees. For example, the post-conflict government in Burundi has failed to conform to the principles of participative democracy and rule of law that ought to encourage transparency and accountability so that refugees could opt for voluntary repatriation and in the process lessen the refugee burdens in the receiving states.⁸²¹

It must be emphasized that the international protection of refugees is not as smooth as it was intended to be. This thesis uses research findings from interviews and case law to identify a number of common factors that have hindered the effective voluntary repatriation of Burundi refugees. These factors include:

⁸¹⁷ An interview with Respondent 111 on 23/03/2011

⁸¹⁸ An interview with Respondent 112 on 22/03/2011.

⁸¹⁹ An interview with Respondent 112 *ibid*.

⁸²⁰ An interview with Respondent 113 on 23/03/2011.

⁸²¹ Focus group interviews with Burundi respondents in Bujumbura, Gitaza, Rumonge, Tanzania and South Africa in 2010 and 2011.

- lack of trusted, prompt and effective transitional justice mechanisms in Burundi which therefore discourages voluntary repatriation of Burundi refugees,
- institutionalised practices that tend to marginalise refugees from full access to basic human rights, and,
- wrong application of the refugee law whereby deportation has been perceived an alternative solution instead of local integration as shown in the *Aruforse's* case.

This study argues that systematic violations of human rights and mass killings are deep-rooted in Burundi's historical legacies of military regimes. These pathologies have been transmitted to post-conflict institutional configurations and are perceived to be the hurdles hindering repatriation of Burundi refugees. For example, "well-founded fears" in terms of refugee law is not only a prevalent phenomenon inside the country but also among Burundi who reside outside Burundi. The research findings here locate a substantial number of Burundi who have deliberately chosen to remain indefinite refugees in exile for fear of persecution should they return to Burundi. The following section proceeds with an interrogation of the protection of refugees' rights in Tanzania.

4.5 TANZANIA

Tanzania which gained its independence from British colonial rule on 9 December, 1961 has been a refugee receiving country for more than four decades and hosted one of the largest refugee populations in Africa. Refugees who have been received and hosted from African countries include those from Burundi, DRC, Uganda, Rwanda, South Africa, Angola, Mozambique, Somalia and Namibia. Additionally, Tanzania has been trying to search for durable solutions to refugees problems.⁸²² For example, under a landmark programme launched by UNHCR and the Tanzanian government in March 2008, some 55,000 refugees from Katumba, Mishamo and Ulyankulu Old refugees' settlements decided to return to Burundi while Other 162,000 refugees opted under the programme for local integration in the hope of getting citizenship.⁸²³

The researcher had an opportunity to visit one of the refugees' (returnees) centers in Ulyankulu Refugee Camp in Tanzania where returnees gathered before the repatriation process in December 2010.

⁸²² UNHCR (2013) "UNHCR Country Operations Profile: United Republic of Tanzania", available at: <http://www.unhcr.org/pages/49e45c736.html> [accessed on 17/01/2013].

⁸²³ UNHCR Report, 2009 available at: <http://www.unhcr.org/pages/49e45c736.html> [accessed on 17/01/2013].

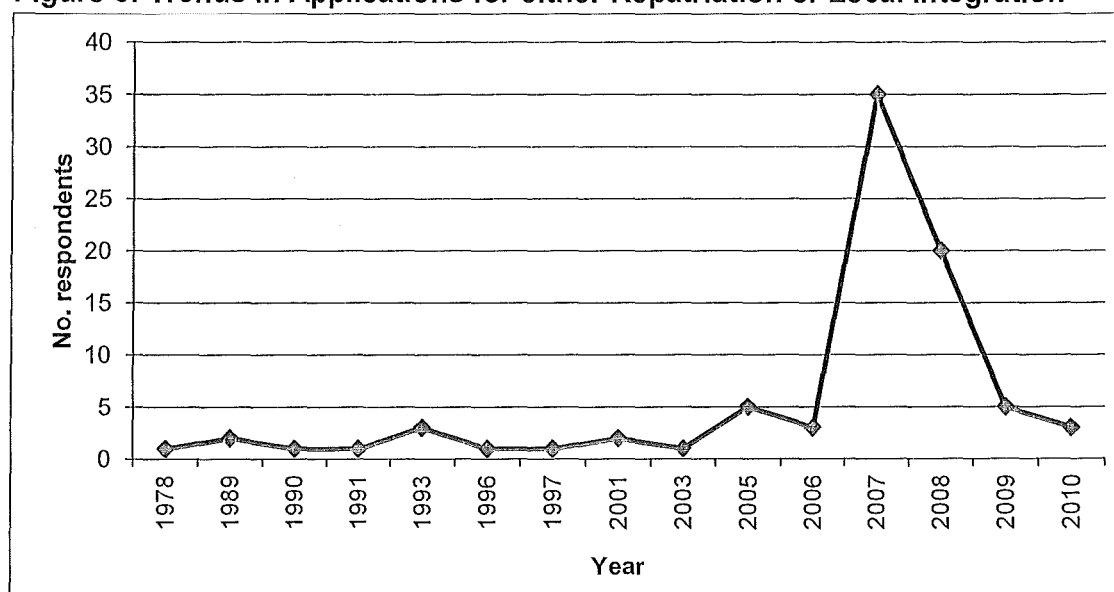
4.5.1 Response to tripartite agreements

In April 2010, Tanzania took a decision to close all refugee camps,⁸²⁴ refugees had to choose between repatriation and local integration. Interviews were conducted among the respondents who opted for either repatriation or local integration (see Figure 8 below). The findings suggest that a large number of refugees chose to be integrated locally. This thesis notes the contributing factors towards the increase and decline of voluntary repatriation without following the formal procedures as stated in the following section.

4.5.1.1 Informal repatriation

There had increase and decrease of informal repatriation of Burundi refugees since 1980s. In 1989 for example, informal repatriation of Burundi refugees from Tanzania declined because of Ntega and Marangara mass killings which participants in this study referred to as the "genocide" of 1988. In 1993 there was an increase in the repatriation process due the democratic elections when a first *Hutu* President, Melchior Ndadaye, was elected to rule Burundi. However when he was assassinated on 21st October 1993 the process declined again as shown in Figure 6.

Figure 6: Trends in Applications for either Repatriation or Local Integration



After the conclusion of the APRA in 2000 refugees feared that they would be forcibly deported, hence some refugees in Tanzania opted for voluntary repatriation without following formal

⁸²⁴ See Appendix G to this thesis, see also UNHCR Report (2010) "UNHCR Tanzania's Decision to Naturalize Tens of Thousands of Burundian Refugees", available at: <http://www.unhcr.org> [accessed on 16/04/2010].

procedures. Although this process started and remained at a low pace since 1978, there was a sudden upsurge of applications during 2007-2008 period. Informal repatriation of refugees between 1978-2003 noted above was compelled by the following different reasons as reported by respondents:

"I was tired of refugee life in exile because most of the basic rights such as freedom of movement, education, work, and others were limited".⁸²⁵

"I viewed being a refugee as a curse".⁸²⁶

"Kutopata haki za binadamu ukiwa mkimbizi" - There is no access to the basic human rights when you are a refugee.⁸²⁷

"Uchovu wa kuwa mkimbizi na kukosa uhuru wa kujiendeleza" – I am tired of being a refugee and lack personal development.⁸²⁸

"I realised that my future was obscure."⁸²⁹

"Kuchoka ukimbizi na manyanyaso kutoka Tanzania" – I am tired of refugee life and its associated intimidations from Tanzania.⁸³⁰

"Unabii wa kanisani" - prophecy from church.⁸³¹

"Some refugees were convinced."⁸³²

"Frustration of working in foreign countries as refugee under hostile environment made me to decide to go back because I felt that it was better to go back to Burundi and be killed instead of remaining as a refugee."⁸³³

"I wanted to go back to Burundi in order to improve the life style of my own people to the optimum level of other free persons also contributing to peace building process through my professional skills."⁸³⁴

"I wanted to re-unite with my relatives and enjoy the fruits of democracy which other citizens in the world enjoy."⁸³⁵

"I wanted to return because there seemed to be peace."⁸³⁶

⁸²⁵ An interview with Respondent 69.

⁸²⁶ An interview with Respondent 69 and 74.

⁸²⁷ An interview with Respondent 74.

⁸²⁸ An interview with Respondent 91.

⁸²⁹ An interview with Anonymous Respondent on 30/12/2010.

⁸³⁰ An interview with Respondents 75 and 90.

⁸³¹ An interview with Respondent 98, see also Mbazumutima, *op cit* n. 65 at p.78.

⁸³² An interview with Respondent 83.

⁸³³ An interview with Respondent 68 on 01/11/2010.

⁸³⁴ An interview with Respondent 68.

⁸³⁵ An interview with Respondent 69.

⁸³⁶ An interview with Respondent 107.

"The more I studied the more I realized how refugees are being mistreated."⁸³⁷

"*Niliipenda nchi yangu*"- I loved my country.⁸³⁸

"In exile I was not allowed to have freedom of movement."⁸³⁹

The aforementioned respondents' diverse opinions suggest that the rights of Barundi refugees in Tanzania were often violated because of intimidation, limiting certain rights such as freedom of movement, denial of education and gainful employment as confirmed in the focus group interview with Barundi respondents who opted for informal repatriation before 2003. In this regard, Morel has confirmed that Tanzania has been criticized for imposing restrictions on the movement of Barundi refugees through confinement to their respective refugee camps and limitation of employment opportunities.⁸⁴⁰ As emphasised in the Human Rights Report of 2009, Tanzania, being a State Party to the UN and OAU Refugee Conventions, has incorporated and domesticated many principles of the Conventions through the Refugees Act, 1998 and Refugees Policy of 2003. Yet, in practice, there is no synchronisation between refugee legislation and policy.⁸⁴¹ This is contrary to the law on the international protection of refugees. Article 5 of the OAU Convention, for example, clearly states that voluntary repatriation of refugees must be respected. The provisions of Article 5 have been reiterated in the Tanzania Refugees Act.⁸⁴² However, the construction of section 34 of the Refugees Act does not provide refugees with the right to resist involuntary repatriation, instead, it prohibits denial of repatriation.⁸⁴³ This is a *lacuna* in Tanzanian refugee law as identified by Chris M. Peter⁸⁴⁴

⁸³⁷ An interview with Respondent 68.

⁸³⁸ An interview with Respondent 74, 75 and 90.

⁸³⁹ An interview with Respondent 107.

⁸⁴⁰ Morel, *op cit* n.740 at p. 109, Section 17 of the Refugees Act which require asylum seekers and refugees stay in their designated areas or settlements, see also UNHCR (2005) "Potracted Refugee Situations" **Refugee Survey Quarterly** at pp.150-161, Swenya, A.; and Lema, D.; (2009) Refugee Protection: Practical and Challenges After Ten Years of Implementation of Refugee Law and Policy in Tanzania" **Journal of the Law Reform**, at p.53, UNHCR Fact Sheet 1st December, 2009 and International Crisis Group (2009) "Burundian Refugees in Tanzania: The Key Factor to the Burundi Peace Process" **ICG Central Africa Report No 12** of 30 November, 1999, at p. 6.

⁸⁴¹ See Kipobota, C.; (2010) "Tanzania Human Rights Reports 2009: Incorporating Specific Part of Zanzibar" **Legal and Human Rights Centre** at p. 93, available at: <http://www.humanrights.or.tz/wp-content/uploads/2010/10/Tanzania-Human-Rights-Report-2009.pdf> [accessed on 24/01/2013].

⁸⁴² Section 34.

⁸⁴³ Section 34 (1) of the Refugees Act, Cap. 37 of R.E. 2002 of the Laws of Tanzania states that: [A]n asylum seeker or refugee shall have the right at any time to return voluntarily to the country of his nationality or from which he entered Tanzania and any action or omission intended to prevent or restrict or which has the effect of preventing or restricting any asylum seeker or refugee from voluntary repatriation except in the due process of the law is hereby prohibited.

⁸⁴⁴ See Peter, C. M.; (1997) "Rights and Duties of Refugees Under Municipal Law in Tanzania:

while referring to the procedures of integration and naturalisation of refugees in Tanzania. Peter has opined that the procedures on integration and naturalisation ought to have been clearly stipulated.

Due to the abovementioned unclear guidelines in terms of Tanzanian Refugees Act and Policy, research findings have revealed further that human rights in the new refugee camps have been violated because some respondents opted for repatriation to Burundi because of the following reasons:

Shule za msingi na sekondari zilifungwa hivyo hatukuwa na chagua jingine na Mkuu wa kambi kuchoma kambi za wakimbizi na kuwafunga... All primary schools were closed down, therefore we had no other options. Again the refugee camps were closed and burnt down completely by the authorities and some refugees were arrested and imprisoned.⁸⁴⁵

Due to the gaps in Tanzanian refugee law, refugees find themselves being compelled to opt for formal or informal repatriation because of intimidation and violations of the human rights even when the requirements of Cessation Circumstances Clauses in terms of the 1951 Convention are not met. These can be viewed as flaws in the application of refugee law and have been demonstrated in the implementation of the tripartite agreements which presuppose formal repatriation although some refugees were not ready for the formal repatriation as elaborated hereunder.

4.5.1.2 Formal repatriation

In 2002, Tanzania entered a Tripartite Agreement with the UNHCR and the government of Burundi on the voluntary repatriation of Burundi refugees.⁸⁴⁶ This Agreement has been criticised for not complying with the 1951 Refugee Convention. The same type of agreement was concluded in 2005 where Tanzania entered a Tripartite Agreement with the UNHCR and Burundi and signed in 2007 and implemented in 2008. It must be acknowledged that in responding to the plight of refugees, Tanzania took the unprecedented decision of naturalizing more than 162,000 Burundi refugees who had been living in the commonly known Old Settlements in the north-west of the country since 1972.⁸⁴⁷ This decision is remarkable in terms

Examining a Proposed New Legislation", *Journal of African Law*, at pp. 81 to 99.

⁸⁴⁵ A Focus group discussion with returnee respondents in Rumonge, January 2011 and Telephone interviews with Burundi respondents in Kigoma in January, 2011.

⁸⁴⁶ The 16th Tripartite Commission Meeting between the Governments of Burundi and Tanzania, together with UNHCR on resolution to close down Mtabila Refugee Camp for Burundi refugees in December 2012. Tanzania Daily News "Tanzania: Mtabila Refugee Camp for Closure This Year" 14 December, 2012.

⁸⁴⁷ UNHCR Global Appeal 2012-2013 - United Republic of Tanzania available at: available at <http://www.unhcr.org> see also UNHCR Report (2010) "UNHCR Tanzania's Decision to

of international protection of refugees. Tanzania has been aiming at finding durable solutions for refugee problems in line with the UN Security Council Resolution of 2004 on promoting peace and national reconciliation and to foster accountability and respect for human rights in Burundi.⁸⁴⁸

Some Provinces and Districts, for example, were selected to integrate Burundi refugees. Despite of Tanzania's commitment to finding a durable solution, in mid-2010 human rights activists have been raising concerns about involuntary repatriation of refugees from Burundi, Congo and Rwanda who had been forced to return to their countries from various camps.⁸⁴⁹ An appeal has been made to the Tanzanian government to rescue refugees from being exposed to the danger of imprisonment, mistreatment, and possibly death.⁸⁵⁰

It is acknowledged that the Tanzanian government has its own domestic problems which may prevent it from continuing to deal with protracted refugee problems. Tanzania's incorporation of the 1951 and OAU Refugee Conventions, facilitating peace and ceasefire agreements, reflects its commitment to protect refugees' rights. As formulated in the peace and ceasefire negotiations since the APRA in 2000, the Pretoria Accord in 2003, DCCA in 2006 and Magaliesburg Agreement in 2008 stated in the previous chapters, Tanzania's efforts to find comprehensive and durable solutions for a significant number of Burundi refugees who fled in 1972 and lived in the three refugee settlements in Tabora (Ulyankulu Settlement) and Rukwa regions (Katumba and Mishamo Settlements) have been commendable.⁸⁵¹

Burundi's case is one of the most protracted refugee situations on the African continent. Therefore, the start of the Burundi repatriation agreements since 2003 as indicated above was among the efforts to find a durable solution to Burundi refugee problem who have been residing in "refugee designated areas" with "refugee status" label for more than forty years. The Tripartite Agreement signed between Tanzania, Burundi and UNHCR in late 2008 laid down the guidelines for voluntary repatriation and local integration of refugees in old refugees' camps, but, refugees in the new camps such as Mtabila were excluded from the local

Naturalize Tens of Thousands of Burundian Refugees", available at <http://www.unhcr.org>. [accessed on 16/04/2010].

⁸⁴⁸ The UN Resolution 1545 (2004), adopted by the Security Council at its 4975th meeting, on 21 May 2004.

⁸⁴⁹ See Global Detention Project (2011) "Tanzania Detention Profile" available at: <http://www.globaldetentionproject.org/countries/africa/tanzania/introduction.html> [accessed on 24/01/2013].

⁸⁵⁰ Global Detention Project, *ibid*.

⁸⁵¹ UNHCR Global Report, 2011 available at: <http://www.unhcr.org/479f06bf2.html>.

integration option. Furthermore, there has been no explicit formal recognition⁸⁵² such as the issuance of naturalisation certificates which would enable integrated refugees to have access to their basic rights.

Tanzania's initiatives have also been associated with challenges of closure of commonly known new refugee camps such as Mtabila.⁸⁵³ Although Tanzania has been a good example in protecting refugees rights, this study notes deficiencies in terms of integrating Burundi refugees such as lack of formal integration in providing Burundi refugees with identification documents and citizenship which could allow them to have access to basic rights such as education, housing, gainful employment, freedom of movement, property, social security services just to mention a few. The defects in the integration processes as noted during interviews tend to contradict tripartite agreement of 2007.⁸⁵⁴ Whilst this thesis acknowledges the financial constraints and other domestic challenges in Tanzania such as socio-economic issues, the defects noted above have sullied that country's commendable record in finding durable solutions to refugees' problems.

This thesis critically evaluates refugees' problems and emphasises that the persecution of refugees in their countries of origin like Burundi must be viewed and understood in other viewpoints such as the possible or actual re-occurrence of violations of refugee rights should they involuntarily be repatriated. According to Kugelmann,⁸⁵⁵ the interpretation of refugee law must take into account all relevant risks which refugees may encounter and aim to grant them effective protection. The human rights dimension of refugee, laws for example, must be regarded as a guiding principle when integrating refugees locally or repatriating them to their countries of origin in order to sanctify the international protection of refugees.

It must be acknowledged and pointed out further that refugees' plight in Burundi in particular and Africa in general must be understood in socio-economic, political and legal viewpoints. The dilemma of asylum seekers and refugees who are forced from their habitual places of residence and being forced to seek refuge elsewhere must not be taken lightly. Refugee conditions being social pathologies resulting from man-made tragedies such as armed conflicts or other political and social upheavals must be considered and dealt with profoundly through exploring all legal and non-legal avenues and be guided by international human rights and

⁸⁵² <http://www.unhcr.org/pages/49e45c736.html>.

⁸⁵³ See the UNHCR Report, 2013 which suggests that about 2,700 Burundi still require international protection and have been relocated to neighbouring Nyarugusu camp to await an alternative durable solution. Available at: <http://www.unhcr.org/pages/49e45c736.html> [accessed on 17/01/2013].

⁸⁵⁴ A focus group discussion of December, 2010 with respondents in Ulyankulu Settlement and the Tripartite Agreement between Burundi, UNHCR and Tanzania of 2007, *op cit* n. 831.

⁸⁵⁵ Kugelmann, D.; (2010) **Max Planck Encyclopaedia of Public International Law**, available at: <http://www.mpepil.com/home> [accessed on 17/01/2013].

humanitarian norms. The following section continues with the legal framework of refugee protection in Tanzania.

4.5.2 Legal framework and procedural matters

Tanzania's compliance with the universal obligations under refugee laws requires either an individual refugee status determination process like the one in South Africa or the provision of benefits in terms of the OAU Convention. But, the application processes pursuant to the Refugees Act seem to be impractical. For example, the Tanzanian government finds itself in breach of the 1951 Convention obligations, especially relating to the principle of *non-refoulement*.

Refugee law and practice in Tanzania resemble the South African law. Like South Africa, Tanzania is a signatory to the 1951 Convention⁸⁵⁶ and the OAU Convention.⁸⁵⁷ At the national level, the Tanzania Refugees Act of 1998 was enacted to deal with the protection of refugees. The provisions of the Act specify three categories of individuals recognisable as refugees to include:

- persecution-related refugees who meet the criteria of the 1951 Convention;⁸⁵⁸
- conflict-related refugees who fit in the expanded refugee definition of the 1969 OAU Convention and possibly environment related refugees;⁸⁵⁹ and
- refugees who belong to a group of persons which by notice in the Government Gazette has been declared to be refugees.⁸⁶⁰

A National Eligibility Committee in terms of the Refugees Act is empowered to consider the applications for refugee status and makes recommendations to the Minister who is responsible for refugee matters for the grant or denial of refugee status and asylum.⁸⁶¹

As Mendel has asserted, the obligation of *non-refoulement* represents an important area of overlap between refugee conventions and municipal rules.⁸⁶² As stated earlier, Tanzania has been focusing on finding durable solutions to refugee problems in the country by encouraging

⁸⁵⁶ Tanzania ratified the UN 1951 Refugee Convention on 12 May, 1964 and its Protocol on 4 September, 1968.

⁸⁵⁷ Tanzania ratified the OAU Refugee Convention on 10 January, 1975.

⁸⁵⁸ Section 4 (1) (a) of the Tanzania Refugees Act of 1998.

⁸⁵⁹ Section 4 (1) (b) *ibid*.

⁸⁶⁰ Section 4 (1) (c) *ibid*.

⁸⁶¹ Sections 6 and 7 (a).

⁸⁶² Mendel, T. D.; (1997) "Refugee Law and Practice International" **Journal of Refugee Law: Oxford Journals**, at, pp. 35-59 available at: <http://jrl.oxfordjournals.org/search?author1=TOBY+D.+MENDEL&sortspec=date&submit=Submit> [accessed on 16/04/2010].

voluntary repatriation to their countries of origin, finding re-settlement in third countries,⁸⁶³ naturalization and local integration for the majority of the refugees who have resided in Tanzania since 1972. However, Tanzania like many countries in Africa, lacks sufficient resources to provide humanitarian assistance and sustainable solutions for the refugees it has hosted for over 40 years.⁸⁶⁴ Reflecting on the big number of refugees hosted as reflected in the naturalization of refugees from Burundi, DRC, Somalia and other countries between 2007 and 2009 (Table 3 below) in Tanzania, refugee problems necessitate a burden-sharing in the light of Morel's proposal who has appealed for international action and co-operation to stop the spiral of national policy restrictions of refugees' rights in Tanzania.⁸⁶⁵

Table 3: A Comparative Refugee Population in Tanzania between 2007 and 2009

REFUGEE POPULATION CONCERN- UNHCR, TANZANIA 1 DECEMBER 2009				
Camps	2010	1January 2009	1January 2008	1January 2007
Burundi refugees	36,338	45,920	118,043	154,406
DRC refugees	62, 818	79,706	97,099	127,973
Mixed	184	201	195	2,402
Burundi Refugee Settlements	140,860	194,560	218,234	218,234
Burundi Naturalized	30,920	0	0	0
Somali Refugees	1,440	1522	2059	2086
Somali Naturalised	1,423	1,222	732	182
TOTAL	273,983	323,131	436,362	505,283

Source: UNHCR, Tanzania Factsheet, 1st December, 2009.

Uncertainty on the integration and naturalisation of refugees in Tanzania demonstrates the ambiguities in the Refugees Act and Policy referred to earlier. Not surprisingly, the law is silent on the naturalisation of refugees. Kamanga, for example, has asserted that the Refugees Act of 1998 does not refer explicitly to local integration or naturalisation as a viable, durable solution, but has confined itself to acknowledging only repatriation and resettlement.⁸⁶⁶

⁸⁶³ See UNHCR Briefing Notes of 18 May, 2007, "Tanzania: Burundian Refugees to be Resettled in USA" **UNHCR** available at: <http://www.unhcr.org/464d78ccd.html>

⁸⁶⁴ United Nations in Tanzania "Refugees Challenges and Opportunities" available at: <http://tz.one.un.org/index.php/what-we-do/refugees?showall=&limitstart> [accessed on 22/01/2013].

⁸⁶⁵ Morel, *op cit* n.740.

⁸⁶⁶ Kamanga, K.; (2005) "The Tanzania Refugees Act of 1998: Some Legal and Policy Implications" **Journal of Refugee Studies** at p.104.

Although the Refugees Act of 1998⁸⁶⁷ was enacted in order to bring previous legislation (the Refugees Control) Act⁸⁶⁸ in conformity with the Tanzania's obligations under the 1969 OAU Convention, research findings in this study have revealed that under the late President Nyerere regime (1964-1985), refugees were seen as an 'economic asset' as were commonly referred to as '*wageni wakazi*' or 'resident guests'.⁸⁶⁹ Yet in the Post-Nyerere period, refugees have been considered as a threat to national security and forced Tanzania to move away from the 'Open Door Policy'.⁸⁷⁰

This thesis has noted the positive provisions of the Refugees Act, but also deficiencies have been noted. It can be adduced that the 1998 legislation if compared to the previous 1965 Act, contains less 'quantity' and more 'quality'.⁸⁷¹ However, in Kamanga's view changes in Tanzanian refugee legislation were made in order to convey the message to the international community about its disappointment with the insufficient humanitarian assistance received and responsiveness of the international community. Additionally, the Act was enacted due to the impact of refugees on economically impoverished Tanzania and assure the public that Tanzanian government has resolved to address refugee problems in a comprehensive manner.⁸⁷² The presence of refugees in Tanzania has been constantly perceived by local communities as a cause of insecurity, environmental degradation and unemployment.⁸⁷³ In this context the legal framework and policy in Tanzania relating to the protection of refugees can attract legitimate censures in terms of international human rights laws. The following section deals with the challenges of application of refugee law in Tanzania.

4.5.3 Challenges of closure of new refugee camps and the legal implications

Under international law the returning of refugees to their country of origin must be voluntary.⁸⁷⁴ But, in the case of Mtabila as mentioned earlier,⁸⁷⁵ the closure of the camp resulted into the worsening of living conditions such as the withdrawal of humanitarian assistance,

⁸⁶⁷ Repealed the Refugees (Control) Act of 1966.

⁸⁶⁸ Act No. 2 of 1966.

⁸⁶⁹ Morel, *op cit* n. 740 at p.111. See Van Hoyweghen argument as cited in Morel, *ibid*. This view has been confirmed by respondents in the Focus Group discussions in Ulyankulu, December 2010. See also Nyerere's statement when he visited Katumba Refugee Settlement in Mpanda District, Barundi refugees who survived mass killings in 1972 were referred to as "*wageni wakazi*" or "resident guests" and were afforded with access to basic human rights like health care services, education and transport infrastructure. All Africa News Report "Tanzania: Naturalisation of Refugees Nyerere's Vision", available at: <http://allafrica.com/stories/201005311097.htm> [accessed on 22/01/2013].

⁸⁷⁰ Morel, *op cit* n.740 at p.111.

⁸⁷¹ Kamanga, *op cit* n. 866 at p. 114.

⁸⁷² Kamanga, *ibid* at p.104.

⁸⁷³ Kamanga, *ibid* at p.104.

⁸⁷⁴ Article 5 of the OAU) Refugee Convention.

⁸⁷⁵ One of the new Barundi refugee camps which received and hosted refugees from 1993 when President Ndadaye was killed.

prevention of social services like health care, education and restrictions on income generating activities which all raised not only serious legal issues, but also the durability and effectiveness of process of finding a long term solution to the refugee problem. Although the closure may be viewed as an application of "Cessation Circumstances Clauses" by the hosting state (Tanzania) through withdrawal of refugee status, it raises critical issues of human rights violations in the eyes of international law relating to the protection of refugees.

As the Tanzania's example suggests, in September 2011 the Ministry of Home Affairs and UNHCR began carrying out interviews in the camps aimed at assessing the continuing protection needs of the refugees.⁸⁷⁶ The decision to close new refugee camps like Mtabila based on "Cessation Circumstances Clauses" raised fear among Burundi refugees who perceived it as victimisation and marginalisation.⁸⁷⁷ The Rema Ministries and the International Refugee Rights Initiative (IRRI), for example, conducted a study that aimed at clarifying the situation of Burundi refugees in Mtabila Refugee Camp and the likely implications of its closure which built on the previous studies by the Centre for the Study of Forced Migration (CSFM) and the Social Science Research Council (SSRC) in late 2008,⁸⁷⁸ IRRI and CSFM in 2009⁸⁷⁹ as well as the study that was conducted inside Burundi which looked at the conditions of refugees who were repatriated from Tanzania,⁸⁸⁰ the research findings have revealed that there were legitimate concerns such as the closure of schools in Mtabila in 2009.⁸⁸¹

The closure of the Mtabila refugee camp, for instance, violated the fundamental rights of refugee children especially their basic right to education. For example, about 60 per cent of the returnees after the formal closure of Mtabila Camp in 2012 were children under 18 years

⁸⁷⁶ The Guardian (Tanzania) "Tanzania Extolled for Naturalising Refugees," 31 August 2011.

⁸⁷⁷ Telephone interviews with respondents in Kigoma in January, 2011.

⁸⁷⁸ Centre for the Study of Forced Migration (CSFM) at the University of Dar Es Salaam, the International Refugee Rights Initiative (IRRI), and the Social Science Research Council (SSRC) "Going Home or Staying Home: Ending Displacement for Burundian Refugees in Tanzania" **Citizenship and Forced Migration in the Great Lakes Region: Working Paper 1**, November 2008. Available at: <http://www.ssrc.org/publications/view/F24DFE71-2755-DE11-AFAC-001CC477EC70/>.

⁸⁷⁹ IRRI "I Don't Know Where to Go: Burundian Refugees in Tanzania under Pressure to Leave", available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5741. [01/09/2009].

⁸⁸⁰ The IRRI, Rema Ministries and the SSRC, Rema Ministries and the Social Science Research Council, "Two People Cannot Wear the Same Pair of Shoes: Citizenship, Land and the Return of Refugees to Burundi," November (2011) "Two People Cannot Wear the Same Pair of Shoes: Citizenship, Land and the Return of Refugees to Burundi," November 2011.

⁸⁸¹ See UNHCR (2012) "Consolidated Inter-agency Information Note on the Closure of the Mtabila Camp in the United Republic of Tanzania and the Return to Burundi of the Former Refugees from 15 October 2012-31 March 2013" at p. 10, available at: <http://www.unhcr.org/50a5ff63c.pdf> [accessed on 05/02/2013].

who used to attend schools before the 2009 closure.⁸⁸² This thesis examines the right to education of Barundi refugee children and asserts that education is a right with well-rounded dimensions. If the right to education is effectively assured to persons it enhances the enjoyment of all other rights and freedoms. However, when this right is denied to a person it impedes the enjoyment of other human rights. Clearly, the closure of Mtabila Camp has denied refugee children their right to basic education. Equally, the UNHCR has raised concerns relating to integration of Barundi returnees in Burundi education curriculum which might be associated with language barriers and long term implications.⁸⁸³ It must be remembered that apart from denying the right to education to Barundi refugees, other rights such as freedom of movement, freedom of expression and freedom from *refoulement* have been violated, contrary to what refugee and human rights laws demand.⁸⁸⁴ The findings on observance and protection of refugees' rights during repatriation are discussed hereunder.

4.6 HUMAN RIGHTS DURING REPATRIATION OF BARUNDI REFUGEES FROM TANZANIA

Out of 113 respondents interviewed, 36 (31.9%) had applied for repatriation and these were either in the process of being repatriated to Burundi or had already been repatriated during the study. The majority of respondents (i.e. 52, equivalent to 46.0% of the respondents) had applied for local integration in their countries of exile. The rest (25 respondents, equivalent to 22.1%) had different status either being internally displaced or still living in exile but had opted for neither repatriation nor local integration. The trend of application for either repatriation or local integration is shown in Figure 7 below.

⁸⁸² UNHCR (2012), *ibid.*

⁸⁸³ UNHCR (2012) *ibid.*

⁸⁸⁴ Article 33 of the 1951 Convention, which in the main provides for *non-refoulment* of asylum-seekers.

Figure 7: The Distribution of Respondents by Time Spent before Receiving Response on Application for either Local Integration or Repatriation

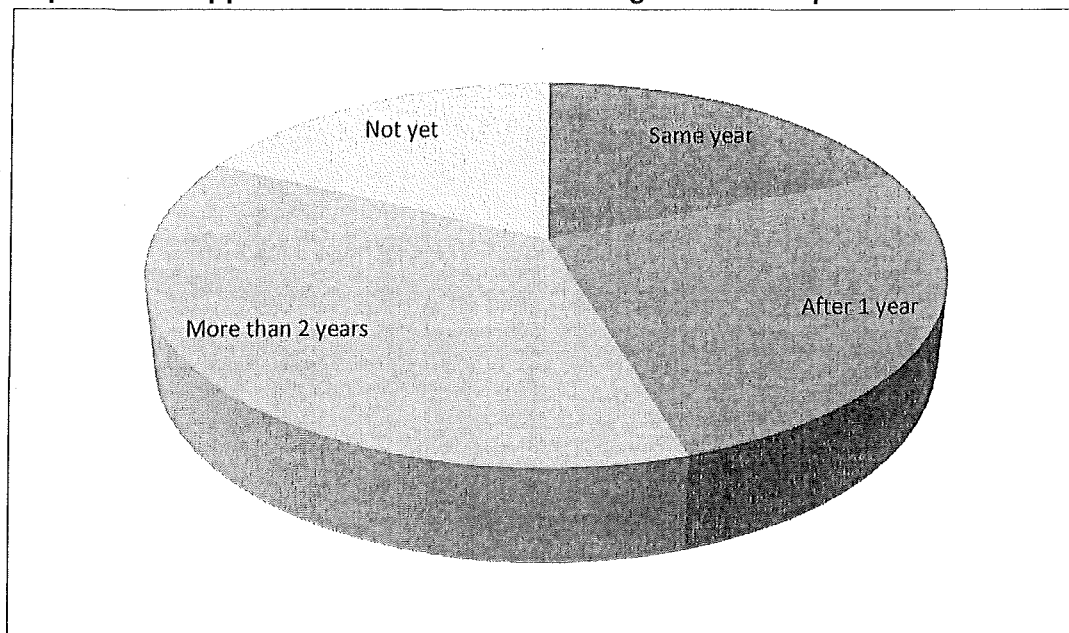


Figure 7 above demonstrates the trends in application of Tripartite Agreements on repatriation of Barundi refugees.

Although the respondents who had either applied for local integration or repatriation (n=84) admitted to have received responses to their applications, some (18%) had not yet received final verdict on their application as indicated in Figure 7 above. The findings show that it took more than 2 years for the majority (37%) of applicants to receive official responses on whether their applications had been accepted or not.⁸⁸⁵ Even with the group which had received responses to their applications, it was clear during the interview that most of them heard overall response of the Governments through the media such as radio or Television Programmes. Only 19% of the respondents received responses within the same year they had applied and all of them were refugees who applied for repatriation in the Western Refugee camps of Tanzania soon after inauguration of the coalition government under the presidency of Pierre Nkurunziza in 2005.

4.7 SOUTH AFRICA AND TANZANIA COMPARED

This thesis compares the protection of Barundi refugees' rights in South Africa and Tanzania and maintains that, refugee laws in both countries, to a large extent provide for a legal framework in which refugees' rights are protected in line with international human rights law.

⁸⁸⁵ See Figure 7 above.

However the study has also noted some gaps in laws and state practices which tend to hinder the effectiveness of the application of refugee laws and the protection of refugees at national level. The focus of the comparison in this section is whether Burundi can learn something from Tanzanian and South Africa's interpretation of refugee laws regarding the protection of refugee rights or vice versa. Thus, South Africa and Tanzania are compared as follows:

- Tanzania has hosted a bigger number of refugees than South Africa.
- Economically South Africa is more stable than Tanzania.
- Tanzania has been focusing on finding durable solutions for refugees' problems in terms of local integration and formal repatriation in partnership with the UNHCR.
- South African integration policy on the other hand is unclear while research findings suggest that deportation practices as demonstrated in *Aruforse*' case are moderately favoured in South Africa.
- Burundi refugees in South Africa have been subjected to direct xenophobic attacks whereas in Tanzania no direct attacks have been reported although there have been incidents of indirect discrimination in fields of employment and education.
- Both South African and Tanzanian authorities tend to focus on implementation of immigration law than refugee law which attract legitimate scholarly debates in terms of international human rights and humanitarian laws.

This thesis compares South African and Tanzanian refugee laws and policies and their application. South African Constitution and case law as construed in the *Khoza*, *Aruforse*, *Ndikundamyi* and *Port Elizabeth* cases mentioned earlier have confirmed that refugees have constitutional protection. Similarly, Tanzania embraces the rule of law,⁸⁸⁶ being a dualist state all, international instruments to which Tanzania is a State Party must be ratified by the parliament in order to form part of the national law.⁸⁸⁷ The Tanzanian Constitution specifies that "every person has the right to equal protection under the laws of Tanzania".⁸⁸⁸ Thus, like Tanzanian citizens and foreigners, refugees are entitled to equal treatment before the law.

As a member state to the UN, Tanzania has ratified a number of international human rights instruments like the ICCPR, ICESCR, CEDAW, CRC, ICERD,⁸⁸⁹ Migrant Workers' Convention⁸⁹⁰ and Torture Convention which all affirm respect for human rights. This is an

⁸⁸⁶ Article 4 of the Constitution of the Republic of Tanzania, 1977.

⁸⁸⁷ Article 63(3) (e) of the Constitution of Tanzania, *ibid*.

⁸⁸⁸ Article 29 (2) of the Constitution of Tanzania, *ibid*.

⁸⁸⁹ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

⁸⁹⁰ Adopted by General Assembly Resolution 45/158 of 18 December 1990.

achievement in protecting and promoting human rights. Yet, the absence of clear refugee policies in place has resulted into ineffective implementation of refugee law in Tanzania and have negative repercussions on refugees' rights.⁸⁹¹

This study uses Tanzania and South Africa as case studies and emphasises that the moving away from the "Open Door Policy" articulated under the Refugee Control Act of 1966 to the Refugees Act of 1998 in Tanzania and the amendments to the South African Refugees Act of 1998 are seen as remarkable achievements in the refugee law jurisprudence. However, the identified shortcomings and challenges such as limiting access to basic rights like freedom of movement, gainful employment, education, deportation threats, delays in the processing of applications for asylum and refugee status determination and lack of proper local integration and resettlement policies tend to adversely affect Burundi refugees' rights. To this end, even the donors who support refugees financially, lose interest because of lack of permanent solutions to refugee problems.⁸⁹² Likewise, the prolonged conflicts in Burundi and lack of transitional justice mechanisms have reduced the desire towards voluntary repatriation among Burundi refugees who continue to be perceived as burdens in the receiving states.

The 1951 Convention recognises the 'need' for international co-operation in order to achieve durable solutions. Goodwin-Gill and McAdam have argued that there is no obligation on State Parties to agree to offer durable solutions.⁸⁹³ Refugee problems as indicated above by using South Africa and Tanzania examples have no quick or immediate solutions. For instance, interrelated factors as articulated by Crisp have become relevant.⁸⁹⁴ Noticeably, Burundi's prolonged armed conflicts and gross violations of human rights have made voluntary repatriation as non-viable option. Fighting is often sustained by various individuals who have economic and political interests and have capitalised on the continuation of armed conflicts, these are among the aggravating factors of refugee problems.⁸⁹⁵ Hence, even the international community often fails to bring armed conflicts to an end. It is submitted that geo-political and

⁸⁹¹ See for example Nkonya, C. M. (2010) "Refugee Status Determination and Refugee Rights in Tanzania" A Paper presented at the Workshop on Refugee Status Determination and Rights in Southern and East Africa, held in Kampala, November, 2010.

⁸⁹² Goetz, N.; (2003) "Lessons From a Protracted Refugee Situation" **The Centre for Comparative Immigration Studies** Working Paper No. 74 at p. 4.

⁸⁹³ Goodwin-Gill, G. and McAdam, J.; (2007) **The Refugee in International Law**: Oxford University Press: Oxford at p. 489.

⁸⁹⁴ Crisp, J. (2003) "No Solution in Sight: The Problem of Protracted Refugee Situations in Africa" **New Issues in Refugee Research**: UNHCR Working Paper No. 75 at pp. 2- 6.

⁸⁹⁵ Crisp, *ibid* at p. 3.

economic factors in Burundi are among the chief co-producing factors to Burundi's refugee problems.⁸⁹⁶

It is submitted that political factor⁸⁹⁷ must be considered in order to get long-term solutions to refugee problems. It must be pointed out that the consequences of political action in terms of persecution or violence in the countries of origin have resulted into the influxes of refugees in hosting countries.⁸⁹⁸ As opined by Burundi respondents,⁸⁹⁹ for a poor country like Tanzania, hosting a large number of refugees and complying with the 1951 Convention requirements would be challenging. Moreover, Burundi which used to be a part of German East Africa and now a part of East African Community does not seem to lessen the refugees' burdens to its neighbouring countries like Tanzania because of ongoing armed conflicts.⁹⁰⁰ But Morel has offered a solution when he states that international action and co-operation are required in order to stop the spiral of national policy restrictions towards refugees who have been affected by protracted conflicts.⁹⁰¹ International co-operation is an important factor in resolving refugees' problems and protecting refugees' rights.

Local integration which is an option to repatriation as stated above by using South African and Tanzanian examples has got its own challenges. Many refugees around the world live with the hope of returning to their countries of origin while others have no hope of returning back. The most common reasons for not returning are ongoing conflicts and the fear of persecution if they were to return. In cases where voluntary repatriation is not a practical option, finding a home in the country of asylum and integrating into the local community is likely to offer a durable solution to the plight of refugees and the opportunity of starting a new life as it was done in Tanzania as stated earlier. However local integration, according to the UNHCR, is a complex and gradual process which comprises distinct but related legal, economic, social and cultural dimensions.⁹⁰²

Local integration requires efforts among the parties concerned such as preparedness of refugees to adapt themselves to the host society's values without relinquishing their own cultural identity and corresponding readiness of host communities and public institutions to

⁸⁹⁶ Crisp, *ibid* at p. 3.

⁸⁹⁷ See the UNHCR (2005) "Protracted Refugee Situations", **Refugee Survey Quarterly**, pp. 150-161; UNHCR, 2006 at pp. 109 and 112.

⁸⁹⁸ The UNHCR Report, 2005, *ibid*.

⁸⁹⁹ A focus group discussion in Dar-es Salaam on 23/01/2011.

⁹⁰⁰ A focus group discussion, *ibid*.

⁹⁰¹ Morel, *op cit* n. 740.

⁹⁰² See UNHCR (2005) "Conclusion on Local Integration", 7 October 2005, No. 104 (LVI) – 2005, available at: <http://www.unhcr.org/refworld/docid/4357a91b2.html> [accessed on 13/02/2013].

welcome refugees and to meet their needs. In other words, local integration is a process that imposes considerable demands on both refugees to be integrated and the receiving society.⁹⁰³ In many cases, acquiring nationality of the country of asylum is the peak of this process. However, in practice local integration in the asylum countries is a slow process that seems to take long before formalization if Tanzania and South Africa may be used as examples.

In terms of implementation of repatriation or local integration strategies, this thesis submits that although an international obligation is clearly stated in the international human rights and humanitarian laws to respect and promote refugees' rights, there is a gap between what is stipulated in the laws and the practical realities.⁹⁰⁴ It argues that the protection of refugees' rights is more than the mere repatriation, deportation or pronouncing local integration of refugees. This means an effective protection of refugees' rights is required during repatriation and local integration. For example, the 1951 Refugee Convention stipulates that:

No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁹⁰⁵

The provisions of Article 33 above impose an obligation on the State Parties to protect refugees against forcible return or *refoulement* which is also prohibited under human rights instruments like the Torture Convention.⁹⁰⁶ It is generally accepted that the prohibition of *refoulement* is part of customary international law.⁹⁰⁷ Equally, states that are not parties to the Refugee Convention must respect the principle of *non-refoulement*. Generally, states have obligations under the Refugee Convention and customary international law to respect the principle of *non-refoulement* because when this principle is violated or being threatened, the UNHCR may

⁹⁰³ See the complexities of refugees' integration and balancing the rights of local communities and refugees in the case of *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others*, *op cit* n. 816.

⁹⁰⁴ Focus group interview with Barundi respondents in Tanzania and South Africa in 2010 and 2011.

⁹⁰⁵ Article 33(1) of the 1951 Refugee Convention.

⁹⁰⁶ Article 3 of the Torture Convention. See also Article 45 para 4 of the Fourth Geneva Convention, 1949, Article 7 of the ICCPR, Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance and Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. At regional level *refoulement* is prohibited under regional human rights instruments such as, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22 of the American Convention on Human Rights, Article II of the OAU Refugee Convention and Article 2 of the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World.

⁹⁰⁷ UNHCR (2005), *op cit* n. 898 at p. 109.

intervene if it deems necessary.⁹⁰⁸ This thesis posits that non-observance of refugee laws in the receiving states as shown in this study illustrate the poor quality and deteriorating standards of refugees' protection.

4.8 GENERAL AWARENESS OF HUMAN RIGHTS OUTSIDE BURUNDI

This section deals with different responses on awareness of human rights which are summarized in Table 4.

Table 4: Awareness on Human Rights by Refugees

<i>Response</i>	<i>No. respondents</i>	<i>Per cent (n=113)</i>
Aware on human rights a refugee deserves in exile	80	70.8
Right of access to courts of law	23	20.4
Right of freedom of association	50	44.2
Right to get asylum	27	23.9
Right to pursue business/trade	24	21.2
Right to access food	31	27.4
Right to freedom of expression	63	55.8
Right of access to education	87	77.0
Right of access to gainful employment	57	50.4
Right to access to health services	86	76.1
Right to access to land	36	31.9
Right to life	32	28.3
Right to freedom of movement	63	55.8
Right to pursue an occupation and profession	20	17.7
Right to social security including grants	13	11.5
Not to be subjected to slavery, servitude or forced labour	25	22.1
Right to shelter	29	25.7

⁹⁰⁸ In some incidents persons facing *refoulement* may have recourse under The UN Special Rapporteurs or bodies such as the Committee against Torture, the UN Special Rapporteur on Summary Executions and the UN Working Group on Enforced Disappearances to prevent vulnerable groups like refugees, asylum-seekers or internally displaced persons from being subjected to imminent human rights abuses or in response to allegations of the existence of such abuses.

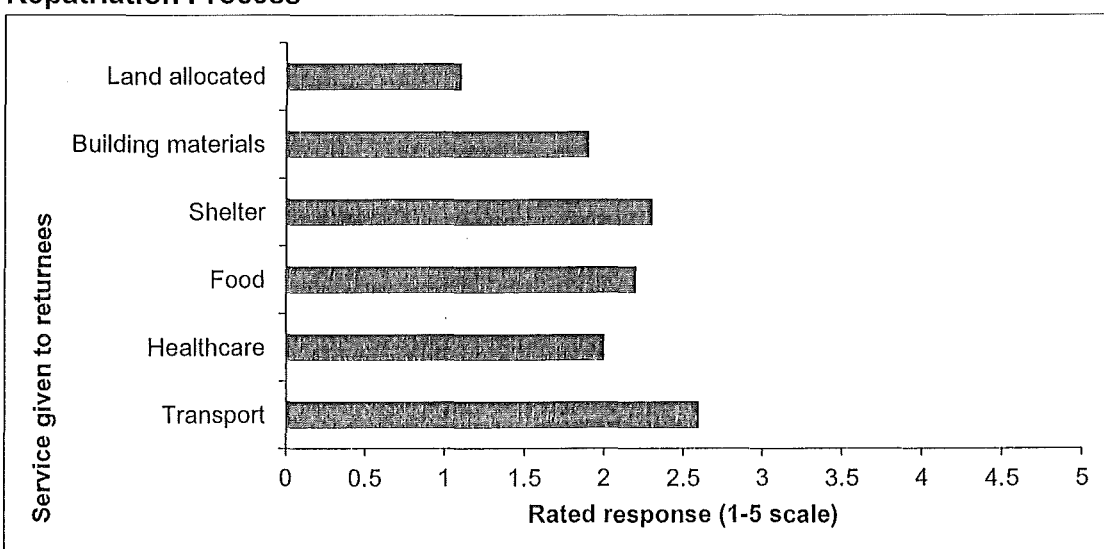
Although, overall 80 respondents (70.8%) reported to be aware of the bundle of rights a refugee is entitled to, there was a great variation between the different categories of rights a refugee is entitled to. Awareness among respondents was high on the right of access to health services and education. On the other hand, awareness was moderate on freedom of movement, freedom of expression and access to gainful employment. Issues which came clear that respondents had low awareness on the rights of refugees included: freedom of association, participation in business and trade, access to land and related properties such as houses and access to the courts of law. The respondents had very limited awareness on rights of a refugee to access social security (grants) and right to pursue an occupation and profession.

This thesis emphasises that although refugees may not be aware of their rights, technically their rights as enshrined in the International Bill of Rights are universally protected like those of foreigners and citizens as shown in the South African case law in the *Khoza*, *Aruforse*, *Ndikundamyi* and *Port Elizabeth* cases. The obligation to protect refugees continues during repatriation of refugees and integration of returnees as elaborated hereunder.

4.9 RETURNING AND INTEGRATION PROCESS IN BURUNDI

Out of 113 respondents, 55 (48.7%) had once returned home from exile. Out of the 55 returnees, only 22 (40.0%) reported the returning process to have gone smoothly while the rest 33 (60%) reported to have experienced difficulties during the process (see Figure 8 below).

Figure 8: Perception of Returning Refugees on Services Received during the Repatriation Process



As Figure 8 above suggests, the common issues reported by returnees who had difficulties in integration include:

- the limited care and services received during the repatriation process
- the separation of family members
- the failure to re-integrate into Burundi society due to land conflicts
- the failure to return back all personal belongings due to limited baggage allowances⁹⁰⁹ allocated to returning refugees
- the loss of properties during the returning process
- the challenge to start new life in almost a new country
- the failure to be provided with items and properties returnees had been promised to get in Burundi such as land, food, building materials/shelter, education and health services
- Continuing war in Burundi contrary to what had been claimed before repatriation⁹¹⁰

Overall, the majority of refugees who returned from Tanzania reported to have received better treatment and services in Tanzania during repatriation and worse services on arrival in Burundi. Using a 1 to 5 Likert scale (where 1=total disagreement and 5=total agreement), the rating of services received by returning refugees is summarized in Figure 8. Only transport service was at least perceived to have been better organised (Mean $\pm$ Standard deviation= 2.6 $\pm$ 1.3). Access to land was reported by the majority of respondents who disagreed with the proposition that the service was provided on arrival.

This thesis asserts that although the principle of Cessation of Circumstances tend to encourage repatriation programs to be put in place as stated above, the legal framework on how to return, receive and integrate refugees is crucial in order to respect, promote and enforce returnees' rights. For example, the norms and principles of international refugee protection must be complied with. That means, effective respect for human rights of returnees is *sine qua non*; hence a causal connection between repatriation processes and remedies/legal consequences for non-compliance with the set legal framework of repatriation such as the tripartite agreements must be clearly stated.

Additionally the agreements must state clearly dispute resolution mechanisms in the event of non-compliance. For example, the findings in this study have shown how Burundi refugees were faced with enormous challenges especially in accessing basic human rights such as

⁹⁰⁹ Not exceeding 50 kilograms per person. See UNHCR (2012), *op cit* n. 881.

⁹¹⁰ For example Gatumba mass killings of September 2011.

education, shelter, food, healthcare services⁹¹¹ and land disputes. This argument is important given that repatriation has been perceived as “another type of refugee infirmity” because refugees are often prejudiced and categorised as “foreigners in their own country”.⁹¹² Therefore formal integration of Burundi returnees must be on top of the agenda of the government. Upon arrival returnees were placed in the reception centres where they had to devise means of having temporary shelters before the permanent ones. Although some returnees opted to go back to their homes which they left since 1972, but they could not rebuild or renovate their properties because of lack of building materials.

A respondent in Busebga reported that:

Since we have arrived from exile in Tanzania, we have not received building materials and our children do not go to school.⁹¹³

The returnee’s children are stuck at the crossroad because in exile in Tanzania for example, they used to go to school where English and/or Kiswahili were used as languages of teaching and learning. In Burundi it has been difficult to integrate returnee children because Burundian curricula use French and Kirundi as media of teaching and learning. Because of the language barriers faced by returnees’ children who cannot speak and write French and Kirundi, Foaleng and Lari, for example, have noted that Burundi is facing enormous challenges of reintegrating thousands of refugees who spent decades in exile.⁹¹⁴

This thesis refers to the repatriation of Burundi refugees and affirms that the 1990s voluntary repatriation has been favoured by the UNHCR and viewed as among the durable solutions to refugee problems. It is acknowledged that repatriation of refugees is an important part of the peace process if it respects refugees’ rights in the eyes of the international community.⁹¹⁵ Accordingly, repatriation of refugees has been regarded as a voluntary process that must consider refugees’ safety and dignity as required by international law. However, there are factors such as pressure from both countries of asylum and countries of origin which have contributed towards violations of refugee’s rights. Fransen and Kuschminder in their study on repatriation and reintegration of Burundi refugees from Tanzania in 2012, have pointed out

⁹¹¹ Returnees reported that, during repatriation they got good food and healthcare services in Tanzania but in Burundi they were limited or not at all. Mostly food was provided by religious groups or family members.

⁹¹² Focus group interviews with returnees in Rumonge District.

⁹¹³ An interview with a returnee respondent in January 2011.

⁹¹⁴ See Foaleng, M. and Lari, A. (2008) “Burundi Stability Depends on Successful Reintegration of Returnees” available at: <http://www.refintl.org/policy/field-report/burundi-stability-depends-successful-reintegration-returnees>

⁹¹⁵ See the UNHCR Report, 2004 at p. 6, Black, R. and Gent, S.; (2006). “Sustainable Return in Post-Conflict Contexts” *International Migration*, 44(3), 15-38.

that competition for resources, social services, employment and educational opportunities between returnees and local residents are among the most pressing challenges which Burundi returnees are still facing.⁹¹⁶

Research findings in this study have revealed that some basic human rights have been violated during repatriation of Burundi refugees. The alleged human rights violations were associated with reintegration challenges such as: lack of institutional policies in place and capacity to integrate returnees at local and national levels, land disputes, insecurity, and stereotype attitudes of the local community, “*abasangwa*” in terms of marginalisation as they consider returnees as non-Burundi, poverty, language barriers and high level of unemployment. Consequently, the repatriation of Burundi refugees has become a complex process and perceived as “starting over for returnees, contrary to what it had been depicted as returning to a previous home and life”.⁹¹⁷

This thesis stresses that the progressive realisation of the returnees’ right to education must be prioritised while land and property disputes between returnees and residents must be addressed vigorously by the post-conflict government in Burundi to ensure long-term stability of returnees as a way of overcoming the challenges facing refugees as discussed in the following section.

4.10 CHALLENGES OF ENFORCING REFUGEE RIGHTS

Research findings in this study reveal that there are challenges of enforcing refugees’ rights not only by the receiving states but also in refugees’ countries of origin if Burundi can be taken as an example. This thesis posits that due to the decentralized nature of the implementation mechanism envisaged by the 1951 Refugee Convention, governments themselves remain responsible to ensure that refugees are treated as the Convention requires.⁹¹⁸ Although the UNHCR may be seen as playing a vital role in promoting respect for refugees’ rights, its role is not transparent so as to ensure accountability by the States Parties to the Refugee Convention. Hathway has pointed out that while the UNHCR protection officers in the field provide confidential compliance reports to the headquarters, states are not required to submit to the public or collegial scrutiny of their records.⁹¹⁹ Additionally there is no forum that requires governments of State Parties to engage in the dialogue of justifying their standard practices in

⁹¹⁶ Fransen and Kuschminder, *op cit* n. 279 at p. 10.

⁹¹⁷ Interviews with returnees in Mugara and Busebwa in Rumonge, see generally Fransen and Kuschminder, *ibid* at p. 3.

⁹¹⁸ Hathway, *op cit* n. 336 at p. 992.

⁹¹⁹ Hathway, *ibid* at p. 992.

terms of human rights and humanitarian laws. The following section proceeds with our discussion relating to IDPs.

4.11 IDPs IN BURUNDI

Chapter two has examined the issue of internal displacements in Burundi in the context of armed conflicts and protracted violence. The IDPs problem offers evidence of forced migration due to ongoing conflicts and gross human rights violations. IDPs are among the most vulnerable groups in the world. According to the Internal Displacement Monitoring Centre (IDMC), the number of IDPs resulting from armed conflicts like the case of Burundi reached approximately 27.1 million by the end of 2009 worldwide.⁹²⁰

As underlined in the UNHCR Report, 2012 there is an ongoing shift in global displacement trends and in the rapid growth in number of IDPs in recent years.⁹²¹ This thesis argues that the basic human rights of IDPs have always been violated. For example, in the interviews conducted with Burundi IDPs in Bujumbura Rural in 2011, it was revealed that although the basic human rights are enshrined in Burundi Constitution of 2005 and the international human rights and humanitarian laws, promotion and realisation of IDPs' rights are still far-fetched. As Birkeland has contended, IDPs are often caught in situations which prevent them from the enjoyment of rights which may even threaten their immediate safety or deny them equal access to basic human rights.⁹²²

The researcher had an opportunity to visit some of the existing IDPs settlements in Bujumbura Rural as shown in Figures 23 below. The findings reveal that the human rights of internally displaced groups such as children, women, elderly, *Batwa* have been adversely affected. As reaffirmed in the UN Guiding Principles,⁹²³ IDPs have the right to be protected from violent attacks, which means, their right to life, dignity, physical, mental and moral integrity and other rights must be respected.⁹²⁴ To the contrary, the post-conflict government in Burundi has failed

⁹²⁰ IDMC Report of 2009).

⁹²¹ UNHCR (2012) "Brookings-Bern Project on Internal Displacement, Strengthened Protection for Internally Displaced Persons in Africa: The Kampala Convention Comes into Force" 6 December 2012, available at: <http://www.unhcr.org/refworld/docid/50c713392.html> [accessed 07/02/2013], See generally, Birkeland, N. M.; (2008) Internal Displacement: Global Trends in Conflict-induced Displacement. **International Review of the Red Cross**.

⁹²² Birkeland, *ibid* at p. 498.

⁹²³ UN Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 17 April 1998, reprinted in *International Review of the Red Cross*, No. 324, September 1998, at pp. 545-556.

⁹²⁴ See Guiding Principles 10 -11 which place obligations upon the UN Member States and provide *inter alia* that "every human being has the inherent right to life and shall be protected by laws and no one shall be deprived of his/her life. For instance IDPs shall be protected against genocide, murder, slavery and sexual exploitation.

to protect the rights of internally displaced Barundi. For example, most of the IDPs children in Bujumbura hinterland like Muhuta and other places in the southern parts of Burundi where there have been ongoing armed conflicts between the ruling party CNDD-FDD and opposition parties like PALIPE-HUTU have been denied their right to education. For instance, there is substantial number of IDPs children who cannot go to school.

Research findings reveal that social upheavals and poverty caused by hostilities between the warring parties in Burundi have made children vulnerable to recruitment as child soldiers and some have been separated from their families.⁹²⁵ The contents of the UN Guiding Principles on Internal Displacement re-iterate the CRC and its Additional Protocols provisions by emphasising that “children and unaccompanied minors shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs”.⁹²⁶ In Burundi, CRC is constantly violated because of protracted armed conflicts.

While *regroupment* camps in Burundi were dismantled in 2000 following international pressure, other IDP settlements remained due to the ongoing conflicts between the *Tutsi*-led army and *Hutu* insurgent groups such as CNDD-FDD and PALIPE-HUTU. Early in 2008, at least 8,000 people were displaced in the north-western province of Bubanza.⁹²⁷ In mid-April 2008, outside the capital, residents were spending the nights in the bush for fear of being caught in the PALIPEHUTU-FNL attacks or military positions in and around Bujumbura which killed more than 30 people.⁹²⁸ To date, a majority of Barundi in Muhuta and other places in the Southern parts of Burundi are still leaving in internally displaced settlements.

This thesis uses Barundi IDPs as an example and stresses that internal displacement is a problem that renders the majority of persons especially those from marginalised groups such as children, disabled, minorities and women vulnerable. It postulates that Burundi and the international community must assess the situations of IDPs who have been affected by armed conflicts and put in place legal measures and policies to monitor the observance and promotion of their human rights.

While this section attempts to address human rights issues in Burundi with specific reference to IDPs, it suggests that the violations of IDPs rights in Burundi are among the issues which cannot be ignored. Although the IPDs were limited in number before 1993, in 1993, a large

⁹²⁵ Focus group interviews in Gitaza, Muhuta, Kanyosha, Kabezi, Rutumo, Magara and Rumonge in January 2011.

⁹²⁶ Guiding Principle 4 (2).

⁹²⁷ IRIN Report, 14 January 2008.

⁹²⁸ IRIN Report, 23 April 2008, focus group interviews in Muhuta, Gitaza and Kabezi.

number of IDPs settlements increased following the assassination of President Melchior Ndadaye and subsequent mass killings.

At the beginning of the exodus, the majority of IDPs were from the *Tutsi* ethnic group, especially in the northern and central provinces, who feared retaliation from their *Hutu* neighbours for the death of the *Hutu* President. From 1996 as conflict escalated, both *Tutsis* and *Hutus* fled in different places, away from their home places especially in the southern parts of Burundi.⁹²⁹

The second government of Buyoya of 1996 ordered the re-location of hundreds of thousands of (mostly *Hutu*) civilians into “*regroupment* camps” twice in the late 1990s, as part of a military strategy against the rebel groups.⁹³⁰ The number of IDPs peaked in 1999 with over 800,000 displaced persons or around 12 per cent of the population.⁹³¹ Many of these IDPs have never returned to their original places since 1972 to date.

The legal protection of IDPs is crucial because the humanitarian needs of IDPs are very similar to those of other vulnerable Burundi like refugees. One of the key objectives of peace-building in Burundi is to find sustainable solutions to the land and socio-economic issues in order to heal Burundi refugees and IDPs population who have been affected by the prolonged armed conflicts. According to the IDMC Report of 2008, the UN High Commissioner for Human Rights took notice of IDPs problems and proposed measures to integrate returnees and IDPs in line with the international human rights and humanitarian laws. These measures will always be ineffective in Burundi if they are not supported by the post-conflict government. The Kampala Convention on the protection and assistance of IDPs in Africa, for example, the Convention specifies that its objectives among others is to promote and strengthen regional and national co-operation through prohibiting and eliminating the root causes of internal displacement as well as providing for durable solutions.⁹³² But the post-conflict government of Burundi which is

⁹²⁹ IDMC Report of 2008 and chapter two of this thesis

⁹³⁰ IDMC Report of 2008.

⁹³¹ IDMC Report of 2009.

⁹³² Article 2 of the Kampala Convention stipulates its objective as to:

- (a) promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions;
- (b) establish a legal framework for preventing internal displacement, and protecting and assisting internally displaced persons in Africa;
- (c) establish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences;

a signatory to the Convention, a Member State to the AU and the East African Community has not ratified the Kampala Convention.⁹³³

According to the IDMC Report of 2011, the number of IDPs in Burundi has decreased.⁹³⁴ However, there are 78,800 IDPs who constitute about one per cent of Burundi's population who are still living in 120 internally displaced settlements.⁹³⁵ The Report has indicated that the majority of IDPs are from *Tutsi* ethnic group who had been displaced due to inter-communal violence since 1993 and the subsequent armed conflicts between the *Tutsi*-led army and insurgent groups. It must be pointed out that the IDMC Report has failed to acknowledge also the plight of internal displacements of Burundi from *Hutu* and *Twa* ethnic groups, especially in the southern parts of Burundi.

Furthermore, the mass repatriation of refugees since 2008 to - date has created more internal displacements especially those returnees who were born in exile and whose parents died during the war or in exile who cannot trace their original homes. Due to this new trend of internal displacement, the IDMC has urged the government of Burundi to put in place socio-economic strategies to integrate IDPs and returnees from exile.⁹³⁶ The integration of returnees from exile and IDPs in Burundi should have been guided by the Kampala Convention which is a regional instrument that binds governments to provide legal protection for the rights and well-being of persons forced to flee inside their home environment due to conflicts, violence, natural disasters, or developmental projects.⁹³⁷ However, Burundi's failure to ratify the Kampala Convention justifies the country's reluctance to assume binding obligations rising thereof. This study hypothesises that finding durable solutions for refugees and IDPs impasses must be the primary objective of not only the countries of origin but also receiving states and the international community at large.

(d) provide for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons;

(e) provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacements

⁹³³ See IDMC Report (2011) "Internal Displacement in Africa" **IDMC** at p. 41, available at: [http://www.internaldisplacement.org/8025708F004CE90B/\(httpCountries\)/CA225945859BEB81802570A7004A7871?OpenDocument](http://www.internaldisplacement.org/8025708F004CE90B/(httpCountries)/CA225945859BEB81802570A7004A7871?OpenDocument) [accessed on 06/02/2013].

⁹³⁴ The IDMC Report of 2011.

⁹³⁵ The IDMC Report of 2011, *ibid*.

⁹³⁶ The IDMC Report of 2011, *ibid*.

⁹³⁷ See Articles 2-7 of the Kampala Convention.

4.12 PERMANENT SOLUTION FOR REFUGEES AND IDPs PROBLEMS

The above sections have discussed the problems associated with refugees and IDPs. Lubbers, in his briefing to the UN Security Council, has argued that "never before had there been many opportunities for lasting solutions to the refugee problems in many parts of Africa, including Eritrea, Angola, Rwanda, Sierra Leone, Liberia and Burundi".⁹³⁸ This thesis asserts that a common international responsibility to reduce the risk of recurrence of conflicts and ensuring that such responsibility continues can help to reduce the influx of refugees who turn to be burdens in the receiving states. The unprecedented scale of atrocities and the failure by the international community to effectively intervene in Burundi crisis has generated influxes of refugees of unimaginable proportions.

It must be pointed out that refugees' problems have national, regional and international security as well as legal implications. Thus, it can be deduced from this view that wherever there is any kind of displacement there will be always movements across borders. As demonstrated in the Burundi case, the Great Lakes Region for many decades and more recently in Central African Republic, the lines of conflicts frequently run across state boundaries due to the various ethnic, social and cultural ties of the affected communities.⁹³⁹

Thus, the gaps in the application of human rights and humanitarian laws need to be filled not only by the government of Burundi but also in partnership with the receiving countries and with the support of the international community. The measures to abide by the UN and OAU Conventions can be viable only if there are mechanisms in place to monitor compliance under national and international jurisdictions. The sustainability of solutions to refugees and IDPs problems depends on the sound peace-making and peace-keeping processes which must involve multi-dimensional approaches.

Given the nature of the conflicts in the Great Lakes Region, greater attention must be dedicated to finding methods of peace-making in cross-border situations. Where appropriate and endorsed, the affected governments (hosting states) must work in partnership with the countries of origin and the affected victims of human rights violations and mass killings. In practice the conflicts tend to become regional although the responsibility remains country-based. For example, the conflicts in Burundi have had negative impacts in neighbouring countries like Tanzania, other African states and the rest of the world.

⁹³⁸ UN Security Council 4973rd Meeting (AM) of 20/05/2004. Available at: <http://www.un.org/News/Press/docs/2004/sc8099.doc.htm>.

⁹³⁹ See Ruud Lubbers' Briefing to the UN Security Council on Forced Displacement and Peace and Security New York, 20 May, 2004. Available at: <http://www.unhcr.org/40ade4364.html>

The mass repatriation of Burundi refugees from Tanzania and other countries since 2008 as stated earlier, has been associated with enormous challenges of land disputes which are the result of land dispossession during military regimes in Burundi. Moreover, the post-conflict government has not addressed land issues properly in a manner consonant with the constitutional principles. As endorsed with equal veracity by the Constitutional Court of South Africa in the case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Others*,⁹⁴⁰ social imbalances and injustices of the past must be addressed and reversed. O'Regan J. has observed that:

[T]he law which allowed arbitrary deprivation of property must be interpreted in a manner which seeks to establish a balance between the need to protect private property on the one hand and to ensure that the property serves the public interest on the other hand in the inequities of land distribution in South Africa as a result of colonial and Apartheid dispossession.⁹⁴¹

Reflecting on the reasoning in the *Mkontwana* case where the South African Constitutional Court has emphasised the commitment to protect human rights such as property rights, this study explicates that in order to enhance repatriation strategies of Burundi refugees, compensation or reparation for dispossessed land in Burundi must be among the priorities of the post-conflict government in order to address land ownership disparities in a manner consistent with the Constitution. Against an historical setting, Burundi is under an obligation to compensate its own citizens who have been forced to leave their properties and homes such as refugees and IDPs because such obligation emanates from the Constitution of Burundi which obliges the state to compensate the victims of arbitrary treatment of the state or its organs⁹⁴² and international human rights laws.⁹⁴³ In terms of customary international law as underscored in the case of *Chorzow Factory (Indemnity Case Germany v Poland)*,⁹⁴⁴ the Permanent Court of International Justice (PCIJ) held that:

T[he] essential principle contained in the actual notion of an illegal act, a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not

⁹⁴⁰ 2005 (1) SA 530 (CC).

⁹⁴¹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Others*, *ibid* at p.57 par 81. The court referred to section 118 (1) of the Local Government, Municipal Systems Act, 2000.

⁹⁴² Article 23 of the Constitution of Burundi.

⁹⁴³ See for example Principle 4 of the International Law Association position taken in 1992 Cairo Declaration which re-iterates the customary international law and declares *inter alia* that a state is under duty to compensate its own nationals who have been forced to leave their homes to the same extent as it is to compensate an alien.

⁹⁴⁴ (1927) P.I.C.J. (ser.A) No. 17 at 47. See also Leckie, S. (2003) "Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons" 3-24.

been committed. Restitution in kind, or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear the award of damages for loss sustained which would not be covered by restitution in kind or payment in place of it. Such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁹⁴⁵

The need to compensate Burundi returnees in the light of the principles adumbrated in the Constitution and *Mkontwana and Chorzow Factory* cases above must be viewed as an overriding in order to end the cycle of gross violations of human rights. Using the PCIJ's reasoning and South African precedent as persuasive authorities in the case of Burundi, this study stresses that the events that had caused the forced expulsion of many Burundi since 1960's which escalated in 1970s, 1980's and 1990s have presented not only a bad track record of serious violations of human rights in Burundi as nation but also have encouraged commission of serious international crimes. It is therefore crucial that in order to redress past injustices in Burundi, compensation must be paid to the returnees in terms of land restitution and socio-economic rights.

Although the host governments may be viewed as primarily responsible for ensuring the safety of refugees, the international community has a responsibility also to assist the hosting states that lack capacity and resources in line with the UN Security Council Resolution 1296 of 2000. The UN at large is duty bound to hold Burundi accountable for the atrocities associated with its protracted armed conflicts. When supporting the peace processes at all levels. The international community must ensure that the principles of disarmament, demobilisation, reintegration of former combatants and empowerment of the most vulnerable groups like youth, women, disabled, refugees, IDPs and ethnic minorities are complied with. The following section deals with violations of women's rights in Burundi.

4.13 WOMEN'S RIGHTS

Barundi women are generally confronted with human rights challenges. These include single mothers and widows or 'woman-headed households' who constantly become the most vulnerable groups during armed conflicts.⁹⁴⁶ Although Burundi is a signatory to the CEDAW, it has still not ratified the Protocol to the African Charter on Human and People's Rights on the

⁹⁴⁵ *Chorzow Factory (Indemnity Case Germany v Poland)*, *ibid* at par. 118.

⁹⁴⁶ See "Africa for Women's Rights: Ratify and Respect" the Campaign on Africa for Women's Rights launched on 8 March 2009 referred to as "Dossier of Claims", **International Federation for Human Rights (FIDH)** available at: <http://www.fidh.org/IMG/pdf/dossierofclaims0803eng.pdf> [accessed on 07/08/2012].

Rights of Women in Africa or the CEDAW Optional Protocol (the Maputo Protocol)⁹⁴⁷ to ensure the full protection of women's rights. This is a gap in law which has to be filled. This thesis acknowledges the positive developments relating to protecting and promoting women's rights in general since the adoption of the Constitution of 2005 that guarantees gender equality in Burundi.⁹⁴⁸

Additionally, the enactment of a new Penal Code in April 2009 as means to strengthening the repression of sexual harassment and domestic violence in terms of Article 560 of the Constitution are major developments in Burundi's commitment to upholding constitutionalism. The 2005 Constitution provides for a minimum of 30% of women in the Government,⁹⁴⁹ in the National Assembly⁹⁵⁰ and in the Senate⁹⁵¹ and the provision that Communal Councils must be composed of 15 members with at least 30% women.⁹⁵² The negative aspects are also noted because no similar measures have been adopted at the provincial level and communal levels.

This thesis argues that there are legitimate concerns regarding the persistent legislative provisions that discriminate against women especially in customary law relating to succession, matrimonial regimes and the perpetuation of sexual and domestic violence where the perpetrators of these crimes go away with impunity as stated in *Ngirincuti's* case referred to in chapters one and two. Furthermore, women have limited access to education, employment and health care services.⁹⁵³ As the UN Secretary-General Ban Ki-moon has reminded the international community, "women continue to suffer from violations of their fundamental rights on daily basis."⁹⁵⁴

Gender inequalities and acts of sexual violence perpetrated with complete impunity in the armed conflicts are obstacles towards full enjoyment of women's rights in post-conflict Burundi.⁹⁵⁵ Hereunder the thesis interrogates the issue of minority groups (*Batwa* and people

⁹⁴⁷ See "the Dossier of Claims" *ibid.*

⁹⁴⁸ Article 13 of Burundi Constitution, 2005.

⁹⁴⁹ Article 129 of the Constitution.

⁹⁵⁰ Article 164 *ibid.*

⁹⁵¹ Article 180 *ibid.*

⁹⁵² Article 181 *ibid.*

⁹⁵³ Dossier of Claims, *ibid* n. 946.

⁹⁵⁴ UN Secretary-General's Message "My Voice Count" Human Rights Day, 10 December, available at: <http://www.un.org/en/events/humanrightsday/index.shtml> [accessed on 07/08/2012].

⁹⁵⁵ *Ngirincuti's* case *op cit* n.12, see also OHCHR "NGO Report on Violence Against Women in Burundi: Executive Summary CEDAW", January 2008, at pp. 3-4. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/acatomctburundi.pdf>, Rwamo, A. "The Role and Impact of Graduate Women in promoting Gender Equality and Women's Rights in Burundi" available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Role-Graduate-Women.pdf>

with albinism) in Burundi who are also among the most vulnerable groups whose rights are not protected.

4.14 MINORITY RIGHTS

4.14.1 Batwa community

As stated in chapter two in the section dealing with the pre-colonial, colonial and post-independence, the *Batwa* ethnic group forms one percent of Burundi's population and it has been subjected to discrimination for a long time. For example, it was difficult for this minority group to own land under customary law during monarchical rule and this disenfranchisement was legitimized during colonial Burundi.

According to the Minority Rights Group Report (MRG) of 2007,⁹⁵⁶ the *Batwa* community face constant challenges relating to land rights due to lack of title deeds, discriminatory practices in land allocations and the government's failure to recognize *Batwa*'s historic land ownership claims. Furthermore, in order to survive, *Batwa* have had to work for *Tutsis* or *Hutus* through cultivating the fields or looking after cattle.

In terms of formulating power-sharing agreements and the Constitution of 2005, there were ethnic quotas provided in order to have ethnic representation, particularly for the *Batwa* ethnic group in government, administration and the military. Although Libérateur Ndayizeye⁹⁵⁷ committed himself to raising of awareness of *Batwa* community rights such as having access to social integration and to progress like *Hutus* and *Tutsis*, the gap is still evident because to date *Batwa* community rights are neither fully protected tangibly actualised.⁹⁵⁸

For example, during the conflicts of 1988 and 1990s, the *Batwa* ethnic group was caught between *Hutu* and *Tutsi* militants, both accusing them of loyalty to the other side. During the fighting between *Tutsis* and *Hutus*, *Batwas* were killed in large numbers as a consequence.⁹⁵⁹ According to the interviewees, the 2010 local, communal, legislative and presidential elections, politically motivated killings that happened before, during and after elections targeted specifically these marginalised *Batwa* communities.⁹⁶⁰ Furthermore, there is

⁹⁵⁶ <http://www.minorityrights.org/?lid=4703>.

⁹⁵⁷ The first woman from *Batwa* community to serve as Member of Parliament.

⁹⁵⁸ OHCHR (2009) "An Indigenous Community in Burundi Battles for Equal Rights", available at: <http://www.ohchr.org/EN/NewsEvents/Pages/BatwaDiscriminated.aspx> [accessed on 18/02/20-13]. See also OHCHR "Campaigning for the Rights of the *Batwa* People Burundi", available at: <http://www.ohchr.org/EN/NewsEvents/Pages/CampaigningBatwapeopleofBurundi.aspx>

⁹⁵⁹ Interviews done with *Batwa* community in Gitaza in 2011 refer Figure 26 above.

⁹⁶⁰ See Human Rights Watch Report of 2011.

a continued systematic discrimination against the *Batwa* ethnic group. In October 2011, the UN Committee on the Rights of the Child urged the government of Burundi to come up with a plan of action that would protect the rights of *Batwa* children, particularly girls. The report indicated that children from other ethnic groups, the *Hutus* and *Tutsis*, have higher opportunities of going to school compared to children from the *Batwa* ethnic group. Drop-out rates for *Batwa* girls are higher than *Batwa* boys. The factors contributing to *Batwa* girls' lack of access to education include poverty, the attitude of *Batwa* parents towards the education of girls and early marriages.⁹⁶¹

Burundi's Constitution recognizes minority groups, including ethnic, cultural and religious minorities.⁹⁶² It provides for proportionate ethnic representation in public enterprises,⁹⁶³ the National Assembly⁹⁶⁴ and the Senate.⁹⁶⁵ The explicit mention of *Batwa* as beneficiaries of such an ethnic quota constitutes an important step towards the recognition of the rights of *Batwa* as an indigenous hunting and gathering community.⁹⁶⁶ Despite the constitutional guarantee, stereotyping and marginalization of *Batwa*, like restricting them from socializing with *Tutsis* and *Hutus*, continues to limit their involvement in political participation. For example, according to Minority Rights Group International Report, *Batwa* hardly attend political or religious gatherings while their customarily owned pieces of land have been wrenched from them by other ethnic groups, especially *Tutsis*. This militarily enforced deprivation of land rights has left *Batwa* as squatters, consigned to perpetual servitude.⁹⁶⁷ This is contrary to international human rights laws.

4.14.2 People with albinism

Violence and discrimination against albinos, one other minority group in Burundi, also continues to be a matter of serious concern.⁹⁶⁸ The killings of albinos have aggravated the grave violations of human rights. People with albinism⁹⁶⁹ are targets of killing in Burundi and

⁹⁶¹ See UNHCR (2011) "State of the World's Minorities and Indigenous Peoples 2011 Burundi" of 6 July 2011. Available at: <http://www.unhcr.org/refworld/country,,MRGI,,BDI,,4e16d37bc,0.html>. See also Minority Rights Group Report, 2011.

⁹⁶² Article 13 of Burundi Constitution, 2005.

⁹⁶³ Article 143 *ibid*

⁹⁶⁴ Article 164 *ibid*

⁹⁶⁵ Article 180 *ibid*.

⁹⁶⁶ See Minority Rights Group International, "State of the World's Minorities and Indigenous Peoples of Burundi 2010", 1 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c33311d45.html>. [accessed on 21/02/ 2013].

⁹⁶⁷ See OHCHR Report, *op cit* n. 1033.

⁹⁶⁸ See The Telegraph "Seven New Albino Killings in Tanzania and Burundi", 6 May, 2010. Available at: www.telegraph.co.uk [accessed on 21/12/ 2013].

⁹⁶⁹ People with a genetically inherited condition caused by the body's inability to produce melanin pigment that helps the skin to protect itself from the sun's damaging ultraviolet rays.

other countries. During the survey and Focus Group Interviews in 2010 and 2011, it was revealed that the killings of albinos are associated with false beliefs that body parts of albinos can enrich a person or make them remain in higher leadership positions.⁹⁷⁰ Their killings, according to the IRIN Report of 2011, are driven by the false beliefs that their body parts have a special power when included in concoctions used in witchcraft. This is a gross violation of human rights, especially the right to life as provided for under human rights laws. Between 2007 and 2009, at least 10,000 people with albinism in Tanzania, Kenya and Burundi abandoned their homes and hid themselves.⁹⁷¹ It must be pointed out that many attacks, killings and discrimination against albinos in Burundi and Africa are not documented or reported. The persecution of people with albinism raises human rights concerns that need joint efforts at both national and international levels. People with albinism are killed and discriminated against because they are presumed to be cursed and bring bad luck to 'normal' society.⁹⁷² These anarchic practices do not uphold human rights on the basis on universality in post-conflict Burundi. Research findings have revealed that the killing of albinos apart from gross violation of human rights is a disgrace among Burundi community.⁹⁷³

As discussed in chapters three and four of this thesis, Burundi respondents in this study have appealed that:

"Burundi must abide by the principles of rule of law, justice and fairness to all ethnic groups.⁹⁷⁴ There must be also respect for human rights and uphold the principles of the African philosophy of *Ubuntu*. Have good governance and respect of the rule of law, dealing with and uprooting corruption, nepotism, regionalism and tribalism at all levels of government and private sectors, dealing properly with socio-economic issues. Foreign investors and international stakeholders should act in partnership with African countries rather than being "superiors."⁹⁷⁵

On the issues of national reconciliation and reconstruction, it has been emphasised that

"..Ili tujenge Burundi yetu katika amani basi ni bora watu kusahau na kusamehe nikimanisha kuwa Watutsi waliua na Wahutu nao waliua. Msamaha ni bora zaidi na wahenga walisema "INTIBAGIRA NTIBANA." Means, "In order to build our country Burundi it is better to forgive, I mean *Tutsis* killed and *Hutus* killed. Forgiveness is better because there is a saying that, "HE WHO DOES NOT FORGET DOES NOT COHABIT."⁹⁷⁶

⁹⁷⁰ Focus group interviews in Bujumbura and Rumonge in 2011.

⁹⁷¹ The International Federation for the Red Cross and Red Crescent Societies. <http://reliefweb.int/node/388422>.

⁹⁷² See BBC Report of 3 April 2008.

⁹⁷³ Interviews with Burundi community in and outside Burundi in 2011.

⁹⁷⁴ Respondent 100 in Appendix E.

⁹⁷⁵ Respondent 100 *ibid*.

⁹⁷⁶ Respondent 81, *ibid*.

As underlined in the above respondents' views, it has been revealed in the research findings that respect for human rights, forgiveness, abiding by the principles of rule of law, justice and fairness, upholding the African philosophy of *Ubuntu* or humanity, national reconciliation and reconstruction are indispensable to national-building and reconciliation in post-conflict Burundi.

It is submitted that Dorfman's vision of truth-telling is relevant to Burundi's case in order to deal with refugees, IDPs and minority rights. This author, who referred to the Chilean and South African transitions, has opined that inquiries about past human rights abuses can create a shared history which the majority of citizens, especially the young generation, can access and lead to true reconciliation, while other steps may be necessary to heal a divided community.⁹⁷⁷ Burundi are still crying for truth, reconciliation and healing with respect to serious crimes committed during the country's turbulent years as evidenced in the APRA and Kalamoh Report.⁹⁷⁸

4.15 SUMMARY

This chapter has defined who asylum-seekers, refugees and IDPs are and examined the protection of their rights in terms of international human rights and humanitarian laws. It discusses emerging trends of repatriation of Burundi refugees and their local integration with the associated challenges by using examples from South Africa and Tanzania. This chapter has critically evaluated the universal protection of refugees and IDPs' rights under the 1951 UN Refugee Convention, OAU Refugee and Kampala Conventions and the complexities of their application in the wake of current problems in post-conflict Burundi. A comparative analysis of the protection of refugees in South Africa and Tanzania, interpretation of refugee laws by using South African case law and closure of refugee camps in Tanzania have demonstrated difficulties which can be associated with the selective application of refugee laws at national level. It shows also how the integration of returnees in Burundi has not been as smooth a process as it was intended to be during the formulation and adoption of Tripartite Agreements. Persistent land disputes relating to land dispossession during military regimes, discrimination against returnees, IDPs, women and minority groups such as *Batwa* and persons with albinism are among the major challenges still haunting post-conflict Burundi.

⁹⁷⁷ Dorfman, *op cit* n. 417.

⁹⁷⁸ A Report of 2005, named after the UN Secretary-General envoy Tuliameni Kalamoh who led a UN inter-departmental delegation that was tasked to establish whether or not a Judicial Commission of Inquiry should be established to investigate mass killings which had been committed since Burundi's independence in 1962.

It has been revealed further that permanent solutions for refugees, IDPs, women and people with albinism and *Batwa* problems and protection of their rights remain elusive. The ongoing systematic violations of human rights in Burundi which have nurtured fear and terror among Burundi community inside and outside Burundi have been associated with reprisals and counter-reprisals that have escalated in Burundi.

My research findings have revealed that the survivors inside and outside Burundi (refugees and returnees) still have memories of the mass killings of 1960s, 1970s, 1980s, 1990s and beyond. Thus, the majority of refugees have opted for local integration in exile because of fear of persecution and reprisals since the perpetrators of heinous crimes in Burundi have not been indicted because of lack of transitional justice mechanisms to deal with impunity. Likewise, Burundi inside the country are still fearful due to ongoing armed conflicts between the ruling party CNDD-FDD and opposition parties and incessant mass killings such as the politically motivated killings in Bujumbura hinterland in places like Muhuta, Kabezi and Gatumba that are comparatively genocidal.

The following chapter proceeds with an evaluation of respondents' memories of mass killings with a view to determining whether these killings amount to the legal definition of genocide.

CHAPTER FIVE: CRITICAL ASSESSMENT OF RESULTS: PRESENTATION AND DISCUSSION

5.1 INTRODUCTION

This chapter evaluates the research findings of this study in relation to human rights and the respondents' memories of mass killings. It uses different research methodological approaches and argues that politically motivated mass killings in Burundi amount to "genocide" beyond the legal definition of the crime under the Genocide Convention.

This chapter critically analyses the mass killings in Burundi with a view to determining whether these killings meet the criteria of the Genocide Convention. In this chapter, reference is made to supportive literature and legal principles. Thus, the study embraces a holistic methodological approach of interpreting research findings that considers not only legal, but also political, socio-economic and humanitarian facets. In so doing, this chapter critically evaluates violations of fundamental rights such as right to life and dignity by using four phases of mass and politically motivated killings in Burundi to establish that the killings in question extend the current legal definitions of "genocide". The phases of mass killings are clustered into four periods: 1960-1972, 1973-1993, 1994-2005 and 2005 to date. This chapter considers the legal issues and assesses whether a *proprio motu* investigation of genocide in Burundi is possible as proposed by Barundi and non-Barundi respondents.

The following section, therefore, proceeds with a presentation of responses to the claims of genocide in Burundi and the proposed solutions to recurrence thereof.

5.2 IN-DEPTH SEMI-STRUCTURED INTERVIEWS, GENOCIDE RELATED RESPONSES

The main questions are analysed by considering closed and open-ended questions which were asked during interviews. The following questions were put to the participants:-

- What can be done to stop violations of human rights in Burundi?
- What can be done to stop "genocide" in Burundi?
- Which aspects of transitional governance need improvement in order to restore peace, human security, governance, rule of law, economic and social development in Burundi and Africa in general?

Below are the themes and sub-themes that emerged from the descriptive data analysis.

- UN Security forces/observers - (regional/ international military interventions and embargo).
- Socio-economic well-being by providing employment opportunities.
- Respect elected leaders.
- Great Lakes stability could stop ongoing wars.
- Truth and reconciliation.
- Punish perpetrators.
- Avoid mono-ethnic army.
- Promote social justice and fairness.
- Involve religious leaders.
- Equity in government.
- Education and launch of public awareness campaigns on human rights.
- Reform national army (educate and mix).
- Promote good governance.
- Discourage exclusionary politics.
- Address land problems properly.
- Promote equality of political parties.
- Promote freedom of expression.

In the in-depth, semi-structured interviews which were conducted among Politicians, MPS, Senators, Local Administrators, Technical Officials and Land Officials, the responses relating to mass killings or “genocide” in Burundi were far-reaching. Some interviewees who participated in the study volunteered to reveal their names but due to ethical considerations this thesis maintains anonymity by not disclosing the names of the participants. A majority of the respondents have opined that refugee-related problems as stated in chapters two and four are associated with impunity for mass killings, war crimes and crimes against humanity and gross violations of human rights.⁹⁷⁹ The interviewees largely recalled a chronology of events or phases of mass killings which, in their opinions, suggested that neither stability nor durable solutions to refugee and internal displacement problems will be realised in Burundi if these eventualities are not dealt with properly.

This chapter considers selected examples and emphasises that memories of mass killings reported by respondents as “genocide”⁹⁸⁰ are still fresh in the minds of Burundi survivors. As

⁹⁷⁹ Focus group interviews in Bujumbura, Gatumba, Gitaza and Rumonge of 2010 and 2011.
⁹⁸⁰ See Ndikumana, T.; (2002) “International Commission of Inquiry for Burundi” **The United**

echoed in the in-depth interview responses of politicians from both ruling and opposition parties, MPs, Land Commissioners, Local Administrators and civilians at large (inside and outside Burundi), the inference that what transpired amounted to genocide can be drawn from the following selected examples as reported by Burundi respondents from CNND-FDD, UPRONA, Land Commissioner, Local Administrators and civilians in general including respondents from other political parties like FRODEBU, PALIPEHUTU.

A Politician from CNND-FDD ruling party reported that:

I recall the **genocide** incidents since 1972; there was **massacre** of civilians in the southern parts of Burundi. *Hutus* started killing *Tutsis* because of the *Hutu extermination plan* which was to be executed by *Tutsis* in April 1972. Instead of the then government trying to resolve the dispute of civilians fighting among themselves, Michel Micombero regime came up with execution of an **extermination plan** of killing people especially from the *Hutu* ethnic group. They killed *Hutu* women, children and elderly people. In other parts like northern, eastern and western parts of Burundi where people were not aware of what was going on in the southern parts, *Hutus* found themselves being victims because influential *Hutus* such as students, businessmen, teachers, church leaders were being summoned by the government officials to go to prove their innocence. It is sad, **they never came back!** After 3 weeks almost 10 percent of **the entire population was brutally killed and buried in mass graves**. That was “a **pure genocide**” because the then government planned and executed this plan of killing civilians from *Hutu* ethnic group and 30 percent in 1972 fled the country.

In 1993 when the wind of democracy started under the vision of Melchior Ndadaye, people were tired of discrimination and killings; they welcomed Ndadaye's democratic initiatives and were fully mobilized. Buyoya the then President, allowed the democratic elections to take place. However, during the 1993 election campaigns, for example, Buyoya's UPRONA Party used statements and slogan like “whoever wants to be an orphan or a refugee must choose Ndadaye”. When election results were announced, there was a first attempt of a coup three days after Ndadaye's winning the presidential elections on 03/06/1993, another second coup took place on 03/07/1993 as planned by Buyoya's chief of cabinet, Colonel Sylvestre Ngingaba who came with a new *Hutu extermination plan* known as “Alliance Sing” or an agreement made to **eliminate Hutus**. Buyoya played a game of imprisoning Sylvestre Ngingaba and other military officials like Bernard Busokoza and others in Mpimba and Rumonge prisons but after one week they were all released.

A consensus was reached to allow Ndadaye to rule on 10/07/1993. But on 21, October 1993 he was brutally killed by the same *Tutsi* military officials. There was an immediate mass reaction as a response towards Ndadaye assassination and some civilians from *Tutsi* ethnic group were killed.

States Institute of Peace, see also International Commission of Inquiry for Burundi Final Report [2002].

FRODEBU officials who escaped death took refuge in French Embassy whereas the then FRODEBU President Jean Minani fled to Rwanda (*sic*).⁹⁸¹

The terms highlighted in bold in above respondent's views reflect a discursive and narrative valance that make the killings and exterminations approximate to and therefore equal in definition to genocide. The acts of mass killings are vividly etched in this respondent. The violence is raw. Ultimately all the highlighted lexical items show a drive towards selective elimination, and brutal killing of an entire Hutu population.

A politician from the UPRONA opposition party while referring to the "genocide" incidents since independence in the 1960s and ongoing politically motivated killings in post-conflict Burundi stated:

Although I belong to the opposition party, I have witnessed **mass killings** in Burundi equal to the **genocide** of Rwanda especially in 1960s, 1972, 1988 and 1993. This will not stop unless the current ruling party agrees to sit together with opposition parties in order to have a comprehensive political dialogue so that we can resolve our conflicts and bring the national unity and ultimately national healing.⁹⁸²

Similarly, as above, the terms used by the respondent are 'mass killings' and 'genocide.' The two terms, in the respondent's wording are synonymous. If the scale of the mass killings is equated to the politician's understanding of genocide, then the term appropriates the proportion of genocide as defined under Article 2 the Genocide Convention and Article 6 of the ICC Statute.

A Land Commissioner recalled that:

It is not easy to deal with land disputes especially the ones relating to refugees who fled the country in 1972. Sometimes when I am conciliating land disputes, I recall the **genocide** of 1972 when my father was killed.⁹⁸³

A Local Administrator in Rumonge reported that:

I was born in Rumonge Mugara; although I am 47 years old I still remember what happened in 1972. For example how we used to hide in the bushes and many *Hutu* people who were killed in the church, this was **genocide** because the targets by the *Tutsi*-led army were *Hutus* although some *Tutsis* were killed as revenge especially after Ndadaye's assassination in 1993.⁹⁸⁴

⁹⁸¹ An interview with a Politician from CNDD-FDD on 29/12/2010. See also the International Commission of Inquiry Report for Burundi *op cit* n.967 para. 95-98.

⁹⁸² Genocide memories of a Politician from the UPRONA Party as reported in the interview on 22/12/2010.

⁹⁸³ An interview with a Land Commissioner in Rumonge on 25/12/2010.

⁹⁸⁴ An interview with a local administrator in Mugara on 26/12/2010.

In the two respondents' responses, the term 'genocide' is again incessantly used. This usage of the term by the respondents, points to the scale of mass extermination experienced in the periods described. To the extent that respondents use this term, they also imply the gravity of the killings, the systematic nature in the execution and the levels of brutality. To this extent then the term is used to equate to and parallel the legal definition of genocide.

In the light of the abovementioned respondents' views, it is clear that mass murders and other heinous crimes which had been committed in Burundi not only explain the reality of individuals' physical harm, but also social, economic and psychological injuries.

The question formulated in chapter one:

- Can Article 2 of the Genocide Convention, 1948 be interpreted broadly to accommodate systematic Hutu and politically motivated mass killings in Burundi so as to constitute the crime of genocide?

The question of genocide is categorically answered by the respondents' opinions above. It can be deduced that genocide indeed took place as remembered by the majority of Burundi respondents while the genocide of 1993 spread across the entire Burundi. The "genocide" memory becomes a repository of the gruesome experiences. In so far as the remembering is indelible, the psychological scars remain a constant reminder of the experience as genocide.

In the light of these research findings, this chapter considers and limits itself to two major themes that are relevant to the study which are critically analyzed under:

- The need for proper investigation of genocide claims and prosecution of the perpetrators.
- The need for truth-telling, reconciliation, reparations for the victims, national healing and reconstruction.

The apparent differences between what is written by authors and the reality of mass killings as reported in Burundi can be explained in a number of ways.

- Most of the research done on Burundi has focused on peace negotiations and peace-building while ignoring the fundamental impunity exhibited in past mass killings.
- There is a lack of national and international monitoring systems.
- There is a lack of judicial, legislative and executive transformation strategies.

Given the unresolved problems of systematic *Hutu* and politically motivated mass killings, Barundi and non-Barundi respondents in this study have called for, *inter alia*, prosecution, truth-telling and reconciliation as solutions to stop human rights violations and "genocide". Furthermore, there are aspects that need improvement in order to restore peace, human security, good governance, the rule of law, economic and social development as narrated hereunder.

5.3 RESPONDENTS' PROPOSAL TO PROSECUTE AND PUNISH THE PERPETRATORS OF SYSTEMATIC GROSS HUMAN RIGHTS VIOLATION AKIN TO GENOCIDE

5.3.1 Barundi respondents and non-Barundi' opinions

Out of 113 Barundi respondents interviewed, 17 (15. %)⁹⁸⁵ called for an investigation into past human rights abuses which investigation ought to be followed by the prosecution and punishment of the perpetrators in order to prevent the recurrence of similar abuses. Selected respondents proposed the following:

"Prosecute those who committed genocide through the ICC."⁹⁸⁶

Watu waliohusika na mauaji ya kuangamiza wafikishwe mahakamani na kuadhibiwa... People who are responsible for genocide must be taken to court and be punished.⁹⁸⁷

Genocide cases should be dealt with thoroughly including those dating back to the 1960s and 1970s.⁹⁸⁸

Stricter laws should be enforced.⁹⁸⁹

To deal with impunity, perpetrators should be punished without discrimination based on ethnicity, political party affiliation.⁹⁹⁰

Mahakama zifanye kazi inavyostahili. Waliohusika na mauaji wahukumiwe... The courts must do their jobs properly. Perpetrators must be prosecuted.⁹⁹¹

Arrest, prosecute and convict all perpetrators of genocide. Learn something like principles used by other countries which experienced genocide. Strive for national unity and eliminate all forms of unfair discrimination.⁹⁹²

⁹⁸⁵ Interviews with Respondents 23, 25, 30, 33, 34, 42, 69, 70, 84, 85, 89, 91, 93, 96, 100, 108 and 111. See Spread Sheet: Appendix E.

⁹⁸⁶ An interview with Respondent 69, Spread Sheet: Appendix E *ibid.*

⁹⁸⁷ An interview with Respondent 23, Spread Sheet: Appendix E *ibid.*

⁹⁸⁸ An interview with Respondent 70, Spread Sheet: Appendix E *ibid.*

⁹⁸⁹ An interview with Respondent 84, Spread Sheet: Appendix E *ibid.*

⁹⁹⁰ An interview with Respondent 85, Spread Sheet: Appendix E *ibid.*

⁹⁹¹ An interview with Respondent 96, Spread Sheet: Appendix E *ibid.*

⁹⁹² An interview with Respondent 100, Spread Sheet: Appendix E *ibid.*

One respondent, however, did not understand the meaning of the concept of “genocide” and stated that:

“I personally don't understand the concept of genocide in Burundi”.⁹⁹³

Sometimes it is difficult to understand the meaning of the term “genocide” in Burundi's perspective. That is why Krueger and Krueger have argued that some lawyers and government officials deny that there was “genocide” committed in Burundi, either creeping or swift.⁹⁹⁴

Non-Barundi respondents also had far-reaching responses. Out of 16 non-Barundi respondents interviewed, 6 (37%),⁹⁹⁵ respondents called for an investigation into past human rights abuses, prosecution and punishment of the perpetrators as a way of preventing human rights abuses and genocide. Some of the respondents stated the following:

A student from Cameroon reported that:

Hate groups which broadcast, advocate and popularise propaganda among Barundi must stop hate speeches. Perpetrators must suffer the consequences. Punishments such as death penalty or life sentence imposed by the International Criminal Court or International Court of Justice must be implemented. UN Security Council must play its role effectively by protecting the population from genocide, war crimes and crimes against humanity in Burundi.⁹⁹⁶

A South African scientist put emphasis on prosecution and reconciliation among Barundi and proposed that:

Justice must prevail first and punish offenders rather than protect them. There is also need for reconciliation between the perpetrators and the victims so as to heal or close the gap of enmity between them. Without this conflict can spark due to sentiments of revenge.⁹⁹⁷

A Nigerian law lecturer, while highlighting the need for human rights education among Barundi, national dialogue, constitutional guarantees and protection of human rights, punishment and compensation for victims of mass killings and deterrence stated that:

⁹⁹³ An interview with Respondent 107, Spread Sheet: Appendix E *ibid*.

⁹⁹⁴ Krueger and Krueger, *op cit* n. 22 at p. xii.

⁹⁹⁵ See the Spread Sheet: Appendix F.

⁹⁹⁶ An interview with Respondent 6, Spread Sheet: Appendix F *ibid*.

⁹⁹⁷ An interview with Respondent 12, Spread Sheet: Appendix F *ibid*.

First important issue is that adequate education should be provided for all citizens for them to know their rights and responsibilities and to be able to respect the rights of others. Human rights education is fundamental and it will serve as an effective instrument towards reducing the incidents of human rights violations. People should be educated to see one another as human beings first and see tribal and ethnic issues as secondary.

Secondly, there should be concerted efforts by international and regional organisations as well as national institutions and individuals to combat intolerance and extremism and to accept cultural and tribal diversity. Also, the right to development and to democratic participation by the people in decision-making processes on issues affecting their daily lives should be well entrenched. There should be adequate constitutional provisions protecting human rights in Burundi and an effective system of redress for violations of human rights with adequate compensation in place.

There should be respect for human rights, rule of law and political stability throughout the country. There should be constant peace meetings and agreements with parties involved; mediation and conciliation efforts should increase as well. There should be established a global mechanism of investigating the crimes against humanity and those found guilty should be adequately punished to serve as deterrence. At the national level, there should be Peace and Reconciliation Commission as well as the National Human Rights Commission to address all the issues of human right abuses and violations.⁹⁹⁸

A South African psychologist had various suggestions and stated that:

[There must be] greater and immediate support and involvement of the international community which should be conditioned on cessation of human rights violations. This should go the same way towards understanding and ameliorating economic pressures and social problems. Exploring and implementing ways of getting groups together in order to remove suspicion and distrust...something more than "Truth and Reconciliation" hearings because I believe these have very little lasting effect. Bringing of genocide perpetrators before the International Tribunals and harsh sentences for them (have these tribunals in countries where death penalty is applicable). Offer the relative leaders of the political factions' incentives for coming together and ensuring peace and security. The activation of an independent, impartial judicial system. Greater commitment from the rest of Africa and the international community is required in sending expertise and support to uplift the people. Greater pressure from African leaders...caution should be put on all action leaders in Burundi to "come to the table and reconcile".⁹⁹⁹

A Sudanese respondent emphasised good governance and reported that:

Good leadership and governance: leaders should lead by example. Education through enlightening people on the advantages and

⁹⁹⁸ An interview with Respondent 8, Spread Sheet: Appendix F *ibid.*

⁹⁹⁹ An interview with Respondent 10, Spread Sheet: Appendix F *ibid.*

disadvantages of insecurity that leads to slow development. Control of arms used by the army (military) that are used to kill more people. Basically, disarmament should be considered as an option.¹⁰⁰⁰

A Tanzanian scientist stated that:

Rule of law (based on a sound scientific understanding which is influenced by the history of genocide committed in Burundi) needs to be developed and implemented in the country. Respect for democracy and people's rights especially right to life must be protected and promoted. Leaders should promote democracy and respect for human rights and serve as examples. Equity among ethnic groups in terms of resource sharing, education, social service provisions must be encouraged in order to eliminate socio-economic disparities among ethnic groups and to ensure ethnic representation in the government and public institutions. Educating people on the need to reconstruct Burundi as a new beginning based on lessons drawn from the history behind the causes and consequences of the genocide. Government must administer and distribute public resources such as land equally to avoid the risk of violence and have national development goals. There should be projects that aim to improve the lives of the disadvantaged minority groups who suffered most from civil war.¹⁰⁰¹

Other respondents from Kenya, Malawi, Zambia and Botswana, while emphasising the need for immediate prosecution, zero tolerance of human rights violations and reconciliation among the warring parties reported that:

Burundi and all people must understand that genocide is a crime punishable by the International Criminal Court. Therefore, zero tolerance of violations and immediate prosecution of those involved in genocide must be promoted. Leaders must have goodwill to reconcile the warring parties and ensure that government officers come from all the tribes equally or fairly.¹⁰⁰²

A Rwandese medical doctor and a civil engineer reflected on Rwandan genocide and stated:

The genocide in Burundi must be studied together with the question of instability in the Great Lakes Region. The dictatorial regimes in the Great Lakes Region are major problems whereas the hatred between *Hutus* and *Tutsis* is a common practice. There must be democratic elections where people must choose their leaders. Burundi must be led in a democratic way and [show] respect for human rights of its citizens. Burundi must not be influenced by other countries even if they got the same problems). Also Burundi must stop to rely [on] and run be by western politics which always encourage African countries to fight because of [their] economic and political interests.

Burundi and all African countries must learn how to use wisely and fairly their own resources. To institute social programmes and education on equality,

¹⁰⁰⁰ An interview with Respondent 7, Spread Sheet: Appendix F *ibid*.

¹⁰⁰¹ An interview with Respondent 14, Spread Sheet: Appendix F *ibid*.

¹⁰⁰² Interviews with Respondents 1, 4, 11, 13 and 16, Spread Sheet: Appendix F *ibid*.

respect for human rights and rule of law through cultural entertainment (concerts, comedies and sports) especially among the youth. There must be promotion of justice and freedom of expression through media reporting without fear and favour. There must be formation of [a] non-partisan, non-ethnic army and promotion of social justice through all government institutions and democracy including promoting a culture of accountability and justice for all. Educate the army and the population at all levels about the rights of each individual. Dialogue about the past atrocities, let the truth be known about the past and establish a national day of forgiveness and reconciliation. Strong criminal courts in Burundi must be created in order to stop impunity and restore peace and to impose embargo on the country if they continue to violate human rights and to strengthen and implement policies on security.¹⁰⁰³

According to the Barundi and non-Barundi views stated above, prosecution of perpetrators, rule of law, democracy, respect for human rights and truth-telling and reconciliation were highlighted by respondents as path-breaking recommendations that would deal with impunity and engender economic development.

This thesis advocates for the prosecution of the perpetrators of genocide and other monstrous crimes in Burundi by considering first the global trends of prosecuting perpetrators of genocide or mass killings as was the case in Rwanda, Yugoslavia, Sierra Leone, Cambodia, Kenya and Libya. The origin of criminal prosecutions for genocide and human rights abuses started with the recognition that the persecution of ethnic, national and religious minorities is punishable under customary international law. Thus, the crime of genocide is not only morally reprehensible but also incurs legal liabilities. Globally, attempts have been made to internationalize criminal prosecution through bilateral and multilateral treaties declarations.

It is submitted that the mass killings of innocent civilians within a given state must attract both state and individual responsibilities. However, genocide cases are consistently not being prosecuted with the necessary legal rigour if Burundi is cited as an example. Schabas has contended that genocide is essentially committed at the order of powerful perpetrators who are often seen as above the law.¹⁰⁰⁴ Schabas' contention is relevant in Burundi's case because there is an unwillingness to prosecute perpetrators of mass killings dating to the 1960s. However, global trends have shown that the perpetrators of genocide can be prosecuted at the international level if there is unwillingness or lack of capacity to prosecute perpetrators at national level. Thus, the principle of universal jurisdiction can be invoked as demonstrated in

¹⁰⁰³ Interviews with Respondents 2 and 3, Spread Sheet: Appendix F *ibid*.
¹⁰⁰⁴ Schabas, *op cit* n. 362 at p. 18.

the *Pinochet*,¹⁰⁰⁵ *Eichmann*¹⁰⁰⁶ and *Yerodia*¹⁰⁰⁷ cases or the ICC's "Complementary Principle" can be applied as shown in the *Taylor*,¹⁰⁰⁸ *Kenyatta*,¹⁰⁰⁹ *Ruto*,¹⁰¹⁰ *Barasa*¹⁰¹¹ and *Gaddafi*¹⁰¹² cases.

Many states have enacted legislation concerning the prosecution for and repression of genocide, mostly by amending the penal or criminal codes in order to add genocide as a distinctly gross offence. Many states have borrowed from the Genocide Convention's definition under Articles II and III but have also added their own innovations.¹⁰¹³ In the case of *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*¹⁰¹⁴ the ICJ held that the aim of the UN in adopting the Genocide Convention was to condemn and punish genocide as a crime under international law, especially genocide's attributive denial of the right of existence of entire human groups.

The scope of the Genocide Convention's definition has been interpreted from both national and international law viewpoints, but some countries employ a narrow interpretation of genocide while others adopt a broader interpretation. For example, the United States of America (USA) enacted a piece of legislation representing a narrow view. The USA Genocide Convention Implementation Act of 1987 specifies that the destruction of a group in terms of the Genocide Convention must represent the destruction in whole or in substantial part.¹⁰¹⁵ On the other hand, other countries like France, through the French Penal Code, ¹⁰¹⁶ define genocide as the destruction of any group whose identification is based on an arbitrary manner.

In Canada, a law was enacted to implement the Rome Statute.¹⁰¹⁷ In terms of Canadian law, genocide means an act committed with intent to destroy in whole or in part an identifiable group

¹⁰⁰⁵ *R v Bow Street Metropolitan Stipendiary Magistrates, Ex Parte Pinochet Ugarte 3*, *op cit* n. 461.

¹⁰⁰⁶ *Attorney-General of Israel v Eichmann*, *op cit* n.506.

¹⁰⁰⁷ *DRC v Belgium*, *op cit* n. 493.

¹⁰⁰⁸ See *The Prosecutor v Charles Ghankay Taylor*, *op cit*. n. 478.

¹⁰⁰⁹ See *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V ICC-01/09-02/11- 414*.

¹⁰¹⁰ See *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11 of 29 March 2012.

¹⁰¹¹ See *The Prosecutor v Walter Osapiri Barasa*, Case No. ICC-01/09-01/13.

¹⁰¹² See Leanos, B.; (2012) "Cooperative justice: understanding the Future of the International Criminal Court Through its Involvement in Libya" **Fordham Law Review**.

¹⁰¹³ Schabas, *op cit* n. 362 at p.5.

¹⁰¹⁴ [1996] ICJ Reports 226 para. 31.

¹⁰¹⁵ Sections 1851 and 1091(a).

¹⁰¹⁶ France's Penal Code of 23, July 1992, Article 211-1.

¹⁰¹⁷ The Crimes against Humanity and War Crimes Act, 48-49 Elizabeth, 1999-2000, C-19, section 4.

of persons which means at the time and place of its commission such act or omission to act constitutes genocide in accordance with customary international law. Genocide is deemed as the most serious crime that concerns the international community under the Rome Statute and in this deliberation, the Rome Statute has reiterated the wording similar to the Genocide Convention as falling within the ambit of customary international law.¹⁰¹⁸ Whereas the Genocide Convention limits the development of international criminal law, national laws such as Canadian legislation incorporate the anticipation of genocide and give room to the development into international law.

The Rome Statute of the ICC¹⁰¹⁹ was adopted as complementary to national criminal jurisdictions. Having in mind the present and future prosecutions, the establishment of an independent permanent international criminal court that would collaborate with the UN to have jurisdiction over the most serious crimes concerning the international community was unavoidable.¹⁰²⁰ Variations of national practice according to Schabas¹⁰²¹ have contributed to the understanding of the Genocide Convention's customary legal definition of the crime of genocide.

The majority of domestic laws concerning genocide repeat the definition of the Genocide Convention which confirm its authoritative nature. This draws on the elements of international criminal law, humanitarian and human rights laws. Undeniably, these elements impose obligations on State Parties in terms of prosecution and extradition. In the *Pinochet* case, the extradition of Pinochet from England to Spain to face prosecution was raised. Although the defence successfully challenged the extradition of Pinochet, he was later prosecuted in Chile. The binding nature of the Genocide Convention claims the status of international humanitarian law treaty which is supported by the inclusion of the crime within the jurisdiction of the international *ad hoc* tribunals such as the ICTY¹⁰²² and ICTR.¹⁰²³

It is imperative to point out that criminal responsibility offers a normative foundation that helps to bridge the phases of a nationally weakened rule of law. Teitel has observed that through criminal trials the pursuit of an historical truth is embedded in a framework of accountability

¹⁰¹⁸ Articles 5 and 6 of the Rome Statute.

¹⁰¹⁹ The Rome Statute of the ICC was circulated as document A/CONF. 183/9 of 17 July 1998, corrected by process-verbaux on 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. It was entered into force on 1 July 2002.

¹⁰²⁰ The Preamble of the Rome Statute of the ICC.

¹⁰²¹ Schabas, *op cit* n. 362.

¹⁰²² Article 4 of the Rome Statute of ICTY adopted by UN RES/827 of 25 May, 1993.

¹⁰²³ Article 2 of the Rome Statute of ICTR adopted by UN RES/955 of 8 November, 1994.

and the pursuit of justice.¹⁰²⁴In the contemporary world, criminal proceedings are used to confirm the importance of individual rights and criminal responsibilities attributed to the commission of crimes.

In the wake of legal principles articulated at the Nuremburg Trials, a precedent has been set that asserts individual and collective criminal responsibility in an historical approach by establishing a permanent record of the Nazi's inhumane extermination policy. Evidently, the Nuremberg Trials have laid down the foundation for dealing with the crime of genocide and other serious international crimes. Although the initial interpretation was narrow or "intentionalist" which aimed at holding accountable the military elites only, however, there has been a paradigm shift after the Nuremburg Trials from "intentionalist" to "functionalist" or a broader approach which considered criminal responsibility as a universal norm. Hence, criminal responsibility can be extended to all sectors not only in the country where the crimes were committed like Germany, but also to other countries which might have hosted the perpetrators of genocide.¹⁰²⁵

As already noted, a broad interpretation of genocide is demonstrated in the *Eichmann Trial*¹⁰²⁶ where Adolf Eichmann was charged with 15 counts of crimes against humanity, war crimes, crimes against humanity and membership to a hostile organization in 1961 in Israel. The *Eichmann* case followed a broader interpretation approach which was extended to include accomplices to the genocide who had to be prosecuted in other countries such as the Netherlands in the case of *Public Prosecutor v Menten* (Holland Proceedings from December 1977- January 1981), France, (in the prosecutions of Klaus Barbie in 1987, Paul Touvier and Maurice Papon in 1990s) and the criminal proceedings in the US, England, Scotland and

¹⁰²⁴ Teitel, *op cit* n. 435 at p. 30.

¹⁰²⁵ Teitel, *ibid* at pp. 74-75. For intentionalist and functionalist debate, see Bessel, R.; (2003) "Functionalists vs Intentionalists: The Debate Twenty Years on or Whatever Happened to Functionalism and Intentionalism?" **German Studies Review**.

¹⁰²⁶ *Attorney-General of the Government of Israel v Eichmann* (Israel Sup. Ct. 1962), Int'l L. p. vol. 36, p. 277. The Supreme Court of Israel confirmed the conviction of Eichmann by the District Court in Jerusalem in December 1961 for crimes against humanity, war crimes and crimes committed against the Jewish people (genocide) during the WWII. This landmark judgment was the first universal jurisdiction case in over a decade since the USA and the UK together with other Commonwealth countries, had secretly called a halt to all prosecutions of Axis nationals for crimes against humanity and war crimes they have committed. The *Eichmann's* case laid down the foundation for a broad interpretation and application of the Genocide Convention and development of public international law. See also, Hilberg, R; (1961) **The Destruction of the European Jews**, Yale University Press. Amnesty International (2012) "Eichmann Supreme Court Judgment: 50 years on, Its Significance Today", **Amnesty International Publications** at p. 4, available at: <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ior530132012en?CMD=VEROBJ&MLKOB=31720875858> [accessed on 16/10/2013].

Australia which arose due to these states' granting safety havens to the perpetrators of genocide during WWII.¹⁰²⁷

International human rights law, according to Brems,¹⁰²⁸ provides minimum requirements for the government's behaviour in all spheres of policy making, including a government's efforts to deal with the legacy of a previous regime and violent conflicts. To some extent, the creation of supra-national human rights protection mechanisms after WWII in itself can be considered an important aspect of transitional justice efforts to deal with impunity. This was particularly the case in Europe, where the European Convention on Human Rights (ECHR) was adopted in 1951, only 6 years after the end of the Second World War. Since its adoption, ECHR case law relating to transitional justice has included hundreds of decisions dealing with a wide range of issues, mainly compensation and restitution, but also prosecution, memory and truth-telling.¹⁰²⁹ It is submitted that Burundi could benefit from these laudable lessons.

This thesis refers to the genocide in Burundi and has demonstrated that Burundi's case is a complex one that calls for joint efforts as happened in the German Holocaust. For example, the legacy of previous *Tutsi*-led military regimes in Burundi has been associated with systematic *Hutu* mass killings and yet criminal responsibility and accountability of the perpetrators has been undermined. It is submitted herein that the past and current genocidal practices must be exposed in order to heal Burundi community and prevent the recurrence of similar practices in the future.

As research findings in this study suggest, *Hutu* and politically motivated mass killings in Burundi have resulted in grave human rights violations, especially the right to life and dignity.¹⁰³⁰ The main task of the post-conflict government in Burundi was to heal Burundi through establishing transitional justice mechanisms as proposed in the peace and ceasefire agreements and to prosecute the perpetrators of systematic mass killings in order to prevent their recurrence and to provide legal remedies to the victims. Regrettably, the post-conflict government has, to date, not established transitional justice mechanisms such as the Truth and Reconciliation Commission or a Criminal Tribunal to prosecute the perpetrators of mass killings that equate to genocide.

¹⁰²⁷ Amnesty International, *ibid* at pp. 10 -12.

¹⁰²⁸ Brems, E.; (2011) "Transitional Justice in the Case Law of the European Court of Human Rights" **International Journal of Transitional Justice: Oxford Journals**, at p.282. Oxford University Press: Available at: <http://www.oxfordjournals.org/>

¹⁰²⁹ Brems, *ibid*.

¹⁰³⁰ See chapters one, two and four of this thesis.

This thesis submits that there has been no proper investigation of systematic *Hutu* and politically motivated mass killings since 1960s to date and truth-telling ought to have determined whether systematic mass killings in Burundi amounted to genocide.¹⁰³¹ In legal terms, the crime of genocide refers to the intent to destroy a designated or targeted group. However, there is no consensus among scholars as stated in chapters one and two on Burundi's case. The efforts of scholars to make sense of the appalling, deliberate and violent destruction of human lives associated with other grave human rights violations in Burundi have been hampered by two main difficulties. First, a practical hurdle relates to the origin of the Simbananiye and Sining Plans¹⁰³² which have been obscured by the destruction of documentary evidence, including the disappearances of witnesses and victims alike. Secondly, an abstract hurdle where through historical analysis of the Burundi genocide, scholars are confronted with the question of how they can provide a rational explanation or validation of the inhumane phenomenon and whether such an explanation could possibly exist. These difficulties have led to a diversity of conflicting interpretations of genocide in Burundi.¹⁰³³

As May has contended, genocide has a specialised meaning which is not consonant with public understanding. The majority of scholars on genocide tend to focus on non- legal aspects and ignore the important legal aspects that consider the rights and duties of both perpetrators and victims of genocide.¹⁰³⁴

5.3.2 Critical assessment of prosecution for genocide

Genocide is one of the most shocking crimes in the world. The practice of exterminating a whole group of people has been part of humanity's call to end genocide and this has been jointly approved by the UN through adoption of treaties like the Genocide and Torture Conventions. Additionally, the Rome Statute compliments the previous UN Conventions and attests to the global commitment to end genocide. Regrettably, Burundi's "genocide" has failed to attract the attention of the international community. For example, it is difficult for mass killings in Burundi, which the majority of respondents in this study have viewed as genocide, to meet the set criteria espoused by the Genocide Convention.¹⁰³⁵

Although contemporary society calls for those responsible for committing genocide to account for their actions as demonstrated in the case studies in chapter three, the main argument in

¹⁰³¹ Refer to sections 2.4.3 and 5.2 of this thesis.

¹⁰³² The directives of Artémon Simbananiye, Minister of Foreign Affairs at the time of the 1972 mass killings and Colonel Sylvestre Ningaba, Buyoya's chief of cabinet, of 1993, see Respondent's view, *op cit* n. 981.

¹⁰³³ See section 1.5. of this thesis.

¹⁰³⁴ May, L.; (2010) **Genocide: A Normative Account**, Cambridge University Press at p. 4.

¹⁰³⁵ See generally Lemarchand, *op cit* n. 197 at p. 9.

this study is that substantive aspects of Burundi's "genocide" have not been accompanied by the necessary resolve to ensure responsibility and accountability.

The elements of genocide are clearly set out in the international legal instruments mentioned before. However, the interpretation thereof has varied from case to case, that means, from tribunal to tribunal such as the Nuremberg, ICTY, ICTR, Sierra Leone, Cambodia, East- Timor, Chile, Guatemala and others which is also found in the variation of the definition of genocide under national legislation.

When the ICC was established, the assumption of the international community was to anticipate a judicial precedent that would maintain legal consistency and certainty. However, among the most problematic aspects is the judicial inconsistency in the interpretation and definition of a targeted group in the context of genocide. On one hand, it is submitted that the definition of genocide should not be too wide while on the other hand, a too strict interpretation of the definition can lead to genocide remaining acknowledged and subsequently not prosecuted.¹⁰³⁶ This has been demonstrated in the case of Burundi because the crime of genocide is erroneously subsumed within the broad concept of war crimes.¹⁰³⁷

Schabas has suggested that the definition and interpretation of targeted group should be used together in cohesion with a broader view of the crime of genocide. The author has offered a workable solution by enlarging the definition and adding new categories to the groups already protected by the Genocide Convention. These include political, economic, social and cultural meanings attributable to genocidal practices.¹⁰³⁸ While the scholarly views have implied lack of consensus on defining genocide in Burundi, this thesis postulates that there have been systematic mass killings which "genocide" as defined in other publicised contexts.

This study examines the stages of genocide as referred to in chapter two in Burundi's perspective to see whether investigation and prosecution could be possible. For instance, the mass killings of *Hutus* in the 1960s to 1990's and the politically motivated killings in post-conflict Burundi could be interpreted broadly as genocide. The interpretation of the crime of genocide in respect of ethnic, political and social groups is possible because *Hutu* mass killings, politically motivated killings, killing of *Batwa* and people with albinism as distinct groups and the Gatumba mass killings of 2011 could be interpreted broadly so as to amount to genocide.

¹⁰³⁶ Schabas, *op cit*, n. 362 at p. 7.

¹⁰³⁷ Schabas, *op cit*, n. 362 at p. 7.

¹⁰³⁸ Schabas, *op cit*, n. 362 at p. 6.

The following section proceeds an analysis of Stanton's eight stages of genocide from the viewpoint of Burundi.

5.3.3 Eight stages of genocide in Burundi's perspective

Although there is no scholarly consensus so as to whether what happened in Burundi amounts to genocide or not, the Genocide Convention, Rome Statute of ICC and post-transition Constitution of Burundi provide for the substantive processes and definition of the nature of genocide. Thus, Burundi's genocide can be inferred and interpreted against the background of Stanton's eight stages of genocide.¹⁰³⁹

- **Classification** - Burundi community has been categorised into *Hutu*, *Tutsi* and *Twa* ethnic groups whose social, political and economic statuses have been determined according to ethnicity, especially in pre-peace agreements era.
- **Symbolism** - In Burundi, apart from ethnic classification, other means of grouping people such as names and symbols have been used to reinforce stereotypes and prejudices. For example, "northerners and southerners" or "*Bahima* and *Banyaruguru*"¹⁰⁴⁰ or "SP" which stands for a French acronym for "*Sang Pur*" to mean "Pure Blood",¹⁰⁴¹ *Tutsis* are inherently superiors.¹⁰⁴² In the post-conflict era, other names like "refugees", "returnees" or foreigners" and "*abasangwa*" have emerged to supplement already existing groups and sub-groups.¹⁰⁴³
- **Dehumanisation** - In Burundi, hate speeches and propaganda have been used to criticise victim groups. For example, Bratic and Schirch have asserted that political elites incite violence through the media and use it as an acceptable means of addressing grievances.¹⁰⁴⁴ Secret meetings and circulation of documents among perceived 'noble' group members are held while instructing them what to do and what weapons ought to be used. For example, an inference can be drawn from the White

¹⁰³⁹ Stanton, G.H.; "The 8 Stages of Genocide", available at: <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>. [accessed on 05/09/2011].

¹⁰⁴⁰ Ndarubagiye, *op cit* n. 9 at p.xv.

¹⁰⁴¹ Ndarubagiye, *ibid* at p.42.

¹⁰⁴² Krueger and Krueger, *op cit* n. 22 at p. 24.

¹⁰⁴³ A general view of returnee respondents who are labelled according to the countries they fled to.

¹⁰⁴⁴ See generally Bratic, V.; and Schirch, L.; (2007) "Why and When to Use the Media for Conflict Prevention and Peacebuilding", **Global Partnership for the Prevention of Armed Conflict**. Available at: <http://www.cco.regener-online.de/2007> [accessed 28.03.2013].

Paper commonly known as "Plan Simbananiye" issued by the Micombero regime on the eve of 28 April 1972.¹⁰⁴⁵ In the media reporting during *Tutsi* military regimes and "Alliance Sining" of 1993 this dehumanising episode is referred to in an earlier plot to assassinate President Ndadaye.¹⁰⁴⁶

- **Organisation** - The *Tutsi*-led army, militias, security services, police and gendarmerie were formed, trained and organised to execute mass killings of *Hutu* civilians in order to deny state responsibility.¹⁰⁴⁷ Consequently, the *Hutu* mass killings of the 1960s, 1972, 1988, and 1993 occurred pursuant to their extermination plans like the Simbananiye¹⁰⁴⁸ and Alliance Sining.¹⁰⁴⁹ The aim of these plans was to provoke the *Hutus* into staging uprisings in order to justify a devastating repression and thus cleanse the country once and for all of the "*Hutu* peril".¹⁰⁵⁰
- **Polarization** - In Burundi, moderates from the *Tutsi* ethnic group were perceived as having the ability to stop mass killings, therefore, they became the first victims to be arrested and killed. For example, the assassination of Prince Rwagasore, Ntare V, Gilles Bimazubute and other *Tutsi* moderates in 1961- 1993 are all attributable to polarization.¹⁰⁵¹ *Tutsi* extremists targeted *Tutsi* moderates in order to silence them.

¹⁰⁴⁵ See the International Commission of Inquiry Report for Burundi, 1993. The Commission has been criticised in the following aspects:

- **The time elapsed while many incidents were still under investigation** - In that period of upheaval many perpetrators and survivor witnesses were displaced, became refugees, or died.
- **Ethnic polarization in Burundi** - In 1993, ethnic confrontation and revenge through collective engagement in extermination plans. This situation fostered feelings of "ethnic loyalty" that lead to concealment of evidence, or justify the actions as self-defence. In such a climate, it was difficult to obtain reliable evidence.
- **The security situation in Burundi (Bujumbura and in the interior)** - the then security situation in Burundi was perhaps the greatest challenge encountered by the Commission
- **Inadequacy of resources** - the commission faced the challenges of human and material resources which had negative effects on its performance

¹⁰⁴⁶ See Respondent's view, *op cit* n. 981.

¹⁰⁴⁷ *Tutsi* army, police, gendarmerie and members of the UPRONA youth wing- JRR in 1972.

¹⁰⁴⁸ The directives of Artémon Simbananiye, Minister of Foreign Affairs at the time of the mass killings.

¹⁰⁴⁹ See Tita, *op cit* n. 63 at p. 4, Mbazumutima, *op cit* n. 65 at p. 40.

¹⁰⁵⁰ For example the *Hutu* uprising that resulted into the 1972 genocide. The aim of the Simbananiye plan was presumably to provoke the *Hutus* into staging an uprising so as to justify a devastating repression and, thus, cleanse the country once and for all of the *Hutu* threat.

¹⁰⁵¹ See Krueger and Krueger, *op cit* n. 22 at p. 11.

- **Preparation** - There have been intense exclusionary measures in Burundi in pre-peace agreement era, especially in the fields of education and employment. *Tutsis* were identified by “i” symbol whereas *Hutus* would be identified by “u” symbol¹⁰⁵² and their properties were expropriated. In other words, *Hutus* and *Twas* were segregated or discriminated against directly or indirectly. Additionally, a preparatory stage which involves the deportation and concentration of targeted groups into famine-struck camps can be identified through the creation of IDPs and refugees because the basic rights of IDPs and refugees have been continually violated. For example, in the concentration camps of 1993, the *Tutsi*-led army was responsible for sexual enslavement, starvation, persecution and murder of millions of *Hutu* and *Twa* civilians.
- **Extermination** - At this stage, politically- motivated killings begin and quickly become mass killings which, in legal terms, are referred to as extermination. This systematic extermination is “genocide.” It is “extermination” because the perpetrators do not recognise their victims as complete human beings. When extermination is supported by the state, the armed forces often work with militias to execute the plans. Sometimes genocide results from revenge killings by groups that are against each other, creating the downward and violent spiral of bilateral genocide. In Burundi, the systematic mass killings of *Hutus* from the 1960s to 1990s by the *Tutsi*-led army resulted also in the killing of *Tutsi* civilians by way of revenge. In thi study, such a practice equates to bilateral genocide. This includes politically motivated killings in post-conflict Burundi.
- **Denial** - Denial of genocide always follows after genocide has been committed. It is among the most unquestionable indicators of further genocide. The perpetrators of genocide dig up the mass graves, burn the bodies, try to conceal evidence and intimidate the witnesses. The perpetrators of genocide deny that they committed any crimes and often shift blame onto the victims. In Burundi’s case, there has been denial of genocide in terms of blocking investigations into genocide. For example, Ndarubagiye has claimed that Buyoya staged a second *coup d’état* in 1996 in order to prevent future investigations.¹⁰⁵³ At the denial stage, perpetrators continue to govern until driven from power by force, when they flee into exile and remain indirectly in power with complete impunity.¹⁰⁵⁴

¹⁰⁵² Krueger and Krueger, *ibid* at p. 30 and Ndarubagiye, *op cit* n. 9 at p. 44.

¹⁰⁵³ Ndarubagiye, *ibid.* at p. 89.

¹⁰⁵⁴ Krueger and Krueger, *op cit* n.22 at p. xiii.

Referring to Stanton's denial stages of genocide, Burundi respondents in this study have confirmed that there have been mass attempts between 1972 -1993 to conceal evidence of genocide. For example, Rusizi River has been identified as a mass grave for genocide victims since 1960s, 1972, 1993 to - date ¹⁰⁵⁵ while throwing dead bodies into Lake Tanganyika and pits is common practice in many parts of Burundi.

Using Stanton's eight stages of genocide we can deduce the following: the first stage of classification which involves the division between cultures, races or ethnic classifications ("us" and "them") lays down the foundation for the second stage of symbolisation to flourish through physical characteristics such as names or symbols that are given or attributed to certain groups. The third stage is dehumanisation where the humanity of the group is denied. The group is often labelled or called certain names during incitement to genocide. The bodies of the victims are mutilated to express the denial of their humanity. The fourth stage is organisation (sometimes an informal one). It is normally done by the state in collaboration with its agents or hate groups but also varies from culture to culture. The fifth polarization stage involves the killing of moderates belonging to the killing group intending to stop the extermination process. Stage six is characterised by preparation which includes identification of the victim group by either specific external markings or cards, expropriation of property and concentration of the victim group in structures such as extermination or concentration camps.

The penultimate stage is extermination of the victims as they are not regarded as human beings. This is also the reason for the mutilation of victims' bodies, burying them in mass graves or burning their bodies. The final and eighth stage is denial. During this stage, mass graves are dug up and hidden and records are destroyed. Denial takes place when reports of genocide are dismissed and referred to as propaganda or labelled "unconfirmed" or alleging that the number of killed victims is minimised and that the mass killings in question do not fit into the definition of genocide. The first stages precede later stages but continue to operate throughout the genocidal process, thus, each stage reinforces the other.¹⁰⁵⁶ Taking an example of Gitaza and Mugara which were visited during interviews, survivors still have memories of the mass graves of 1972 and 1993 of the mass killings as reported in the following examples which justifies the denial stage of genocide.

¹⁰⁵⁵ See IRIN "Death of Dozens of People Found Floating in the Rusizi River", 24 September 2010, available at: <http://www.irinnews.org/report.aspx?reportid=93777> [accessed on 12/12/2011]. For general discussion see Krueger and Krueger, *op cit* n.22 at p. xiii.

¹⁰⁵⁶ Stanton, *op cit* n. 1039.

A respondent from Gitaza stated:

I recall thousands and thousands of people who **were slaughtered** under this mango tree in 1972. Meetings would be called by the then administrator by the name of Rudigi; blindly people would go to the meetings as they were told they needed to come to prove their innocence because the government was searching for traitors. Upon arrival they would be queued. For example, a father would be asked to kill his own child or cut his private parts, fingers or toes and eat them. It is sad! My brother was among the victims. Few strong men would be spared and ordered to dig huge pits and **gather dead bodies in the mass graves**; lastly the spared would be forced to join their friends while still alive inside the pits and be shot to death. For local people this place is known as a 'slaughtering place'. To date we have never enjoyed peace; the police, army officials are patrolling everywhere searching for FNL rebels. You hear people have been killed in places like Kabezi, Mubanga, Rutunga, Rutumo and Buyenzi; we are used to gun shots. When I was in exile in Rwanda and DRC I was forced to come back to my country just not to die as a refugee. I do not see why people advocate human rights; there are no human rights in Burundi. They are written only on the papers.¹⁰⁵⁷

Similarly, Mugara Pentecost Church which was built in 1940 and its surroundings in Rumonge District is among the places where mass graves are found. In 1972, for example, many people sought refuge in the church but they were all killed inside and outside the church building and hot water spring known as "*mumashuha*".¹⁰⁵⁸

A respondent from Mugara reported:

My name is..., I am 60 years old. I was born in Mugara, the district of Rumonge in Bururi Province. I **will not forget my loved ones** including my father, mother and siblings who were killed in this church by *Tutsi* priests. As you can see, inside and outside of this church, **corpses were scattered everywhere**. I survived because, *Tutsis* thought I was dead and dead bodies fell over my back, I could not move. I managed to move only when the army went to bring trucks to remove the corpses inside the church. I was rolling like a snake a bit further and hid in the bush. Again down, there at the hot water spring a lot of **slaughtering** happened in 1972 and 1993.¹⁰⁵⁹

The intensity of the memory, the indelible experience; 'corpses everywhere' suggest large numbers of the corpses strewn all over; and 'slaughtered' conveys an almost carnivalesque but in an horrifying sense of the outrageous butchering on targeted groups. Furthermore, the graphic details that emerge from the above mentioned in-depth interviews suggest that such atrocities can be interpreted as genocide.

¹⁰⁵⁷ An interview with a Local Administrator Respondent in Gitaza on 28/12/2010. See also Krueger and Krueger, *op cit* n. 22 at p. 29.

¹⁰⁵⁸ Focus group interviews in Mugara in January 2011.

¹⁰⁵⁹ An interview with Respondent in Mugara on 05/01/2011.

This thesis adopts Stanton's stages of genocide and argues that although there is no formal endorsement of genocide in Burundi, the country has undergone all stages of genocide. For example, a plan for genocide may not be recorded or written down by scholars; however a practice that allows members of one group to consider members of another group as less human reinforces systematic mass killings of members of unwanted groups and this is interpreted broadly to amount to genocide.

Burundi's case holds that successive *Tutsi*-led army regimes as perpetrators of systematic mass killings have been targeting *Hutus* and political elites in pre-peace agreement era.¹⁰⁶⁰ Kuper has called these types of killings genocide because they target certain groups like intellectuals, politically affiliated groups and leaders.¹⁰⁶¹ Similarly, politically motivated killings in post-conflict Burundi or targets of minority and distinct groups of *Batwa* and people with albinism intending to destroy these groups in whole or in part can also be interpreted broadly to amount to genocide.

5.3.4 Factual overview of Burundi's genocide

As many scholarly writings suggest, mass killings of *Hutus* did not begin in 1972, yet, the 1972 killings set the stage for other genocide incidents which followed afterwards. A turning point in the escalation of *Hutu-Tutsi* tensions came in May 1965 with the subversion of the first post-independence elections to the National Assembly as discussed in chapters one and two. During the period of 1962-1965 most *Hutu* politicians and army officers were killed culminating in the King refusing to appoint a Hutu Prime Minister who won the 1965 elections. In 1966 the constitutional monarchy was overthrown by a *Tutsi* military officer, Micombero, who ruled with an iron fist and carried on with the extermination of *Hutus*.¹⁰⁶² It must be pointed out that there were divisions also among *Tutsi* ethnic groups (the *Tutsi-Hima* from the south and the *Tutsi-Banyaruguru* from the north which was threatening the Micombero regime).

Given the *Hutu* killings of 1962-1965, terror among Burundi (*Hutus* and *Tutsis*) was widespread amid rumors of plots and counterplots. This resulted into arrests and trials of *Tutsi Banyaruguru* politicians and *Hutu* elites when they were accused of working hand in hand with the monarchists who wanted to overthrow the Micombero regime. It is common cause that the complexities of Burundi issues lie in the fact that power was highly centralized in the hands of

¹⁰⁶⁰ Stanton, *op cit* n. 1039.

¹⁰⁶¹ Kuper, L.; (1982) **Genocide: Its Political Use in the Twentieth Century**, Yale University Press. Kuper argues that systematic mass killings are acts of genocide even if only a part of a group like intellectuals is targeted. He describes the political situations which have resulted in genocide and shows how technological developments have made mass killings more feasible and discusses the influence of big nations in fomenting conflicts.

¹⁰⁶² See Ndarubagiye, *op cit* n. 9 at p.x.

a small faction of the *Tutsi* minority (monarchy) which viewed itself as a holder of power and had a distinct social category.¹⁰⁶³

On April 29 1972, a small group of *Hutus* instigated violence as sign of revolting against the Micombero regime; *Tutsis* were killed in the towns of Rumonge and Nyanza-Lac in the south.¹⁰⁶⁴ Some views suggest that the *Hutu* violence of 1972 was out of provocation. For example, Gahutu has submitted that on the evening of April 27, 1972 the then Interior Minister, Albert Shibura, a *Tutsi*, arrived at a *Tutsi* civil servants' meeting in Rumonge and stated the following:

Brothers, if we look at what happened in Rwanda in 1959, we will see that as the *Hutu* grew in number they became conceited. The time has therefore come to diminish their number. If you want to save them keep only the illiterate, they aren't any threat to us.¹⁰⁶⁵

Along with the above statement, Shibura assured the attendees of a plan of action including supplying them with rifles. This was in line with argument that the Hutu killings were inscribed long way before in what referred to as Simbananiye Plan or the directives of Arthémon Simbananiye,¹⁰⁶⁶ the then Minister of Foreign Affairs. Undeniably the Simbananiye Plan played a key role in organizing the *Hutu* killings because as the social profile of the victims suggests, there was an element of rationality behind such carnage. For instance, the killing of all educated *Hutu* elites including civil servants, university students, women, elderly persons and schoolchildren amounted to ethnic cleansing. As Lemarchad has contended in respect of the

¹⁰⁶³ See Lemarchand, R. (2002) "Le génocide de 1972 au Burundi: Les silences de L'histoire" at pp. 551–67. *Cahiers d'études Africaines*, No. 167, XLII–3.

¹⁰⁶⁴ Ndarubagiye, *op cit* n. 9 at p. 39 and Gahutu, *op cit* n. 21 at p. 57.

¹⁰⁶⁵ Gahutu, *op cit* n. 21 at p. 56.

¹⁰⁶⁶ A *Tutsi-Hima* of the Babanda clan, born in the commune of Matana, in Bururi province, Simbananiye emerged as a leading figure of the so-called Bururi "lobby" in the early 1970s. As Minister of Justice in 1971, he staged the parody of justice that presided over the trial of several high-ranking *Tutsi* politicians of Banyaruguru origins suspected of monarchist sympathies. Described as a man of "limitless cynicism, ambition and cruelty" (*Remarques Africaines*, May 1972), Artémon Simbananiye is widely considered as the principal architect of the mass murders of *Hutus* in 1972. On the eve of the bloodbath he served as Minister of Foreign Affairs, Cooperation and Planning. It was in this capacity that he negotiated with Idi Amin of Uganda the return of Charles Ndizeye (King Ntare V), a conspiracy that led to his assassination in Gitega on April 29, 1972. Simbananiye's name is associated in *Hutu* memory with the "Simbananiye Plan", a machination presumably aimed at killing enough *Hutus* to ensure numerical parity between *Hutus* and *Tutsis*. Although the evidence suggests a politically motivated fabrication, to-date the Simbananiye Plan is retrospectively cited by many *Hutus* as irrefutable proof that the genocide of *Hutus* was planned long before it happened. After his fall from grace in 1987 he went into exile, only to return to Burundi a few years later as a Born-Again-Christian. See Lemarchand, R. (2008) "Simbananiye Artémon" **Online Encyclopaedia of Mass Violence**, available at: <http://www.massviolence.org/Simbananiye-Artemon>. [accessed on 02/04.2013].

White Paper issued by the Micombero regime, extermination of *Hutu* was on the agenda.¹⁰⁶⁷ *Hutu* carnage was carried out in order to prevent *Hutu* rebellion in the foreseeable future.

Given the above facts, it is easy to understand why some of the most atrocities occurred on the premises of the University of Bujumbura, secondary and technical schools. A good example is Kiremba Christian High School in Bururi and others where *Hutu* students were physically assaulted by their *Tutsi* classmates and then beaten to death.¹⁰⁶⁸ In a scenario that would repeat itself, groups of soldiers and members of the UPRONA youth wing- JRR would suddenly appear in classrooms calling *Hutu* students by names and take them away, they never returned back home.¹⁰⁶⁹

Although there is no consensus on the number of deaths of the *Hutu* victims, some views suggest that the total number of *Hutu* victims who were killed in the 1972 mass killings only is between 100,000 and 200,000,¹⁰⁷⁰ whereas others increase the number up 300,000 victims.¹⁰⁷¹ As Hoyt reported in the following examples during 1972 genocide:¹⁰⁷²

No respite, no letup. What is apparently happening is genocide that continues. Arrests going on around the clock.¹⁰⁷³

Tutsi reprisals unabated in the interior but have slackened somewhat in Bujumbura. In the north *Hutu* take cover upon arrival of any vehicle, reflecting pervasive fear.¹⁰⁷⁴

In two days following July 14 three new ditches filled with *Hutu* bodies near Bujumbura airport. Arrests have continued throughout the week in Bujumbura, in the hills around town, in Ngozi region and central Burundi.¹⁰⁷⁵

Repression against *Hutu* is not simply one of killing. It is also an attempt to remove them from access to employment, property, education and the general chance to improve themselves.¹⁰⁷⁶

¹⁰⁶⁷ See Lemarchand, *ibid.*

¹⁰⁶⁸ Lemarchand, *ibid.*

¹⁰⁶⁹ A focus group interview in Rumonge in January 2011. See also Ndagijimana's testimony, *op cit* n. 358.

¹⁰⁷⁰ Sullivan, *op cit* n. 64 at p.77, Bentley and Southall, *op cit* n.23 at p. 43.

¹⁰⁷¹ Kiraranganya, B.; (1985), **La Vérité sur le Burundi**. Sherbrooke (Canada) : Naaman at p.76, Ndarubagiye, *op cit* n. 9 at p. 39, Gahutu, *op cit* n. 21 at p.57, Krueger and Krueger, *op cit* n.22 at p. 3).

¹⁰⁷² Michael Hoyt Deputy Chief of Mission from the U.S. Embassy in Burundi in 1972. See Hoyt Report on Genocide of 1972 and Lemarchand, *op cit* n. 1062.

¹⁰⁷³ Hoyt Report of 26 May, 1972.

¹⁰⁷⁴ Hoyt Report of 11 July, 1972.

¹⁰⁷⁵ Hoyt Report of 21 July, 1972.

¹⁰⁷⁶ Hoyt Report of 25 July, 1972.

According to Hoyt, *Hutu* mass killings were planned and executed by *Tutsi* regimes. Kiraranganya also has asserted that systematic *Hutu* killings in Burundi were planned. The author has revealed further that *Tutsi* military regimes would claim that the genocidal killings were universally endorsed by the *Tutsi* community. While comparing with Rwanda, Kiraranganya has clarified that not all members of *Tutsi* ethnic group participated in *Hutu* mass killings, instead, some *Tutsis* did everything possible to save their *Hutu* neighbours as it was the case in Rwanda in the 1994 genocide when *Tutsis* were protected by their *Hutu* neighbours but could do little to stop the carnage.

Nonetheless, from this orgy of genocide, *Tutsis* from the south designed an administrative system with intention to remain in power.¹⁰⁷⁷ For example, it is an irrefutable fact that *Tutsi*-led army elites' insatiable appetite to cling on to power in pre-peace agreement era was associated with *Hutu* mass killings and military coups. Voracious appetite for power has been also demonstrated in post-conflict administration and viewed as a major hindrance to the establishment of effective transitional justice mechanisms by the CNDD-FDD governments of 2005 and 2010 to deal with impunity, prosecute the perpetrators of genocide and bring about national healing through truth-telling and reconciliation.¹⁰⁷⁸

5.3.5 The phases of mass killings

Research findings in this study have revealed that Burundi has witnessed mass killings equal to genocide over five decades. Since independence in 1962, the *Tutsi*-led army have murdered *Hutu* university students, school children, political elites and civilians in 1960s, 1972, 1988, 1991 and 1993. Subsequently, the period of 1993-2005 saw a deluge of mass murders of both *Hutus* and *Tutsis* culminating in a civil war that claimed an estimated 300,000 lives.¹⁰⁷⁹ Political tensions have increased in post-conflict Burundi since 2005 due to ongoing reprisals and counter-reprisals while impunity for these killings has taken precedent. For instance, since the 2010 general elections, reciprocal killings by members of the ruling party CNDD-FDD and the former rebel group the FNL have been on the rise.¹⁰⁸⁰

From the factual overview of Burundi's history mentioned above, mass killings of *Hutu* and *Twa* civilians in 1960s, 1972, 1988 and 1993 can be categorized as genocide committed by the *Tutsi*-led army while the killings of 1993-2005 can be categorized as a bilateral genocide committed by the same *Tutsi*-led army and insurgent groups against either *Hutus* or *Tutsis*. It

¹⁰⁷⁷ Kiraranganya, *op cit* n. 1071.

¹⁰⁷⁸ Focus group interviews in Bujumbura, Gatumba, Gitaza and Rumonge of 2010 and 2011.

¹⁰⁷⁹ Bentley and Southall, *op cit* n. 23 at p. xi.

¹⁰⁸⁰ See Genocide Watch <http://www.genocidewatch.org/alerts/newsalerts.html>. [accessed on 23/04/2013].

must be remembered that the period of 2005 to date has been characterized by politically motivated mass killings that include the killings of albinos as a distinct group.

Regrettably, no single perpetrator has ever been prosecuted for mass murders committed in Burundi over the past fifty one years. It is common cause that the post-conflict government in Burundi has not conducted itself in a manner consistent with the human rights and humanitarian norms. For example, extra-judicial executions and torture of political opponents, human rights activists and other gross violations of human rights against civilians continue unabated in the post-conflict administration. Although the Genocide Convention affirms that genocide is a crime punishable under international law which must be condemned and the perpetrators be held accountable.¹⁰⁸¹ Burundi's genocide has failed to attract international attention in comparison with Rwanda's genocide which consistently has gained international attention because of selective morality and double standards nature in dealing with genocide cases.

Nonetheless, the fact remains that genocide, including other serious international crimes can be punishable under both national and international laws¹⁰⁸² as demonstrated in the Nuremburg Trials, ICTY, ICTR, Guatemala, Cambodia and other similar cases.

There are three approaches by which an investigation of any possible crime under the jurisdiction of the ICC may be initiated:

- The UN Security Council 's referrals to the Prosecutor of the ICC,¹⁰⁸³
- The State's referrals to the Prosecutor of the ICC,¹⁰⁸⁴ and,
- The Prosecutor's *proprio motu* power to investigated complaints.¹⁰⁸⁵

The ICC Statute obliges the ICC Prosecutor to investigate allegations of genocide if it is clear that the crime was either committed by a national of a State Party or on the territory of a State Party.¹⁰⁸⁶ Nonetheless, scholars have criticised the ICC's investigation and prosecution of

¹⁰⁸¹ Aptel, C.; (2003) "The Intent to Commit Genocide in the Case law of the International Criminal Tribunal for Rwanda: Criminal Law Forum, **Kluwer Law International**, at. p. 273 Aptel argues that the principals offenders and their accomplices whether private individuals or public officials or statesmen and whether the crime is committed on religious, racial, political or any other grounds, the perpetrators must be held accountable.

¹⁰⁸² Article 1 of the Rome Statute of the ICC stipulates that, the ICC shall be a permanent institution and shall have power to exercise its jurisdiction over persons for the most serious crimes of the international concerns and shall be complementary to national criminal Jurisdictions.

¹⁰⁸³ Article 13(b) of the ICC Rome Statute.

¹⁰⁸⁴ Article 13(a) of the ICC Rome Statute.

¹⁰⁸⁵ Article 13(c) of the Rome Statute, refer to Kenyan and Libyan cases.

¹⁰⁸⁶ Article 13(a) and (c) of the ICC Rome Statute. Refer to the Kenyan and Libyan cases.

international crimes. For example Cryer has argued that no matter how qualified it is the addition of the power of independent initiation of investigation is individualistic in the positive sense.¹⁰⁸⁷ Leaving referral to states and the UN Security Council alone means to give the preliminary decisions or options of whom to prosecute according to their whimsies or politics. As a result, a referral by one state of a situation existing in another might be viewed as an unfriendly act and the probability of such referrals happening would be low.¹⁰⁸⁸ The worst case scenario would be to compare the international attention given to the genocide of Rwanda while ignoring the genocide of Burundi which was committed before 1994.

Articles 12 and 13 of the ICC Statute refer to the conditions relating to the ICC's jurisdiction to deal with genocide cases including referrals of one state against another State Party. It is not surprising that self-referrals by countries like Burundi, DRC, Uganda or Rwanda regarding situations existing within their own borders would be viewed as astonishing in the eyes of international law.¹⁰⁸⁹ As demonstrated in the UN Report of 2010 commonly known as "the UN Report on Second Rwanda Genocide" where human rights of the majority of the victims (children, women, elderly people and the sick who were undernourished and posed no threat to the attacking forces) in terms of Articles 12 and 13 were violated,¹⁰⁹⁰ yet, prosecution under the ICC Rome statute is unlikely to happen. It has been indicated that at least 617 most serious incidents alone constituted war crimes and crimes against humanity or both.¹⁰⁹¹ Although the Report has accused Rwanda, Uganda and Burundi of killing civilians and recommended prosecution of perpetrators responsible,¹⁰⁹² yet, the proposed prosecution remains elusive.

The UN Report of 2010 on Rwandan genocide has reminded the international community of the scale of the crimes committed in the DRC and deficiencies in the international criminal justice system. However, the Report has also indicated that human rights violations may no

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- ¹⁰⁸⁷ Cryer, R.; (2005) **Prosecuting International Crimes Selectivity and the International Criminal Law Regime** Cambridge University Press, Cambridge, at p. 163.
- ¹⁰⁸⁸ Cryer, *ibid*, see also Schabas W. A.; (2007) **An Introduction to the International Criminal Court**. Cambridge: Cambridge University Press at p. 143.
- ¹⁰⁸⁹ see for example http://www.youtube.com/watch?v=vLV9szEu9Ag&feature=player_embedded [accessed on 21/10/2011].
- ¹⁰⁹⁰ Fisher, M.; (2010) "UN Report on Rwanda Genocide Shakes Africa" **The Atlantic Wire** Aug 29, 2010. Available at: <http://www.theatlanticwire.com/global/2010/08/un-report-on-rwanda-genocide-shakes-africa/23224/>. See also Human Rights Watch "DR Congo UN Report Exposes Grave Crimes: International Efforts Needed to Create Mechanisms to Ensure Justice" October 1, 2010. Available at: <http://www.hrw.org/news/2010/10/01/dr-congo-un-report-exposes-grave-crimes>.
- ¹⁰⁹¹ See OHCHR "DRC: Mapping Human Rights Violations 1993-2003", available at: <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx> [accessed on 02/05/2013].
- ¹⁰⁹² See BBC News " UN Report Says DRC Killings May be Genocide", 1 October 2010, Available at: <http://www.bbc.co.uk/news/world-africa-11450093>. [accessed on 02/05/2013].

longer be concealed. Instead, these violations need serious investigations which can be followed by robust regional and international actions aiming at ending impunity that lies behind the strife in the Great Lakes Region.

Article 13(b) of the ICC Statute regulates the UN Security Council referrals. One of the differences between this type of referral and the other two (state referral and the ICC Prosecutor's power of investigation) is that the Prosecutor does not need to obtain authorisation from the Pre-Trial Chamber before investigating. Another difference is that while the other two types of referrals are limited to State Parties, a UN Security Council referral is not, in other words, if the Security Council is aware of a situation that requires investigation by a non-state party, the referral will be limited to a situation and not an individual. The rationale behind this conception is that it is the Prosecutor's prerogative and not that of political bodies to decide which suspects and cases are to be investigated.

This thesis submits and emphasises further that investigation of the genocide of Burundi is required. For instance, apart from mass murders, violence against vulnerable groups like women during and after armed conflicts has been committed in Burundi with complete impunity.¹⁰⁹³ Taking an example of rape as underscored in the case of *Ngirincuti v Secretary of State for the Home Department*,¹⁰⁹⁴ has been used as a weapon of war to intentionally violate women's rights and dignity, contrary to what is stated in the international human rights and humanitarian laws. Furthermore, children and minority rights have consistently been violated through sexual abuses and servitude at the hands of the *Tutsi*-led army and insurgent groups.¹⁰⁹⁵

The crime of rape which is a brutal and dehumanizing attack that causes grievous bodily and psychological harm to the victims has been deliberately used during armed conflicts to violate women's rights. According to the interviewees, in many incidents Burundi women were raped in front of their husbands and children by multiple male armed combatants including using gun barrels or other objects to penetrate them.¹⁰⁹⁶ These acts are among the examples of intention to commit crimes against humanity and other horrendous international crimes listed down in the Genocide Convention, Torture Convention, Geneva Conventions and the ICC Rome Statute and confirmed by the ICC in the *Prosecutor v Akayesu's* case.¹⁰⁹⁷

¹⁰⁹³ Focus group interviews Gatumba, Bujumbura and Rumonge of 2010 and 2011.

¹⁰⁹⁴ *Ngirincuti v Secretary of State for the Home Department*, *op cit* n. 12.

¹⁰⁹⁵ Focus group interviews in Bujumbura, Gatumba, Gitaza and Rumonge of 2010 and 2011. See also the ICTR's reasoning in the *Akayesu's* case in Rwanda.

¹⁰⁹⁶ Focus group interviews Gatumba, Bujumbura and Rumonge of 2010 and 2011.

¹⁰⁹⁷ *Prosecutor v Akayesu*, *op cit* n. 452 para. 685-686.

It must be pointed out that in the context of ethnic and politically motivated mass killings, rape can be viewed as a tool of "cleansing". For example, the deliberate infesting of HIV to the victims underlined in the *Ngirincuti* case, rape can be interpreted as an intentional act and a weapon during armed conflicts to exterminate a given targeted group similar to the crime of genocide. Furthermore, rape continues to be used by perpetrators as weapon of war when the conflicts have ceased to exist in terms of traumatization and prejudice against the rape victims. For example, women victims who had been abducted by combatants are forced to become sexual slaves with no rights.

Thus, rape has been conceived by perpetrators as a reward of armed conflicts.¹⁰⁹⁸ On some occasions, rape has been used also as a way of undermining and humiliating men. For instance, Barundi men whose wives or other female relatives became rape victims were frowned upon as incapable of protecting their women (wives and other female members of the family like children and mothers). In this regard, rape has become an aspect of cultural warfare and to some extent, means of ethnic cleansing.¹⁰⁹⁹ Sexual violence in the form of rape has been viewed as an invisible war crime in contemporary armed conflicts.¹¹⁰⁰ In the Burundi's case, there is a gap in law because the crime of rape during armed conflicts was not included in the post-conflict transitional justice arrangements. This *lacuna* has encouraged impunity because the perpetrators of rape during armed conflicts may not be prosecuted and punished.

International criminal law requires specification of the elements of a crime on what must be proven, in other words, material (*actus reus*) and mental (*mens rea*) elements.¹¹⁰¹ Under customary international law, for example, rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts. The prohibition of rape under international humanitarian law can be traced way back in the Lieber Code.¹¹⁰² While

¹⁰⁹⁸ Focus group interviews Gatumba and Bujumbura of 2010 and 2011.

¹⁰⁹⁹ For general discussion see, Nowrojee, B.; (2005) "Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims" **Harvard Human Rights Journal** pp. 85-105.

¹¹⁰⁰ Nowrojee, *ibid* at p. 85.

¹¹⁰¹ As Triffterer has clearly articulated, there are two subjective elements required to establish criminal responsibility for genocide: the *mens rea* as the pendant to the *actus reus* and the 'intent to destroy. See Triffterer, O.; (2001) "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such" **Leiden Journal of International Law** at p. 400.

¹¹⁰² See ICRC "Rule 93 Rape and Other forms of Sexual Violence" available at: http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule93 [accessed on 26/02/2013]. Instructions for the Government of Armies of the United States in the Field (Lieber Code) of 24 April 1863 as prepared during the American Civil War by Professor Francis Lieber and revised and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The Lieber Code has influenced the codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874

Common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, however, it prohibits violence to life and person including cruel treatment, torture and outrages upon personal dignity which impliedly include rape.¹¹⁰³ The Third Geneva Convention provides that prisoners of war are in all circumstances entitled to respect for their honour and dignity.¹¹⁰⁴ The prohibition of crimes against personal dignity is acknowledged in the Additional Protocols I and II as a fundamental guarantee for civilians and persons *hors de combat*.¹¹⁰⁵

Article 75 of Additional Protocol I specifies that the prohibition in this regard, covers in particular, humiliating and degrading treatment, enforced prostitution and any form of indecent assault while Article 4 of Additional Protocol II specifically adds "rape" to the list.¹¹⁰⁶ The standard of respect for human dignity therefore is the foundation of all Geneva Conventions and international law in general because these laws oblige the combatants to treat civilians with respect during armed conflicts including the prohibition of rape.

Pursuant to the Rome Statute, committing crimes of rape, sexual slavery, enforced prostitution, forced pregnancy or any other form of sexual violence is a grave breach or serious violation of common Article 3 of the Geneva Conventions because these crimes constitute war crimes in both international and non-international armed conflicts respectively.¹¹⁰⁷ The crimes listed under the ICC Rome Statute have been confirmed by the international tribunals with specific reference to rape as a crime against humanity under the ICTY and ICTR Statutes and has been interpreted broadly to mean genocide.¹¹⁰⁸

This thesis advocates that to complement an independent judiciary with a legal system based on respect for the rule of law needs strong, independent and impartial prosecutors. As asserted by the Office of the High Commissioner for Human Rights and International Bar Association, the willingness to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity can

and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907 which later influenced the adoption of the Geneva Conventions, 1949. See Schindler, D. and Toman, J.; (1988) **The Laws of Armed Conflicts**, Martinus Nijhoff Publisher at pp. 2-23.

¹¹⁰³ Common Article 3 Geneva Conventions, 1949.

¹¹⁰⁴ Article 14 (1) of the Third Geneva Convention, 1949.

¹¹⁰⁵ See Article 75(2) of Additional Protocol I and Article 4(2) of Additional Protocol II.

¹¹⁰⁶ Articles 75(2) and 4(2) of the Additional Protocols *ibid*.

¹¹⁰⁷ Article 8(2) (b) (xxii) and (e) (vi) of the ICC Statute.

¹¹⁰⁸ Article 5(g) of the ICTY Statute and Article 3(g) of the ICTR Statute. See also the ICTR judgment in the *Akayesu* case.

prevent their recurrences.¹¹⁰⁹ This means, unless prosecutors, judges and lawyers are able to exercise their professional duties freely, independently and impartially, the rule of law will slowly and gradually be eroded while effective protection of human rights of individuals will be adversely affected and prevention of genocide will remain theoretical.

The rules of International Humanitarian Law concerning responsibility for international crimes are not consistent in the international criminal law jurisprudence. Traditionally, there has been a problem of classifying international crimes. For example, Article 6 of the London Charter¹¹¹⁰ recognises three crimes namely: war crimes, crimes against humanity and crimes against peace which have brought problems of distinguishing between war crimes and crimes against humanity. However, these crimes together with genocide fall under the broader concept of *crimina juris gentium*¹¹¹¹ and war crimes, crimes against humanity and genocide are considered as part of the broader category of *crimina juris gentium* as developed in a significant and considerable way since the WWII.¹¹¹²

Following the Nuremberg Trials, crimes against humanity were linked to war crimes and regarded in the context of war against peace and considered only if they were committed before or during war. Nevertheless, case law has an autonomous character of the seriousness of such crimes. For example, Stretcher and Baldur von Schirach in the Nuremberg Trials were found guilty and convicted of crimes against humanity and sentenced to death although under international customary law in the case of von Hagenbach and others,¹¹¹³ the perpetrators were found criminally responsible under *crimina juris gentium* in war, peace and in borderline situations. The criminal acts in the *Hagenbach's* case were regarded as crimes against humanity and part of customary international law as affirmed by the ICTY in the *Tadic* case.¹¹¹⁴

¹¹⁰⁹ Office of the High Commissioner for Human Rights and International Bar Association (2003) **Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers** at p. 116.

¹¹¹⁰ London Charter of August 8, 1945.

¹¹¹¹ Greppi, E.; (1999) "The Evolution of Individual Criminal Responsibility" **ICRC**, available at: <http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm>

¹¹¹² Greppi, *ibid*.

¹¹¹³ Hagenbach was convicted of murder and rape he allegedly perpetrated as a governor of the Duke's Alsatian territories from 1469 to 1474. Scholars have perceived *Hagenbach's* case as a landmark in formulating a nascent version of crimes against humanity and rape as a war crime. The court referred to the principles of customary international law and rejected the defence of superior orders which helped the Nuremberg Trials with greater historical legitimacy and development of international criminal law in post-Cold War. Although *Hagenbach's* case has attracted academic debate in terms of its judicial precedency, Hagenbach's five year regime of terror that culminated in atrocities has shown a legitimate conviction and continue to play an important role as a historic and conceptual pillar of contemporary international criminal law.

¹¹¹⁴ *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999.

Furthermore, the ICTR Statute considers crimes against humanity as an autonomous category that include rape.¹¹¹⁵

Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity also refers to crimes against humanity by using similar wording of Article 6 of the London Charter. It reiterates the wording "whether committed in time of war or in time of peace".¹¹¹⁶ War crimes and crimes against humanity in contemporary world are viewed as two autonomous and self-sustained categories of crimes that are often linked with modern armed conflicts. Mass murders, deportations and gross violations of human rights against civilians are clear examples of the connection and overlap between war crimes and crimes against humanity. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations of civilians' rights can be classified as both war crimes and crimes against humanity.¹¹¹⁷

Significantly, contribution to the evolution of the concept of individual criminal responsibility has been stated in the Draft Code of Offences Against the Peace and Security of Mankind of 1996 (The Draft Code).¹¹¹⁸ Previously in the 1951 and 1954 drafts of the Code, Article 1 provided that "offences against the peace and security of mankind are crimes under international law for which perpetrators shall be punished". Article 1 of the 1996 version on the other hand states that crimes against peace and security of mankind are crimes under international law and punishable in spite of whether or not they are punishable under national law. In other words, a crime against the peace and security of humankind entails criminal responsibility in the eyes of international law.¹¹¹⁹

Having in mind the definitions of international crimes as provided for under the 1948 Genocide Convention, the crime of genocide has the same wording as in the Draft Code as well as the ICC Rome Statute.¹¹²⁰ For crimes against humanity, the Draft Code adds acts which are "instigated or directed by the government or by any organisation or group" or command

¹¹¹⁵ Article 3 of the ICTR Statute.

¹¹¹⁶ Article 6 (c) of the London Charter, 1945.

¹¹¹⁷ The Geneva Conventions and their Additional Protocols are at the fundamental for international humanitarian law that regulates the conduct of armed conflict and seeks to limit its effects. They specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war.

¹¹¹⁸ The Draft Code was prepared by the International Law Commission. (ILC) and adopted by the ILC at its forty-eighth session, in 1996, and submitted to the UN General Assembly as a part of the Commission's Report. For more details and commentaries on the Code refer to the **Yearbook of the International Law Commission**, 1996, vol. II (Part Two).

¹¹¹⁹ Article 2 of the Draft Code of Offences against the Peace and Security of Mankind, 1996.

¹¹²⁰ See Article 17 of the Draft code *ibid* and Article 6 of the ICC Rome Statute.

theory.¹¹²¹ The list in the Draft Code is, however, less detailed than what is stipulated under Article 7 of the Rome Statute. Additionally, instead of mentioning the crime of Apartheid, the Draft Code includes this unique crime in a general term, "institutional discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" while the Rome Statute includes Apartheid in the list of crimes against humanity.¹¹²² War crimes on the other hand, are listed more or less the same way as Article 8 of the Rome Statute but in a less extensive formulation.

Moreover, there is a new provision on the protection of the natural environment that has been introduced which states that "in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudicing the health or survival of the population",¹¹²³ is part of recognisable international crimes. Article 19 of the Draft Code adds a further provision relating to crimes against UN and associated personnel committed with a view to preventing or impeding an operation involving such personnel. The only exclusion is when UN personnel are engaged as combatants against organised armed forces in an enforcement action authorized by the Security Council under Chapter VII of the UN Charter where the law of international armed conflicts applies. The protection of UN personnel under the Rome Statute is included also in Article 8 (b) iii and (e) iii.

It is imperative to point out that international crimes are listed under international law while individual criminal responsibility has been enlarged and given a clearer scope and general principles have been laid down that consider an act or omission to be a crime. Starting with the judgment of the US Military Commission of February 4, 1946 in the *Yamashita* case¹¹²⁴ as an example, atrocities committed by army officials against the civilian population in the Philippines and their failure to prevent crimes from being committed were considered to be acts constituting serious crimes which deserved punishment. Where murder and rape and vicious revengeful actions are widespread offences and there is no effective attempt made by army leaders to investigate and minimise the criminal activities, such leaders may be held responsible and criminally liable for the crimes committed by their troops under the command

¹¹²¹ Article 18 *ibid.*

¹¹²² Article 7 (1)-j of the ICC Rome Statute.

¹¹²³ Article 20 (g) of the Draft Code.

¹¹²⁴ *In re Yamashita* -327 U.S. 1 (1946).

theory.¹¹²⁵ Articles 86 and 87 of Additional Protocol I and the Rome Statute clearly take the same line.

Another significant development to be noted is the codification of international law. There is a growing connection between international humanitarian and human rights law. It appears that the provisions of humanitarian law clearly have been influenced by the rules and standards of international human rights protection. The ICC Rome Statute refers to concepts like "personal dignity", the prohibition from "humiliating and degrading treatment", "judicial guarantees", the prohibition of "persecution" as an intentional and severe deprivation of fundamental rights contrary to international law or the deprivation of identity of the group or collective discrimination and Apartheid as provided for under Article 7 of the Statute. These concepts have all been established in the main instruments adopted by the UN for the protection of the fundamental rights of the individuals. However, the principle of humanity is at the core of international humanitarian law and forms the basis of political, social and economic developments that have been discussed in this thesis. Moreover, the principle of individual responsibility has been clearly established by International Humanitarian Law.

This thesis notes a growing reciprocal influence between treaties and Customary International Law. Admittedly, Customary International Law has played an important role in the development of criminal responsibility jurisprudence. Since contemporary International Humanitarian Law as applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols, customary international law has accelerated the development of the law of armed conflicts, particularly, in relation to crimes committed in international and non-international armed conflicts. In this regard, case law principles established since 1474 in *Hagenbach* case, the Nuremburg Trials, ICTY and ICTR just to mention a few, have made an important contribution towards the development of international criminal responsibility. The basic legal rules which have been laid down for many years, remain significant in criminalising acts and omissions committed by individuals or state officials in non-international armed conflicts like Burundi as well as international armed conflicts and in time of peace.

As noted in this study, individual and state or collective responsibilities are not only a moral duty, but also, a basic obligation under Customary International Law and International Humanitarian Law. There has been a rapid development of International Criminal Law in the last decade. The rules that have been established thereof, have provided a framework for a comprehensive analysis of substantive and adjective facets of international criminal justice.

¹¹²⁵ *Yamashita's case, ibid.* See also Greenawalt, A.; (1999) "Re Thinking Genocidal Intent: The Case for Knowledge-based Interpretation", **Columbia Law Review** at pp. 2280-2281. Greenawalt refers to German Holocaust and contends that genocidal intent means where the state deploys an entire bureaucratic military chain of command to execute a genocidal plan.

Werle has analysed the fundamental issues such as evolution, sources and enforcement of International Criminal Law in the context of ICC Rome Statute and Customary International Law and contends that the general principles of International Criminal Law must deal with individual and state responsibilities for crimes such as genocide, crimes against humanity, war crimes and the crime of aggression.¹¹²⁶ The author uses a systematic approach to examine the ICTY, ICTR and several national courts' decisions and his work is commendable for contemporary development of International Criminal Law jurisprudence.

There are four crimes recognisable under international criminal law: namely genocide, crime against humanity, war crimes and aggression whose *actus reus* and *mens rea* elements must be proved. International Criminal Law, according to Cryer in Evans, is a combination of international law and criminal law whose methodological approaches differ. For example, criminal law prohibits non-reliance on unwritten law (*nullum crimen sine lege scripta*)¹¹²⁷ whereas under international law an international crime can arise from the violation of an international custom as used by the ICTY.¹¹²⁸ The conduct element in terms of Article 2 of the Genocide Convention includes killing, causing serious and bodily or mental harm, deliberately inflicting conditions designed to destroy a particular group; imposing measures to prevent birth and forcibly transferring children of the group to another group. Case law suggests inconsistencies in applying the principles of international criminal law to factual situations as can be seen below.

The crime of rape, for example, during armed conflicts has been interpreted broadly by international criminal tribunals. For example, the case of *Prosecutor v Anto Furundzija*¹¹²⁹ in 1998 which held that rape requires "coercion or force or threat of force against the victim or a third person".¹¹³⁰ In its decision later in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (the *Kunarac case*)¹¹³¹ in 2001, the ICTY held that there are other factors that render an act of non-consensual sexual penetration or non-voluntary on the part of the victims of rape to fall within the accurate scope of the definition of rape

¹¹²⁶ Werle, G.; (2005) **Principles of International Criminal Law**, Humboldt-Universität zu Berlin, available at: http://www.cambridge.org/gb/knowledge/isbn/item1178510/?site_locale=en_GB [accessed on 06/05/2013].

¹¹²⁷ Means no crime without written law.

¹¹²⁸ Evans, *op cit* n. 498 at p. 754.

¹¹²⁹ *Prosecutor v Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, ICTY, 10 December, 1998, available at: <http://www.unhcr.org/refworld/docid/40276a8a4.html> [accessed 26/02/2013].

¹¹³⁰ *Furundzija case*, *ibid*.

¹¹³¹ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001, available at: <http://www.unhcr.org/refworld/docid/3ae6b7560.html> [accessed 26/02/2013]

under international law. The ICTR on the other hand in the *Akayesu*'s case in 1998 held that "rape is a form of aggression and the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts".¹¹³² The ICTR has defined rape as a physical invasion of a sexual nature committed against a person under circumstances which are coercive.¹¹³³

Rape and sexual violence can also constitute the elements of other crimes under international law as pointed out by the ICTY in the *Delalić*'s case.¹¹³⁴ In the *Delalić* case the ICTY held that rape can constitute torture when the specific conditions of torture are fulfilled. Likewise, the ICTR in the *Akayesu*¹¹³⁵ and *Musema*¹¹³⁶ cases held that rape and sexual violence can constitute genocide when the specific conditions of genocide are fulfilled. It has been specified by the international tribunals that in practice the prohibition of sexual violence is non-discriminatory. That means, like women, children, men and minority groups should equally be protected by law.

It is submitted that the crimes of rape and sexual violence are prohibited when committed against "any person" pursuant to the ICC Rome Statute. Impliedly men are also protected against any form of sexual violence such as rape and other forms of sexual assaults. Admittedly, the elements of crimes as provided for by the ICC Rome Statute include "invasion" that has been used to define rape broadly and be regarded as gender-neutral. For example, the ICTR in its landmark in the *Akayesu* case held that rape, if interpreted broadly in armed conflicts, equates genocide. The ICTY on the other hand convicted the perpetrators of rape, torture and enslavement as crimes against humanity in the *Kunarac* case.¹¹³⁷

The ICTY for example, in the case of *Prosecutor v Krstić*¹¹³⁸ held that the element of genocide were not present under customary international law but in the case of *Prosecutor v Al Bashir*¹¹³⁹ the ICC was of the view that the issuing of an arrest warrant against Al Bashir was based on an international custom not in contradiction with the ICC Statute which reiterates the elements of Article 2 of the Genocide Convention. The conflicting views in *Krstić* and *Al Bashir* cases

¹¹³² *Prosecutor v Akayesu*, *op cit* n. 452.

¹¹³³ *Prosecutor v Akayesu*, *ibid*.

¹¹³⁴ *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgment)*, IT-96-21-T, ICTY, 16 November 1998, available at: <http://www.unhcr.org/refworld/docid/41482bde4.html> [accessed 26/02/ 2013].

¹¹³⁵ *Prosecutor v Akayesu*, *op cit* n. 452.

¹¹³⁶ *Prosecutor v Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, ICTR, 27 January, 2000, available at: <http://www.unhcr.org/refworld/docid/48abd5791a.html> [accessed 26 /02/ 2013].

¹¹³⁷ For further discussion see Hall-Martinez, K.; and Bedont, B.; (1999) "Ending Impunity for Gender Crimes Under the International Criminal Court" **The Brown Journal of World Affairs**.

¹¹³⁸ *Prosecutor v Krstić*, *Judgement*, Case No IT-98-33-A April para. 224.

¹¹³⁹ *Prosecutor v Al Bashir*, Case No 02/05/09 4th March 2009, para. 132.

tend to undermine the status of international law and the perpetrators of international crimes can easily escape prosecution with complete impunity if Burundi can be used as an example.

5.4 PROSECUTION OF MASS KILLING AMOUNTING TO GENOCIDE IN BURUNDI

In general terms, the Constitution aims to ensure the functionality of state organs and their relationship inter-se. This thesis interrogates the effectiveness of the prosecution of genocide in Burundi in the light of the Constitution. Currie and de Waal describe a Constitution as a beacon of hope in a world plagued by conflicts, poverty and the failure of the governments.¹¹⁴⁰ In Burundi Title XII of Post-transition Constitution, 2005 allows for the establishment of, among others, National Councils and National Monitoring Unit (NMU) (*l'Observatoire National*)¹¹⁴¹ to uphold the constitutional values through the prohibition of genocide and other serious international crimes. The NMU, for example, is empowered by law¹¹⁴² to prevent and eradicate genocide, war crimes and crimes against humanity in many aspects including:

- following regularly the development of Burundi community guided by prevention and eradication of the crime of genocide, war crimes and crimes against humanity,
- suggesting effective measures to fight against impunity for crimes committed,
- promoting the creation of regional monitoring unit,
- promoting a national inter-ethnic front of resistance against genocide, war crimes and other crimes against humanity as well as globalization and collective culpability,
- enacting legislation against genocide, war crimes and other crimes and to monitor their strict observance,
- proposing policies and measures for the rehabilitation of victims and
- contributing to the implementation of a large sensitisation and education program for peace, unity and national reconciliation.

Article 275 goes further and requires the NMU to prepare and submit an annual report relating to the prevention and eradication of these crimes to the President, Government, the National Assembly and Senate. The law under Articles 268, 274 and 275 of the Constitution clearly reiterates the requirements of the Genocide Convention¹¹⁴³ which, *inter alia*, require the Contracting Parties to prevent and punish the perpetrators of genocide. Furthermore, State Parties are under a duty to enact necessary legislation to give effect to the provisions of the

¹¹⁴⁰ Currie, J. *et al.*; (2001) **The New Constitutional and Administrative Law**. Cape Town: Juta at pp. 1-2.

¹¹⁴¹ Article 268 of the Post-Transition Constitution, 2005.

¹¹⁴² Article 274 of the Constitution, *ibid*.

¹¹⁴³ Articles I, V, VII of the Genocide Convention.

Genocide Convention including granting extradition in accordance with their national laws and treaties. These are far-reaching provisions which can be utilised and implemented by the post-transition government in Burundi to ensure accountability for genocide and other crimes committed.

Although the Burundi Constitution of 2005 emphasizes investigating, prosecuting, and the punishing of the perpetrators and the rehabilitation of the victims in a substantive sense, however, the post-conflict government lacks political will and adequate legal enforcement to investigate and prosecute international crimes committed over fifty one years. This is a gap in the law that needs further investigation in order to deal with impunity for past, current and future crimes as the Constitution demands. This thesis argues that the lack of proper investigation and prosecution of the perpetrators of systematic mass killings or "genocide" cases since independence to date has encouraged a cycle of impunity and retaliation among *Hutu* and *Tutsi* ethnic groups especially in 1990s.

Equally, reprisals are not restricted to ethnic divisions but also have been evidenced with respect to political affiliation as demonstrated in politically-motivated killings which started in 1960s and currently reinforced in post-conflict Burundi through systematic, politically-motivated killings such as the Gatumba mass killings of 2011 including the killings of people with albinism, political opponents and human rights activists.¹¹⁴⁴

As Vandeginste has asserted,¹¹⁴⁵ over the past decade, the African Union has put in place a normative constitutional framework to promote rule of law and power-sharing agreements in countries that have experienced armed conflicts. While opposing unconstitutional means of obtaining or transferring power among State Parties, the AU has been generally supporting the use of power-sharing agreements as instruments of dispute resolution in armed conflicts.¹¹⁴⁶ Conversely, most power-sharing agreements have failed because of their incompatibility with prevailing constitutional orders. The author has criticised the power-sharing agreements policy in Burundi which is inconsistent with AU strategies.

This study argues that peace and power-sharing agreements in Burundi were negotiated and concluded since 2000, yet, neither political stability nor constitutional values have been effectively accomplished. Peace and ceasefire agreements like the APRA of 2000, Pretoria

¹¹⁴⁴ Human Rights Watch World Report, 2013, available at: <http://www.hrw.org/world-report/2013/country-chapters/burundi?page=3> [accessed on 26/04/2013].

¹¹⁴⁵ See Vandeginste, S.; (2013) "The African Union, Constitutionalism and Power-sharing", *Journal of African Law*, at pp. 1-28).

¹¹⁴⁶ Vandeginste, *ibid*.

Accord of 2003 and Dar Es Salaam Comprehensive Agreement of 2006 all aimed at the establishment of effective transitional justice mechanisms to deal with, among others, genocide and grave human rights violations. To date no transitional justice mechanisms have been established and put into place.

Despite of the adoption of the above mentioned peace agreements there is no comprehensive transitional justice mechanism in place because of lack of the Truth and Reconciliation Commission, no prosecution of perpetrators of genocide has taken place, no reparations and apology to the victims have been made as it was the case with Chile, South Africa and other countries referred to in chapter three. This thesis submits that transitional justice in Burundi must be a comprehensive one with view to having long lasting peace. As Shelton has contended, historical injustices claims are generally seen as targeting an entire group that can be killed or discriminated against by another group or political regime.¹¹⁴⁷In the Burundi's case public interest in human rights, the rule of law and legal certainty call for the need to develop a framework to determine the legitimacy and modality of responding to reparations claims for genocide or past injustices committed against target groups such as *Hutus*, *Twas*, political opponents and albinos.

In attempting to answer the questions posed in chapter one, Schabas' broad definition of genocide should be kept in mind.¹¹⁴⁸ In this context it can be assumed that the prosecution of genocide under the *ad hoc* intentional tribunals and ICC would have brought a comprehensive and durable peace in Burundi while democracy and human rights would have been flourished. Unfortunately, that is not the case because Burundi, the Great Lakes Region and Africa are still far from experiencing true democracy, openness and accountability for heinous crimes that can enhance respect for human rights.

As discussed earlier, the definition of genocide lacks consistent interpretation at both national and international levels. Taking Burundi's case as an example, the commission of genocide has always been associated with denial theory although mass murders of civilians and gross violations of human rights have been committed. It is an historical fact that perpetrators of genocide and grave human rights violations in Burundi have escaped prosecution with impunity while reparations for the victims have been overlooked.

¹¹⁴⁷ Shelton, D.; (2004) "The World of Atonement Reparations for Historical Injustices *Miskolc Journal of International Law* 2 (1) at p. 260.

¹¹⁴⁸ Schabas, *op cit*, n. 362 at p. 6.

Internationally there have been a paradigm shift to institute reparation claims in order to redress past gross violations of human rights. Shelton has contended that German efforts to confront the Holocaust have set a standard for remedying the past where states and individuals or a group of individuals may be asked to account for past human rights abuses and provide redress to victims or their descendants.¹¹⁴⁹ For example, there have been reparation claims which have been brought forward against Germany for injuries and losses suffered during WW II.¹¹⁵⁰ Similarly, the UN Conference on Racism held in Durban in 2001, deliberated on the issues of reparations for slavery and colonialism.¹¹⁵¹ Recently, there have been reparation claims such as those of Native Americans in the United States and Canada, aboriginal peoples in Australia and New Zealand, diamond miners and other victims of apartheid in South Africa,¹¹⁵² and the families of disappeared persons in Latin America and North Africa.¹¹⁵³

Likewise in 1995, when German Chancellor Helmut Kohl visited Namibia, Herero community presented a petition claiming US \$600 as reparations for alleged genocide which was committed during the Namibian war in 1904-1907 when German army and settlers killed about 75-80% of the Herero population.¹¹⁵⁴ Furthermore, the Hereros instituted reparation claims against German companies (Deutsche Bank, Terex Corporation and Woermann Line) as accomplices during the Herero genocide.¹¹⁵⁵ Although the Herero reparation claims were unsuccessful,¹¹⁵⁶ however, German government made a public apology to Namibia. The Herero's case underscores the need for developing norms of reparations and apologies in order to address past, present and future injustices.

This thesis cites examples from other jurisdictions and advocates that public interest in human rights, rule of law and legal certainty call for the need to develop a framework to determine the

¹¹⁴⁹ See *In re Holocaust Victims Assets Litigation*, *op cit* n. 640, Shelton, *op cit* n. 1147 at pp. 260-261.

¹¹⁵⁰ Shelton, *op cit* n. 1147 at p. 261, on 30 October. 1997 a Greek court entered a default judgment against Germany and awarded damages, for further discussion on WW II reparation claims see the *Distomo Massacre Case*, BGH-III ZR 245/98 (June 26, 2003).

¹¹⁵¹ The World Conference against Racism, Durban South Africa, August 30, 2001 to Sept. 7, 2001, pursuant to UNGA 52/111, <http://www.un.org/WCAR/e-kit/backgrounder1.htm>.

¹¹⁵² See the *Apartheid Reparation* case, *op cit* n. 632, *Ken Wiwa v Royal Dutch Petroleum Company* *op cit* n. 641 and *Kiobel v Royal Dutch Petroleum*, *op cit* n. 643.

¹¹⁵³ Shelton, *op cit* n. 1147 at p. 261.

¹¹⁵⁴ Arbitrary land dispossession in Namibia led to an uprising by the Herero in response to the German General Lothar Von Trotha who issued a proclamation on October 2, 1904, ordering all Herero men to be killed and all their pieces of land and cattle be seized. Some Herero were imprisoned in concentration camps where they were subjected to scientific experiments and torture. Women and children were driven into the Kalahari Desert where they died of mass starvation. A few number of Hereros who escaped became refugees in Botswana.

¹¹⁵⁵ Shelton, *op cit* n. 1147 at p. 262.

¹¹⁵⁶ See the case of *Hereros et al v Deutsche Afrika-Linien GmbH & Co*, 10 April 2007 US Court of Appeals for the 3rd Circuit, No. 06- 1684.

legitimacy and modality of responding to reparations claims for historical injustices. It is submitted that legal actions that seek to invoke state responsibility under international law can result into inter-state claims. For instance, it has been shown in the cases of *Apartheid Reparation*, *In re Holocaust Victims Assets Litigation*, *Ken Wiwa v Royal Dutch Petroleum Company*, *Kiobel v Royal Dutch Petroleum*, that delictual actions can be instituted against state or state agents while perpetrators of gross human rights violations may be prosecuted under national or international criminal law and/or civil actions by individual or group of individuals seeking remedies against individual perpetrators of genocide and other international crimes.

This thesis asserts that reparation is a legal and moral issue that requires a formal acknowledgement of past wrongs, recognition of continuing injuries or harms done to the victims and government's commitment to redress these wrongs. It is emphasized that reparation claims in Burundi must be acknowledged and pursued because they are powerful acts that can confront human rights abuses of the past in order to secure the present and future political, economic and social arrangements.¹¹⁵⁷

Research findings in this study have revealed that effective utilisation of transition justice mechanisms such as truth and reconciliation commissions may result into healing Burundi should they be accompanied with observance, respecting for and promoting human rights articulated in the International Bill of Rights. It must be stressed that studying the crime of genocide in Burundi needs a multi-disciplinary approach that must identify perpetrators and victims can be compensated. One of the fundamental goals of dealing with international crimes such as genocide, war crimes and crimes against humanity is accountability. In this perspective this thesis submits that studying Burundi's mass killings in the context of accountability for genocide and other crimes committed calls for an interdisciplinary approach.

This thesis accepts that when analysing mass killings in Burundi in the context of transitional justice for example, Dube's approach is relevant because the author has contended that sufficient attention has been paid to transitional justice as both a phenomenon and a conceptual tool to address the issue of past human rights violations.¹¹⁵⁸ Clarke has elaborated

¹¹⁵⁷ Shelton, *op cit* n. 1147 at p. 289. For reparations for genocide see generally, Cohen, S.; (2001) **States of Denial: Knowing About Atrocities and Suffering**. Polity Press, Cambridge, Minnow, M. (1998) **Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence**, Boston Beacon Press. Thompson, J.; (2002) **Taking Responsibility for the Past: Reparation and Historical Justice**, Polity Press, Cambridge at pp. 104 and 107. Greenawalt, *op cit* n. 1125 at pp. 2259-2294.

¹¹⁵⁸ Dube, S. I.; (2011) "Transitional Justice Beyond the Normative: Towards a Literary Theory of Political Transitions" **International Journal of Transitional Justice: Oxford Journals**. Oxford University Press: at p. 177. Available at: <http://www.oxfordjournals.org/>

further by stating that since the early 1990s, transitional justice has developed from being a mysterious area of study and infrequent in international politics to being relevant for states emerging from violent conflicts or undergoing transition from authoritarian to democratic rule.¹¹⁵⁹In the academic world, the field of transitional justice has emerged as truly interdisciplinary with contributions from legal scholars, political scientists, historians, anthropologists, psychologists and others.

Although scholars and the international community have failed to recognise the genocide of Burundi, this study poses the supremely important question whether the military regimes of 1966 to 1996 in Burundi did commit genocide? Research findings in this study have shown largely that genocide has been committed by the *Tutsi*-led army although Burundi remains an ambiguous case because the mass killings have not been interpreted legally to meet the criteria of the Genocide Convention. As Hiebert and Policzer have contended, genocide is a highly contested concept.¹¹⁶⁰

This thesis points out the challenges of identifying the targeted groups and criminal accountability of the perpetrators in Burundi and argues that individual and collective accountability can be possible if a broader meaning of genocide can be employed and victims of genocide be compensated. In legal terms, the crime of genocide is associated with the intent to destroy certain target group(s). Although there is a troubling aspect to establish whether the crime of genocide was committed in Burundi, this study has identified *Hutu* and *Batwa* ethnic groups as targeted groups by the *Tutsi*-led army in 1960s, 1972, 1988 and 1993 mass killings. Similarly, due to the revenge and retaliation insurgent groups also have committed mass killings against *Tutsis* as a response to *Hutu* genocide in the dark period of late 1990s and early 2000 which can be interpreted to mean genocide and qualify to what scholars have referred to as bilateral genocide. Other target groups can be drawn from the politically motivated mass murders and killings of people with albinism which have escalated in post-conflict Burundi.

In the premises, this thesis acknowledges that Burundi is experiencing unprecedented levels of genocide accompanied by systematic gross violations of human rights through persistent armed conflicts. International Humanitarian Law recognises two types of armed conflicts:

¹¹⁵⁹ Clarke, K. M.; (2009) "Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa", **Cambridge University Press**. The author challenges the establishment of the ICC in 2002 by asserting that it was hailed as a international court to deal with human rights violations in the world and uphold the rule of law to be the answer to global violence. However it has come under scrutiny in dealing with Africa cases.

¹¹⁶⁰ Hierbert and Policzer, *op cit* n. 508 at p. 64.

international and non-international armed conflicts.¹¹⁶¹ Burundi's conflicts can be categorised as non-international armed conflicts in terms of Article 3 of Geneva Conventions. There have been a number of country-based UN Resolutions adopted to respect and promote human rights in armed conflicts.¹¹⁶² The combatants in both international and non-international conflicts are under a duty to respect human rights as confirmed in case law. In its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case in 1996, the ICJ affirmed the applicability of international human rights law during armed conflicts and held, *inter alia*, that the application of the ICCPR does not cease in the times of war.¹¹⁶³

¹¹⁶¹ Article 3 is common to the four Geneva Conventions of 1949. It provides that:
in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) violence to life and person in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.
an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The parties to the conflict should further endeavour to bring into force, by means of special agreements all or part of the other provisions of the present Convention.

¹¹⁶² See Siatitsa, I. and Titberidze, M.; "Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges", available at: <http://www.geneva-academy.ch/RULAC/pdf/Human-Rights-Law-in-Armed-Conflict.pdf>

¹¹⁶³ *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996 I.C.J. Reports 226, para. 25. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, 2004 I.C.J. Reports, para.106 and *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ, Judgement of 19 December 2005, para. 216.

The respondents' views in this study have indicated that armed conflicts in Burundi have long-term effects in terms of political stability, consolidation of the rule of law and economic development.

5.4.1 Material and mental elements of genocide in Burundi's perspective

Under international criminal law, the material (*actus reus*) and mental (*mens rea*) elements must be proved. Evidently, Burundi has suffered atrocities through mass killings as indicated in the research findings in this study. Numerous cases of torture and systematic mass killings and forced disappearances have been reported since 1960's to date . A high level of cruelty associated with victims being tortured and subjected to inhumane treatment before killings have been recorded.

The Nuremberg Trials were important landmark decisions in international law jurisprudence in which individuals were held accountable for crimes they committed such as genocide, war crimes and crimes against humanity.¹¹⁶⁴The International Military Tribunal (IMT) for the trial of Nazi leaders was established in 1945 in terms of the London Charter which is regarded as a cornerstone in international law history because the top Nazi officials were held personally responsible for the atrocities committed by the Nazi regime during the WWII. The Nuremberg legacy laid down the foundation for human rights movement which was not limited only to international criminal justice but also providing universal assurance of individual rights. Human rights are currently articulated in a vast number of international and regional instruments in mentioned above in section 2.2 of this chapter.

Sartre, as cited in Falk, Kolko and Lifton, has submitted that for a very long time genocide has gone unpunished.¹¹⁶⁵Schabas agrees with this view and suggests that the crime of genocide has been recognised as a state policy within the context of war or colonial conquest. Hence domestic prosecutions were unthinkable because of the defence of immunity.¹¹⁶⁶Referring to the cases of Germany and Rwanda, Schabas has stated further that it was rare to consider accountability for genocide committed or to inspire other jurisdictions to intervene because of

¹¹⁶⁴ See the London Charter of the International Military Tribunal, 1945. The Charter laid down the rules and procedures by which the Nuremberg Trials would follow. It stipulated how perpetrators of genocide committed during world wars would be prosecuted, including senior officials and their subjects who followed the superior orders but also acting under superior orders would be considered as a mitigating factor if the Tribunal determined that justice was required.

¹¹⁶⁵ Falk, R.A.; Kolko, G.; and Lifton, R.J.; (eds) (1971) **Crimes of War** New York: Random House at p. 534.

¹¹⁶⁶ Schabas, *op cit* n. 362 at p.1.

respecting the state's sovereignty.¹¹⁶⁷ This attracted academic discourse because genocide cases were mostly dealt with on an *ad hoc* basis. Sometimes claims were brought forward before the International Court of Justice (ICJ) which would lack jurisdiction to prosecute the perpetrators. According to Grant and Barker, the new development of international law has marked the genesis of international criminal law which attracts interests and emerging as a discipline of its own.¹¹⁶⁸

Building on the above views, the starting point should be the Genocide Convention.¹¹⁶⁹ In terms of the Convention, the crime of genocide is narrowly defined to mean any of the following acts:

- (a) Killing members of a population or ethnic group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; and
- (e) Forcibly transferring children of the group to another group.¹¹⁷⁰

The Genocide Convention initially was meant to protect minority groups who were victims of genocide, hence its narrow definition. Although acts of genocide may be committed against other groups who do not fall within the Genocide Convention definition, like the case of Barundi, the group notion was limited to minorities and ignored majority groups. What should have been considered is the fact that the consequence of the genocide crime is an extreme one because it tends to fuel racial and ethnic discrimination and hatred due to its nature of human destruction.

The term "genocide", as articulated by the Polish-Jewish international lawyer, Raphael Lemkin, who combined the Greek term *genos* (people or tribe) and the Latin *cide* (to kill) after the atrocities committed by the Nazi German government against Jews, has come to mean deliberate killing or destruction of any minority group within a given society. This study argues that the crime of genocide should be extended to all victims, irrespective of the group they belong to, which means the protection and prohibition of the threat of genocide against a particular group should be derived in terms of the core principles of human rights instruments

¹¹⁶⁷ Schabas, *ibid.* at p. 2.

¹¹⁶⁸ Grant J. P.; and Barker, J.C.; (2006) **International Criminal Law Deskbook**: Cavendish Publishing Limited: London at p. vii.

¹¹⁶⁹ The Convention on the Prevention and Punishment of Genocide, 1948 was adopted by the UN General Assembly on 9th December, 1948 by Resolution 260 (III) and came into force in January, 1951.

¹¹⁷⁰ Article 2 of the Genocide Convention.

such as UDHR, ICCPR, ICESCR and African Charter. These core principles should be interpreted broadly and purposefully so as to situate the human rights instruments in their proper political, economic and social contexts.

The Genocide Convention does not state clearly whether states are expected to make assumptions in the prevention and punishment of genocide. Article 1 of the Convention stipulates that the crime may be committed in the times of war as well as in times of peace. Harris has criticized the Genocide Convention when he stated that it has no supervisory machinery.¹¹⁷¹ Grant and Barker agree with Harris when they submit that the draft of the Convention which was presented to the UN General Assembly was adopted as an annex to Resolution 260(III) without name.¹¹⁷² Article 6 (3) of the ICCPR elaborates further that when deprivation of life constitutes the crime of genocide, nothing shall authorise any state party to derogate in any way from any obligation assumed under the Genocide Convention. This provision provides for an absolute bar on genocide as it is *jus cogens*.¹¹⁷³

State Parties are obliged to enact legislation that criminalise genocide and associated acts and to punish the perpetrators.¹¹⁷⁴ Despite of the duty imposed upon the State Parties under UDHR, the Genocide Convention and the ICCPR, there was no universal penal tribunal until the adoption of the Rome Statute of the International Criminal Court in 1998.¹¹⁷⁵ Burundi ratified the Rome Statute on 21 September 2004; nevertheless, massive human rights violations and other crimes under international laws continue unabated.¹¹⁷⁶ Ratification of the Rome Statute means that Burundi is under a positive duty to ensure that crimes under international law are thoroughly investigated and prosecuted by national courts in co-operation with the International Criminal Court. To the contrary, there have been systematic and politically motivated mass killings amounting to genocide while impunity for international crimes committed in Burundi remains unaddressed.

Like Burundi, the unwillingness to prosecute and inability to prosecute international crimes has been demonstrated in other countries such as Kenya and Libya in the cases of Kenyatta, Ruto, Barasa, Sang and Gaddafi as explained in the next section below. However, in comparison with Burundi, the ICC's approach to prosecute the perpetrators of mass killings in Kenya and Libya has been different. For example, in Kenya after the outrages of widespread violence

¹¹⁷¹ Harris, *op cit* n. 172 at p. 652.

¹¹⁷² Grant and Barker, *op cit* n. 1168 at p. 40.

¹¹⁷³ www.lectlaw.com/def/d144.htm. [accessed on 15/05/2011].

¹¹⁷⁴ Article V of the Genocide Convention.

¹¹⁷⁵ Grant and Barker, *op cit* n. 1168 at p. 40.

¹¹⁷⁶ www.Reliefweb.int/node/155648 [accessed on 15/05/2011].

followed the Kenyan presidential elections held in December 2007, a substantial number of civilians were killed and displaced similar to Burundi case.¹¹⁷⁷

Unlike Burundi, following the mass killings in Kenya, a Commission of Inquiry on Post-Election Violence, referred to as, "the Waki Commission" was established in February 2008 under the chairmanship of Judge Philip Waki.¹¹⁷⁸ The Waki Commission published a report which recommended, among others, the establishment of a special tribunal composed of national and international experts to investigate and prosecute perpetrators of the post-election armed violence in Kenya. It was clearly stated that if the tribunal was not established within a certain period, the Waki Commission's Report would be handed over to the ICC including the names of persons who were suspected to be the most responsible for mass killings. In February 2009 the Kenyan parliament voted against a Bill to establish the special tribunal and no further action was taken by the government to implement the Waki Commission's recommendations. In July 2009 the Commission Report was sent to the ICC Prosecutor Office.¹¹⁷⁹

On November 26, 2009 following analysis of the Waki Commission's Report, the ICC Prosecutor requested approval from the Court to open an investigation relating to crimes against humanity allegedly committed in relation the post-election violence in Kenya. This was the first time that the ICC Prosecutor invoked the *proprio motu* powers¹¹⁸⁰ under Article 15 (3) of the Rome Statute which was endorsed by a majority decision of the Pre-Trial Chamber on March 31, 2010.¹¹⁸¹ Kenyatta was charged with five counts orchestrating post-election violence, committing crimes against humanity consisting of murder, deportation or forcible transfer, rape, persecution and other inhumane acts allegedly committed during the post-election violence in Kenya in 2007-2008. On 23 January 2012, it was confirmed that the ICC had jurisdiction to try the alleged crimes. In the context of the Kenyan situation two other cases: *The Prosecutor v*

¹¹⁷⁷ The former UN secretary-general Kofi Annan was called in to facilitate the peace agreement. It was agreed by parties to establish a Commission of Inquiry under Judge Philip Waki. The Waki Report recommended the establishment of a domestic tribunal to try persons responsible for gross violations of human rights in Kenya. The Waki Report was also given to Annan, who was instructed to forward it to the ICC if the Kenyan tribunal was not established.

¹¹⁷⁸ See Nmaju, M. C.; (2009) "Violence in Kenya: Any Role for the ICC in the Quest for Accountability" *African Journal of Legal Studies*, at p. 79.

¹¹⁷⁹ Nmaju, *ibid* at pp. 89-90.

¹¹⁸⁰ The Prosecutor's right to initiate an investigation at his/her own instigation without a referral from the State Party or the UN Security Council.

¹¹⁸¹ See *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, *op cit* n. 1009.

*William Samoei Ruto and Joshua Arap Sang*¹¹⁸² and *The Prosecutor v Walter Osapiri Barasa*¹¹⁸³ are currently before the ICC at the time of writing this thesis.¹¹⁸⁴

The Kenyan case illustrates the manner in which ICC's Prosecutor can initiate investigations into a situation in a State Party pursuant to the "Complementarity" Principle.¹¹⁸⁵ The Kenyan government's unwillingness to prosecute perpetrators of gross violations of human rights in 2007 have been shown further when Kenyans went ahead to elect one of the accused perpetrators (Uhuru Kenyatta) to be the President in 2013. Similarly, it has been the case with Libya where inability to prosecute Saif Al Islam Gaddafi, one of the perpetrators of human rights violations level attracted the jurisdiction of the ICC.¹¹⁸⁶ Although the Libyans wanted Saif Al Islam Gaddafi to be prosecuted by national courts, lack of capacity and civil war unrest called for the ICC jurisdiction in terms of the "Complimentary Principle".¹¹⁸⁷

It must be pointed out that the general rule is that a State Party must prosecute the perpetrators of international crimes committed in its territory. However, if there is unwillingness on the part of the government to prosecute the perpetrators of such crimes, criminal investigation and prosecution before the ICC may be a test of the Court's "Complementarity Principle" as it was done in the Kenyan and Libyan cases. Among the factors which can be used to invoke the ICC Prosecutor's *proprio motu* powers include, lack of capacity in terms of expertise, resources and conducive environment such as ongoing wars and violence. This thesis argues that there is a paradigm shift to resort to "Complementarity Principle" which underpins the jurisdiction of the ICC if there is if no attempts undertaken by the government to prosecute the perpetrators of gross violations of human rights like the Burundi's case.

Article 13 of the Rome Statute states that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 if:

¹¹⁸² *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, *op cit* n. 1010.

¹¹⁸³ *The Prosecutor v Walter Osapiri Barasa*, *op cit* n. 1011.

¹¹⁸⁴ The ICC "The Trial of Uhuru Kenyatta Before the ICC Trial Chamber V(b) to Start on 5 February 2014", **Press Release**, 31 October 2013, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr958.aspx

¹¹⁸⁵ See Article 1 of the Rome Statute. "Complimentary Principle" gives the State Parties to the ICC Rome Statute investigative and prosecutorial priority. However, the state's failure or unwillingness to investigate and prosecute serious international crimes gives the ICC jurisdiction to prosecute the alleged crimes.

¹¹⁸⁶ See Leanos, *op cit* n.1012 at p. 2296-2298.

¹¹⁸⁷ Leanos, *ibid* at p. 2299.

- a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;¹¹⁸⁸
- a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter;¹¹⁸⁹ or,
- the ICC Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.¹¹⁹⁰

Article 15 of the ICC Rome Statute requires the Prosecutor to initiate investigations, analyse the seriousness of the information received as shown in the Kenyan case. The Prosecutor may seek additional information from the states, UN organs, intergovernmental or non-governmental organizations or other reliable sources that may be deemed appropriate including written or oral testimony. If in Prosecutor's view, there is a reasonable basis to proceed with an investigation of the case, it is mandatory for the Prosecutor to submit to the Pre-Trial Chamber a request for authorization of an investigation together with supporting evidence.¹¹⁹¹ The victims of genocide, war crimes and crimes against humanity may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence.¹¹⁹²

This study refers to ongoing mass killings in Burundi and asserts there is unwillingness to investigate and prosecute serious crimes in the country. The ICC Prosecutor's Office has also been reluctant to invoke its *proprio motu* powers in Burundi, contrary to what the Kenyan and Libyan cases suggest. Failure to investigate and prosecute serious crimes in Burundi by the Post-transitional government and the ICC are among the actors which have encouraged ongoing mass killings in post-conflict Burundi.

My research findings have indicated that victims were attacked and tortured before killing and suffered severe mental and bodily harm, including bodily mutilations.¹¹⁹³ Accounts of torture, body mutilation, rape and sexual violence have been used in in Burundi's armed conflicts as

¹¹⁸⁸ Article 13 (a).

¹¹⁸⁹ Article 13 (b).

¹¹⁹⁰ Article 13 (b) (c) of the ICC Rome Statute.

¹¹⁹¹ Article 15(3) of the ICC Rome Statute.

¹¹⁹² The ICC, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹¹⁹³ See Ndadaye's funeral- *Funérailles du Président Melchior Ndadaye*, available at: <http://www.youtube.com/watch?v=yL3RhtTb1RM>. [accessed on 02/132/2011], Amnesty International, **Burundi: Briefing to the Committee Against Torture**, 1 October 2006, AFR16/016/2006, available at: <http://www.refworld.org/docid/45388c3e4.html>. [accessed on 30/04/ 2013].

tools to instigate terror among Burundi civilians and justify the *actus reus* and *mens rea* elements to commit heinous crimes. This is contrary to human rights and humanitarian norms.¹¹⁹⁴ It is common cause that one of the main purposes of International Humanitarian Law is to prevent human suffering during armed conflicts, yet, the atrocities and human suffering in Burundi as stated in the APRA, 2000 and UN Mission Report of 2005 referred to as Kalomoh Report¹¹⁹⁵ demonstrate a deliberate contravention of the rules of International Human Rights and Humanitarian Laws.

Although there is no scholarly consensus on whether genocide has actually taken place in Burundi, as a State Party to the UN Charter, Burundi has an obligation under the UN Conventions and Treaties such as the Genocide Convention, ICCPR, and Rome Statute of ICC including the regional legal instruments like the AU African Charter just to mention a few to respect and promote human rights. At national level the Post-transition Constitution and Penal Code¹¹⁹⁶ provide for substantive nature of Burundi's genocide which may be inferred and interpreted against the background of Stanton's eight stages of genocide to ensure the prosecution of the perpetrators. However, the absence of transitional justice mechanisms undermines genocide laws.

The APRA and Kalomoh Report constitute the fundamentals of transitional justice in Burundi. The APRA represents former belligerents' most advanced attempt to resolve the protracted ethnic and politically motivated killings that have ravaged Burundi since independence in 1962. The parties to the APRA, the then the government of Burundi under Pierre Buyoya, warring factions (*Tutsi*-led army and insurgent groups and opposition political parties from *Hutus* and *Tutsis*) recommended judicial and non-judicial solutions in order to resolve their conflicts and try to heal Burundi wounds through the establishment of an International Judicial Commission of Inquiry (IJCI), a Special Criminal Tribunal (SCT) and Burundi Truth and Reconciliation

¹¹⁹⁴ See Nibigira, C.; and Scanlon, H.; (2010) Gender, Peace and Security: The Challenges Facing Transitional Justice Processes in Burundi, **International Center for Transitional Justice**, at p. 9, available at: <http://www.initiativeforpeacebuilding.eu/pdf/1008burundi.pdf> [accessed on 14/05/2013].

¹¹⁹⁵ The Kalomoh Report was UN Assessment Mission established by the UN Security Council, S/2005/158, March 2005 and named after Tuliameni Kalomoh, a Namibian who was appointed as an Assistant Secretary-General for Political Affairs. Kalomoh Report was submitted to the UN Security Council on 11 March 2005 and noted that delineation between the mandate and the powers of International Commission of Inquiry, a Special Chamber Tribunal and Burundi Truth and Reconciliation Commission was unclear because there was a risk of overlapping jurisdictions, contradictory findings and a waste of resources. Instead the Kalomoh Report recommended a combination of transitional justice mechanisms through the creation of a single Truth and Reconciliation Commission composed of national and international experts.

¹¹⁹⁶ *Loi N°1 / 05 du 22 Avril 2009 portant Revision du Code Penal* Burundi (was signed by the President on 22 April 2009).

Commission (BTRC).¹¹⁹⁷ Subsequently, the Kalomoh Report called for the establishment of dual transitional justice mechanisms composed of both a Truth and Reconciliation Commission and a Special Chamber to try persons bearing the greatest responsibility for acts of genocide, war crimes or crimes against humanity.¹¹⁹⁸ However, the negotiated operational framework on implementation of the proposed transitional justice mechanisms has not yet been put in place.¹¹⁹⁹

Among other recommendations of the Kalomoh Report was to have a team of UN experts that would assess the viability of the ICI proposed in the Arusha Agreement,¹²⁰⁰ and immediate establishment of the BTRC and SCT within Burundi's judicial system that would have composed of national and international judicial and non-judicial experts. Subsequently, the Kalomoh Report underscored having an operational framework that would have been negotiated between the UN and the Government of Burundi in consultations with all Burundi stakeholders.¹²⁰¹ Although in 2006 the Nkurunziza government in its memorandum and subsequent amendments had expressed its willingness and desire to establish the BTRC and SCT, the post-conflict government stance on amnesty and the independence of the BSCT's Prosecutor remain unclear.¹²⁰²

Some critics have argued that there have been no transition justice initiatives in Burundi because in 2005 when the Nkurunziza government came to power there was still an active armed group, PALIPEHUTU-FNL. Furthermore, the same argument can be linked to the withdrawal of some political parties from the 2010 elections which formed an Alliance for Democratic Change (the ADC-IKIBIRI) and new armed groups.¹²⁰³ Due to delaying tactics and lack of implementation strategies of transitional justice mechanisms, to date no single perpetrator has been prosecuted for genocide, war crimes and crimes against humanity committed during Burundi's armed conflicts and impunity continues unabated.

5.4.2 Impunity in Burundi

According to the case of *Ngirincuti v Secretary of State for the Home Department*,¹²⁰⁴ impunity continues to take place in Burundi. Additionally, the Gatumba massacre of 18 September 2011

¹¹⁹⁷ UN Human Rights Council Universal Periodic Review on Burundi of December 1-12, 2008, **International Center for Transitional Justice**, at p.1.

¹¹⁹⁸ Nibigira and Scanlon, *op cit.* n. 1194 at p.7.

¹¹⁹⁹ UN Human Rights Council Universal Periodic Review *ibid* n.1197.

¹²⁰⁰ See the UN Security Council Resolution 1606, 2005.

¹²⁰¹ UN Human Rights Council Universal Periodic Review, *ibid* n.1197 at p. 1.

¹²⁰² UN Human Rights Council Universal Periodic Review, *ibid.* at p. 2.

¹²⁰³ See Nibogora, *op cit* n. 16 at p. 59.

¹²⁰⁴ *Ngirincuti v Secretary of State for the Home Department*, *op cit* n. 12.

demonstrates the unresolved issues that continue to encourage mass killings and prevent attempts at consolidating peace, human security, stability and lastly implementation of transitional justice mechanisms in line with the Post-Transition government's mandate. For example, the International Centre for Transitional Justice (ICTJ) has raised concerns over unjustifiable and unnecessary delays in the implementation of transitional justice mechanisms in Burundi.¹²⁰⁵ Thus, there is lack of commitment to conduct proper criminal investigation by the prosecuting agencies and integrated sound policies on redressing the victims of genocide in Burundi.

It must be pointed out that since the conclusion of the Arusha Agreement and establishment of the post-transitional government, the root causes of the politico-ethnic conflicts that have claimed many lives and inflicted massive property losses on Burundi have not been addressed in a comprehensive manner. It must be stressed that the post-transitional authorities in Burundi seem to ignore important aspects of national healing and the role of transitional justice mechanisms in consolidating democracy and constitutionalism.

Notably, judicial and non-judicial guarantees to end impunity and ensure that there is no recurrences of past crimes and grave human rights violations have been undermined. The political indifferences in post-conflict arrangements have also encouraged systematic outbreaks of mass killings associated with torture and ill-treatments of political opponents.¹²⁰⁶ Therefore, the failure to deal with genocide and inadequate mechanisms to address gross human rights violations have also failed to respond satisfactorily to the widespread incidents of rape and sexual violence perpetrated against women, including victimisation of children during ongoing armed conflicts. Clearly, impunity for crimes committed during Burundi's armed conflicts continues unobstructed.

Lodge has argued that the root causes of armed conflict in Africa are:

- ethnic competition for control of the state,
- regional or secessionist rebellions,
- continuation of liberation conflicts,
- fundamentalist religious opposition to secular authority,

¹²⁰⁵ Cited in the UN Human Rights Council Universal Periodic Review, *op cit* n. 1197.

¹²⁰⁶ See the UN Secretary-General Report on progress towards achieving benchmarks for the future evolution of the United Nations Office in Burundi (BNUB), 18 January 2013, S/2013/36 and UN Security Council Resolution extending the mandate of BNUB until 15 February 2014, S/Res/2090, 13 February, 2013, available at: <http://www.securitycouncilreport.org/un-documents/>. [accessed on 11/ 04/ 2013].

- warfare arising from state degeneration or state collapse, and,
- border disputes and protracted conflict within politicised militaries.¹²⁰⁷

The above mentioned causes of conflicts are relevant in the case of Burundi case.

As primary data and some literature have revealed in this study, there is irrefutable evidence that genocide was committed in Burundi under successive military regimes. For example, the extermination measures taken by the military authorities such as the "Simbananiye" and "Sining" Plans of 1972 and 1993, exclusionary policies against *Hutu* and *Twa* ethnic groups in education and employment, concealing evidence by throwing corpses in the pit, rivers and lake Tanganyika as mass graves and politically-motivated killings lead to the conclusion that genocide was committed in Burundi. Similarly, what has been ignored in the scholarly discussions is the mass killings which were committed by the insurgent groups against *Tutsi* or *Hutu* civilians and politically-motivated killings in the post-conflicts period.

It is submitted that there is the need to test the claim of genocide and other crimes against humanity committed in Burundi. The argument is based on the following reasons:

- First, acts amounting to genocide have been perpetrated by the *Tutsi*-led army during successive military regimes.
- Secondly, the judicial system which is largely modeled on the colonial set-up has failed to advance justice by failing to prosecute perpetrators of the alleged genocide.
- Thirdly, Burundi which is a State Party to a vast number of international and regional Conventions and Treaties, has not yet discharged its obligations by failing to further investigate genocidal acts and bring to justice persons responsible for mass murders in 1960s, 1972, 1988 and 1993.
- Fourthly, the international community also has been slow to confront impunity for crimes committed in Burundi as it was in the case of Rwanda.
- Lastly, the post-conflict government has failed to establish transitional justice mechanisms such as the TRC and Special Tribunal, contrary to the objectives of the APRA, Constitution and the the UN Security Council Resolution 1606 of 2005.

The UN Reports (Ruhashyankiko, 1978 and Whitaker, 1985) and the UN Commission of Inquiry, 1993 have perceived genocide in contradictory views. The APRA on the other hands, traces the genocide which was committed since 1960s and pressed for proper

¹²⁰⁷ Lodge, T.; "Towards an Understanding of Contemporary Armed Conflict in Africa" April 1999 <http://www.iss.co.za/pubs/monographs/No36/ArmedConflict.html> [accessed 2012-11-14].

investigations¹²⁰⁸ while underlining accountability, truth and reconciliation, national unity and reconstruction. To- date it is more than thirteen years since the signing of the APRA and nine years after the establishment of the post-transition government, yet, nothing has been done to further criminal investigations or institute prosecutions for genocide.

It is argued further that the persecution of minority groups such as albinos and Twas can fall within the conventional definition of genocide. However, due to the flaws in Burundi's criminal justice system and corruption, prosecution at national level is not likely to materialise. At the international level, the ICC lacks jurisdiction because most of the crimes were committed before its establishment, hence the "Complimentary Principle" cannot be applied. Thus, the right criminal accountability approach would have been to establish an *ad hoc* tribunal similar to the ICTR, ICTY, Sierra Leone, or Cambodia. Despondently, Burundi has chosen to conceal the truth about its dark periods of genocide and terror culminating into the miscarriage of justice while compensation and reparations remain pipedreams.

Unlike the approaches adopted in the Nuremburg Trials, Chile, South Africa, Argentina, Guatemala, Cambodia, Rwanda and Sierra Leone, just to mention a few, transitional justice in Burundi has left a "complex documentary trail,"¹²⁰⁹ composed of pre-negotiation agreements, substantive agreements and implementation agreements between various political parties and armed groups that have played a major role in Burundi's protracted conflicts.

The agreements such as APRA, 2000 and Global Ceasefire Agreement (GCA), 2006 contain provisions that dealt with transitional justice as demonstrated in Table 5 below.

Table 5: Peace and Ceasefire Agreements

Signatories Title	Date of signature	Particulars of the agreement

¹²⁰⁸ Protocol I of the APRA, Article 6 (10).

¹²⁰⁹ See Vandeginste, S.; (2007) "Transitional Justice for Burundi: A Long and Winding Road" A paper presented at the Conference on Building a Future on Peace and Justice, held at Nuremberg, 25 – 27 June 2007 at p.11, available at: <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf> [accessed on 16/05/2013]. Vandeginste cites Bell's view and notes a complex documentary trail in Burundi peace process where different issues were dealt with at different stages. See Bell, C. (2000) **Peace Agreements and Human Rights**, Oxford University Press, Oxford at p. 20.

• The Government of Pierre Buyoya • The National Assembly • A total of seventeen political parties	28/08/2000 Arusha	Arusha Peace and Reconciliation Agreement (APRA) made up of: • Protocol I- Nature of the Burundi conflict, problems of genocide and exclusion and their solutions • Protocol II- Democracy and Good Governance • Protocol III- Peace and Security for All • Protocol IV- Reconstruction and Development • Protocol V- Guarantees on Implementation of the Agreement
• Transitional Government of Domitien Ndayizeye • The CNDD-FDD of Pierre Nkurunziza	16/11/2003 Dar Es Salaam 02/02/2002 27/01/2003 08/10/2003 02/11/2003 02/11/2003	Global Ceasefire Agreement (GCA) including its integral parts: • the Ceasefire Agreement • the Pretoria Protocol on political, defence and security and power-sharing • the Pretoria Protocol on outstanding issues • the Forces Technical Agreement
• The Government of Nkurunziza • PALIPEHUTU-FNL of Agathon Rwasa	07/09/2006 Dar Es Salaam 18/06/2006	Comprehensive Ceasefire Agreement (CCA) including as an integral part: • the Dar Es Salaam Agreement of Principles towards Lasting Peace, Security and Stability
• The Government of Nkurunziza • PALIPEHUTU-FNL	11 June 2008	Magaliesburg Agreement • Recognise PALIPEHUTU-FNL as a political party
• The Government of Nkurunziza • PALIPEHUTU-FNL	4 December 2008	Bujumbura Agreement • to release political and war prisoners and offered 33 positions to senior PALIPEHUTU-FNL members in the government • PALIPEHUTU-FNL agreed to change its name

	9 January 2009	• Armed forces be disbanded and restructured • PALIPEHUTU-FNL changed its name to <i>Forces nationales de liberation</i> (FNL).

Adopted from the UN Security Council Report, available at: <http://www.securitycouncilreport.org/chronology/burundi.php?page=3> and Vandeginste, S., (2007) Transitional Justice for Burundi: A Long and Winding, available at: <http://www.peacejusticeconference.info/download/WS10Vandeginste%20report.pdf>. [Accessed on 10/10/2013].

Although various peace and ceasefire agreements were signed as shown in the table above, Vandeginste cites Bell's view and notes the complexities of peace process in Burundi where different critical issues were dealt with at different stages.¹²¹⁰ Parties to the peace and ceasefire agreements were political actors who could not come to compromise easily during peace negotiation processes. For example, some political parties could accept and/or reject the terms and conditions of the agreements which had implications on Burundi's transitional justice model, such as: unnecessary delays in peace and ceasefire negotiations, dictating the alterations to the terms and conditions on the critical issues of accountability for crimes committed during armed conflicts, avoiding responsibility and accountability which had negative impact on reparations to the victims.

In order to articulate the measures for reconciliation and the fight against impunity, the APRA contained provisions on the establishment of the BTRC mentioned in chapter one and a judicial mechanism in the form of IJCI to investigate allegations of genocide, war crimes and crimes against humanity which could have been followed by the establishment of SCT. However, neither the BTRC, IJCJ nor STC have been established to date to investigate and prosecute the persons responsible for genocide and grave human rights violations.¹²¹¹ In 2004, the Burundi Parliament passed a law on the establishment of the BTRC, this law has undergone certain amendments, yet, such law has never been implemented.¹²¹² The UN sent an International Assessment Mission to evaluate the suitability and feasibility of the IJCI.¹²¹³ The

¹²¹⁰ Vandeginste, *ibid* at p. 7-9.

¹²¹¹ See Rubli, *op cit* n. 57 at p. 4.

¹²¹² Vandeginste, (2011), *La Commission Vérité et Réconciliation et la qualification des faits: une question à première vue purement technique*, available at: <https://sites.google.com/site/newsdebuja/burundi-bjm-news-6827> [accessed on 10/10/2013].

¹²¹³ International Center for Transitional Justice, Submission to the Universal Periodic Review of the UN Human Rights Council, December 1-12, 2008, available at:

Mission's findings and recommendations are contained in the Kalomoh Report,¹²¹⁴ which called for a review of the APRA proposal on the establishment of the BTRC and SCT or a dual mechanism that consists of a truth and reconciliation commission and a judicial processes.

It is acknowledged that the APRA and the Kalomoh Report laid down the foundation of transitional justice in Burundi. For instance, the APRA Agreement represented the former belligerents' most advanced attempt to resolve the enduring ethnic and political conflicts that have ravaged Burundi since independence in 1962. It involved the Buyoya's government, warring factions and opposition political parties. It recommended judicial and non-judicial mechanisms to resolve Burundi's conflicts and try to heal the wounds of Burundi through the establishment of a Truth and Reconciliation Commission and Special Criminal Tribunal. Following the endorsement of the Kalomoh Report, the UN and the new CNDD-FDD government negotiated the implementation strategies of the Kalomoh Report's recommendations in 2006 and 2007.

This thesis takes note of the disparities in the implementation of the Kalomoh Report's recommendations. The central issues of dissonance among the parties to the peace negotiations have been associated mostly with the demand for amnesty for war crimes, crimes against humanity and genocide, the independence of the SCT's Prosecutor and the link between the BTRC and SCT jurisdictions.¹²¹⁵ In 2007, the negotiating parties eventually agreed to hold popular consultations on transitional justice. These consultations underlined the modalities and composition of the BTRC and SCT and were finally conducted in 2009.¹²¹⁶

In June 2011 the President nominated a Technical Committee, whose responsibility was to draft a Bill that would have reinforced the establishment of the BTRC and its functions. The Bill was supposed to be made available for public comments in November 2012, and be scrutinized

<https://ictj.org/sites/default/files/ICTJ-Burundi-HRC-Review-2008-English.pdf> [accessed on 10/10/2013].

¹²¹⁴ UN Security Council, S/2005/158, March 2005.

¹²¹⁵ Ndikumamasabo, M. and Vandeginste, S. "*Mécanismes de justice et de réconciliation en perspective au Burundi*" in: Marysse, S., Reyntjens, F. and Vandeginste, S. (eds.), (2006-2007) *L'Afrique des Grands Lacs: Annuaire*, Paris: L'Harmattan, at pp.109-133., cited in Rubli, *op cit* n. 57 at p.7.

¹²¹⁶ *Comité de Pilotage Tripartite*, 2010, available at: <http://levisionnaire-infos.blogspot.com/2010/01/communiqué-du-comité-de-pilotage.html> accessed on 10/10/2013].

by the Senate and the National Assembly,¹²¹⁷ to date after 14 years since the conclusion of the APRA, conceptualisation and implementation of the BTRC law remains elusive.

The Kalomoh Report noted that the delineation between the mandate and the powers of the BTRC was blurred. As a result, there was a sense of overlapping jurisdictions that would have resulted into inconsistent findings and a waste of resources. This observation called for a further recommendation on creating a single Commission with mixed (national and international) configuration.¹²¹⁸ The mandate of the new Commission would have been composed of two units in accordance with the APRA and have mandate to:

- investigate and establish the facts,
- determine the causes and nature of the conflicts in Burundi, and
- classify the crimes committed since independence and identify those responsible for the crimes of genocide, crimes against humanity and war crimes committed during the various cycles of conflict.

The mixed Commission would have a Research Unit responsible for establishing the causes and facts of the conflicts and the nature of the crimes committed during the various cycles of violence, an Investigative Unit responsible for the investigation of crimes and identifying those responsible. It was added that "while the investigation would have been conducted by the Commission, it would have been not regarded as a criminal or judicial investigating body. Instead, investigators would have conducted their investigations in full respect of the rights of witnesses and law".¹²¹⁹ Additionally, it was recommended that judicial accountability would have been dealt with in form of a Special Chamber within the court system of Burundi composed of national and foreign judges,¹²²⁰ as inspired by the Bosnia and Herzegovina model on War Crimes Chamber. It was proposed that the Special Chamber would have jurisdiction to prosecute those bearing the greatest responsibility for the crime of genocide, crimes against humanity and war crimes.¹²²¹ Its provisional mandate would have been limited to specific phases of the conflicts and would include the mass killings between 1972 and 1993.¹²²² In

¹²¹⁷ Human Rights Watch Report, "Burundi: Universal Periodic Review Submission", 30 December, 2012. Available at: <http://www.hrw.org/news/2012/12/30/burundi-universal-periodic-review-submission-updated-december-2012>.

¹²¹⁸ Kalomoh Report, para. 31.

¹²¹⁹ Kalomoh Report, *ibid* para 56 c.

¹²²⁰ Kalomoh Report, *ibid*.

¹²²¹ Kalomoh Report, *ibid*.

¹²²² Kalomoh Report, *ibid* para. 61.

terms of the Kalomoh Report, the UN monitoring was essential in the course of the UN credibility on promoting peace, justice and the rule of law in Burundi.¹²²³

Unfortunately, the Kalomoh Report whose designs and recommendations aimed at moving Burundi from armed conflicts to democratic stability, yet, its recommendations have not been implemented. This has been confirmed by the Special Representative of the Secretary-General and Head of BNUB, Parfait Onanga-Anyanga in his briefing to the UN Security Council in July, 2013, who stated that the transitional justice mechanisms anticipated by the APRA have yet to be effected.¹²²⁴

It is worth stressing that dealing with gross violations of human rights is a hard and painful path, however, the facts remain vital to rebuild Burundi so that Burundi may be free, live without fearing for their lives, be proud of their national identity and engage in economic activities leading to the country's development.

The international community accepts that peace, justice and development are inseparable components of human freedoms,¹²²⁵ thus, a more coordinated approach to resolving conflicts is in Burundi required. For example, the UN Charter requires measures to be taken with respect to threats to the peace, breaches of peace and acts of aggression.¹²²⁶ As such, transitional justice has gained acceptance and considered as a collective determination to maintain peace, democracy and rule of law which are used as guidelines in peace negotiations. In other words, collective determination to have peace, justice and development are values underlying transformation of the state institutions of the dictatorial regimes to constitutional order. Therefore, these are settled strategies for addressing the social and economic root causes of conflicts in troubled societies like Burundi. However Powell has opined that transitional justice has been slow to appreciate or capitalize on the inherent potential of political processes to further justice and peace imbedded in the constitutions.¹²²⁷

¹²²³ Kalomoh Report, *ibid* para. 72.

¹²²⁴ Briefing on behalf of the UN Secretary-General Ban Ki-moon to inform the Security Council of the implementation of the mid-term mandate of the BNUB, in accordance with the relevant provisions of the UN Resolution 2090 (2013), of 13 February 2013, in particular paragraph 13.

¹²²⁵ Articles 1 and 2 of the UN Charter.

¹²²⁶ Chapters VII to X of the UN Charter.

¹²²⁷ See Powell, D.; (2010) "The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition" journals.permissions@oxfordjournals.org. [Accessed on 23/05/2011].

The Constitution of Burundi provides for the establishment of the National Monitoring Unit for prevention and eradication of genocide, war crimes and crimes against humanity.¹²²⁸ To the contrary, the envisioned Monitoring Unit cannot be established and discharge its duties in Burundi in the absence of the Truth and Reconciliation Commission. Furthermore, the Constitution allows for the appointment of an Ombudsman and empowers the same to receive complaints and conduct inquiries relating to the violations of human rights by government officials.¹²²⁹ Although successive Ombudsmen such as Mohammed Rukara were appointed to this effect in Burundi, their powers are limited because of executive interference including death threats.¹²³⁰ This contravenes the human rights and humanitarian norms.

Barungi and Mbugua have rightly submitted that peace building includes the efforts directed at promoting human rights and human security in post-conflict societies such as Burundi. Addressing of the root causes of the conflicts through democratic means, promoting justice in the form of social and economic development as one way of trying to heal the society from the past memories of repressive regimes.¹²³¹ As underscored by Barungi and Mbugua, political means to expose past human rights violations and establish responsibility and accountability, are among the major components of transitional justice. However, Burundi as aforesaid is slow in finding means to end systematic human rights violations and mass killings.

Some authors such as Garland, Cavadino, Wacquant and others, have claimed that punishment and regime changes are positively correlated with an embrace of neo-liberal economic policies in western countries.¹²³² Garland for instance, acknowledges that the paradigm shift from an historical focus on treatment and rehabilitation to punishment and the social segregation of "dangerous classes" in the world does not always mean justice.¹²³³ Similarly, Cavadino clearly demonstrates that states often use their power to enforce punitive sanctions by profiling and targeting groups for incarceration while profiling other types of violence and discrimination.¹²³⁴ Bradshaw and Klepac have concluded that a great deal of

¹²²⁸ Articles 268 to 274 of the Burundi Constitution.

¹²²⁹ Articles 237- 239 of the Burundi Constitution *ibid*, see Law No. 1/03 of 25 January 2010.

¹²³⁰ BBC News "Burundi Ombudsman Mohamed Rukara Finds Plot to Kill Him", 10 May 2012, available at: <http://www.bbc.co.uk/news/world-africa-18017909>

¹²³¹ Barungi and Mbugua, *op cit* n. 407 at p. 31.

¹²³² See Garland, D.; (2001) **The Culture of Control: Crime and Social Order in Contemporary Society**: Chicago: Chicago: University of Chicago Press, Cavadino, M. (2006) **Penal Systems: A comparative Approach**, Sage Publication: London, Wacquant, L. (2008) **Ordering Insecurity: Social Polarization and the Punitive Upsurge. Radical Philosophy Review**: Available at: http://frenchstudies.einaudi.cornell.edu/files/sanspapier/LWacquant_sanspapier_April08.pdf. [accessed on 26/10/2012].

¹²³³ Garland, *ibid*.

¹²³⁴ Cavadino, *op cit* n.1232.

social harm is done by constructing refugees, asylum-seekers and unbalanced citizens.¹²³⁵ These scholarly arguments are relevant in Burundi's context because the social harm in Burundi is seen through the political, social and economic lenses that do not advance the cause of transitional justice while finding permanent solution for refugees and internal displacement problems as pointed out in chapters two and five of this thesis. In other words, refugees and IDPs problems remain among the obstacles towards the establishment of transitional justice mechanism in Burundi.

Likewise, Wacquant has asserted that the emergence of multiple neo-liberal political economies is designed to force people to submit to the free market on a global scale.¹²³⁶ The author has suggested that along with an emphasis on individual responsibility and a refusal to acknowledge the social responsibility and accountability are among the contemporary societies' most pressing problems. Subsequently, neo-liberal ideology supports the implementation of punitive and aggressive law-enforcement policies, which are designed to target those who have been economically marginalized. This thesis submits that global trends in social and criminal justice can only be understood in the context of political, social, economic and historical circumstances in which they arise.

This thesis has indicated that diverse and relevant issues within Burundi's reluctance to embrace and transitional justice mechanisms, justify the failure to deal with past injustices and human rights violations in the country. Despite of such failure, there is a call for transitional justice concerns to which scholars are continuing to develop innovative theories and approaches. This study stresses that the main objective of transitional justice in Burundi is to:

- generate a detailed record of the nature, extent and causes of human rights violations that occurred in the country and document the context in which those violations occurred,
- identify persons, institutions, organisations, political parties, which were responsible for gross violations of human rights,
- provide the victims of gross human rights violations a public platform to express themselves in order to allow them to regain their human dignity,
- make recommendations to the government of Burundi on how to prevent future commissions of gross violations of human rights and measures to be adopted regarding reparations and the rehabilitation of victims of human rights violations, and,

¹²³⁵ Bradshaw, E. A.; and Klepac, M.; (2011) "Comparative Criminology in the Era of Neoliberal Globalization" *International Journal of Comparative and Applied Criminal Justice* Routledge Taylor and Francis Group, at pp.189-191.

¹²³⁶ Wacquant, L.J.D.; (2009) **Punishing the Poor: The Neoliberal Government of Social Insecurity**; Duke University Press, at p. 41.

- facilitate the granting of amnesty to deserving individual perpetrators of human rights violations.

Although the above mentioned objectives have failed to materialize, however, Barundi survivors and victims as described in the research findings in chapters five and six of this thesis, literature survey, case law and the UN Basic Principles, have rights to know the truth, justice and reparations or remedy.

5.4.3 Victims' right to truth before reconciliation

The right to know the truth has attracted academic inquiries since the existence of the western civilisation.¹²³⁷ And yet, truth remains a slippery notion. Parlevliet as cited by McDonald, has noted that truth, justice and reconciliation, are elusive concepts that defy rigid definitions.¹²³⁸ It is acknowledged that truth, justice and remedy are inseparable. Although they may be viewed as separate concepts, in a broader understanding from the international human rights and humanitarian law viewpoints, they are connected concepts. For example, truth which is a form of justice and also a remedy; justice consists of truth and a remedy at the same times remedy consists of truth and justice.¹²³⁹

Judge Richard Goldstone, while referring to the SATRC has opined that "the SATRC was a political decision because it was not established for moral or justice reasons, rather, it was a political compromise between the desire to adopt the Nuremberg-Trials Model on one hand and forgetting the atrocities suffered on the other hand through forgiveness". This means, truth in Goldstone's view, truth is a moral imperative which can be also a religious obligation and an essential element of transitional justice. For example, there is a biblical version that puts an emphasis on truth because the truth sets a person free.¹²⁴⁰

Although the victims of gross human rights have rights afforded to them under international human rights and humanitarian laws, these rights are not easily accessed or realised in post-conflicts countries. While the victims of atrocities committed either by state (the army) or by non-state actors (the insurgent groups) like the case of Burundi, revealing of the truth and reconciliation are always encouraged so that the victims may forgive their aggressors as the South African case suggests. It is undeniable that unlike South Africans, Barundi are still faced

¹²³⁷ See generally, McDonald, A.; (1999) "A Right to Truth, Justice and a Remedy for African Victims of Serious Violations of International Humanitarian Law" at p. 1444, **Law, Democracy and Development Law Journal**, available at: <http://www.saflii.org/za/journals/LDD/1999/>, see further Chapman and Ball, *op cit* n. 102 at pp. 1-43, Lira, E."The Reparations Policy for Human Rights Violations in Chile" in De Greiff, *op cit* n. 517 , Goti, *op cit* n. 409 and Vandeginste, *op cit* n. 67.

¹²³⁸ See McDonald *ibid.* at p. 1444.

¹²³⁹ McDonald, *ibid.*

¹²⁴⁰ John 8:32 (New International Version Bible).

with the challenges of revealing the truth that may lead to reconciliation, national and constitutional democracy. It is submitted that democracy in Burundi would have been a reality, if truth and reconciliation as articulated in the Constitution, were complied with.

The victims of serious violations of international human rights and humanitarian laws seem to be caught between prosecution and reconciliation. Although prosecution, truth and reconciliation may be seen as separated processes, in practice, these processes are intertwined. For example, truth and reconciliation commission can complement the criminal justice system once the truth has been known and victims may get reparations.

It is submitted that the decision by national authorities to punish or grant amnesty for serious violations of international humanitarian law or human rights is not always a smooth undertaking. Yet, it has been indicated that the granting of amnesties along with the establishment of a national truth and reconciliation commission are mostly favoured, rather than the adopting of punitive measures (refer to the South African case). This is often seen as an accurate way to ensure a peaceful transition from armed conflicts to peace or from dictatorial to democratic regimes where the right to truth, justice and reparations do complement one another. Undeniably, truth seeking initiatives in Burundi can play a powerful role in documenting and acknowledging the legacy of human rights violations. Memory initiatives may also contribute to public understanding of past abuses. However having in place sound legal framework as discussed before, can secure the truth, justice and remedy or reparations.

As pointed out by the African Commission, when the people who have been tasked with providing protection of human rights are the same individuals who are involved in persecuting the victims, an atmosphere in which available domestic remedies may be exhausted is compromised.¹²⁴¹ Furthermore, the precedent that has been set out by the African Commission suggests that the legal requirement of exhausting domestic remedies is not necessary, if the complainant is in a life-threatening situation that makes domestic remedies unavailable.¹²⁴² As stated in the cases of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,¹²⁴³ victims of persecution like refugees in exile are not necessarily required to return to the place where they suffered persecution in order to exhaust local remedies.¹²⁴⁴

¹²⁴¹ *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

¹²⁴² *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) at par.33.

¹²⁴³ [(2000) AHRLR 321 (ACHPR 1996)].

¹²⁴⁴ *African Institute for Human Rights and Development v Guinea* *ibid* par. 35.

Thus, the right to truth, justice and remedy (reparations) for serious violations of international humanitarian law is a complex one. Although legal remedies of truth, justice and reparations seek to recognize and redress the harm suffered by victims of systematic human rights violations in post-conflict Burundi, judicial uncertainties at international and national levels tend to contravene the principles which have been laid down in the International Bill of Rights. It must be emphasised that there are lessons available, should Burundi consider reparations measures from other countries and the role which can be played by the civil society.

5.4.4 The role of civil society

There are cases whereby civil societies have been utilised effectively to enforce the rights of the victims in post-conflict societies. For example, the ICTJ's Reparative Justice Program provides knowledge and comparative experience on reparations to victims, civil society's contribution and policy-making worldwide.¹²⁴⁵ Civil societies' intervention for example, has been used in the course of struggle for the access to the victims' right to remedy or reparations in contemporary post-conflict societies.

Using South Africa as an example, the ICTJ in the period of 2007 and 2008, played a central role in amending the National Prosecuting Authority's prosecution policy which provided for amnesty for perpetrators of gross violations of human rights. It supported the victims in the struggle to have their cases being seriously considered by the prosecuting authorities which can be a good lesson for Burundi.

Likewise, in 2008 and 2009 period, the ICTJ joined a coalition of civil society organizations and took legal action for transparency and victim participation in the presidential pardons process. Equally, the South African Constitutional Court upheld the claims of victims and emphasised that full disclosure of truth as a means to pursue national transition and reconciliation was the basis of the moral and operational structure of the Reconciliation Act.¹²⁴⁶ In conjunction with the South African Coalition for Transitional Justice (SACTJ) which is an umbrella body of organizations working to advance the rights of victims of past conflicts and to hold government

¹²⁴⁵ See ICTJ **Reparations** at <http://ictj.org/our-work/transitional-justice-issues/reparations>. See also See Ongoya Z. E.; (2008) "The Law, the Procedures and the Trends in Jurisprudence on Constitutional and Fundamental Rights Litigation in Kenya", **Kenya Law Review Journal**, available at: <http://www.kenyalaw.org/klr/index.php?id=56> [accessed on 22/02/2013]. Ongoya has argued that it is necessary to develop a culture of public interest litigations so that may be discussed among the civil society, citizens and academics to give them chance to contribute in human rights and mass killings debates around them (emphasis added).

¹²⁴⁶ See ICTJ "South Africa: Constitutional Court Upholds Right to Express the Truth", 8 April, 2011, available at: <http://ictj.org/news/south-africa-constitutional-court-upholds-right-express-truth> [accessed on 29/10/12].

accountable to its obligations, it supported the victims in their petition before the Constitutional Court to uphold their constitutional rights to freedom of expression and truth.¹²⁴⁷ In the remarkable reparation claims in South Africa, the victims' claims in the Khulumani legal action against multinational corporations accused of supporting the Apartheid regime the SACTJ filed an *amicus* brief supporting the rights of victims to have the case heard in the United States in the *Apartheid Reparations* case.¹²⁴⁸

In the light of landmark cases handed down by the South African Constitutional Court in the *AZAPO and McBride* cases, the rights of the victims were considered as of the paramount importance in terms of encouraging the media and public to speak the truth about crimes amnestied by the SATRC as a way of abiding by the constitutional requirement of openness or truth-telling. The Court held that truth-telling was the moral base of the transition from the injustice of Apartheid to democracy and constitutionalism.¹²⁴⁹ It held further that the SATRC's process which was premised on the necessity of truth-telling in pursuit of national unity and reconciliation, could not operate so as to render the truth false.

Moreover, the SACTJ challenged the Department of Justice and Constitutional Development's 2011 Regulations for the payment of educational assistance and health benefits exclusively to victims identified by the SATRC. These Regulations which were published on 11 May, 2010 as General Notice 282 in the Government Gazette were criticized for contravening the Reconciliation Act on the following grounds:¹²⁵⁰

- The Reconciliation Act did not contain provisions that supported a closed list of victims eligible for reparations
- A closed list policy was offensive to victims' constitutional right to equal protection under the law.
- Failure to extend reparations to all victims of Apartheid violated South Africa's obligations under international law as reflected in a number of human rights instruments that South Africa has ratified.
- The regulations would render the proposed assistance inaccessible to many victims.¹²⁵¹

¹²⁴⁷ See ICTJ, *ibid*.

¹²⁴⁸ *In re South African Apartheid*, *op cit* n. 632.

¹²⁴⁹ *The Citizen 1978 (Pty) Ltd and Others v McBride*.

¹²⁵⁰ See SACTJ Submission on TRC Reparations Regulations, Press Conference Release of 8 June, 2011. Available at: http://www.saha.org.za/news/2011/June/sactj_submission_on_trc_reparations_regulations.htm [accessed on 11/11/2013].

¹²⁵¹ SACTJ Submission on TRC Reparations Regulations, *ibid*.

The SACTJ proposed that the Department of Justice and Constitutional Development carry out an open and transparent process of consultation and dialogue with civil society to revise the Notice 282 Regulations so as to be more responsive to victims' needs. It was emphasised further that the Department should allow all victims of gross human rights violations identified under the standards specified in the Reconciliation Act, to access educational and medical benefits and establish ongoing victim registration procedures including affirmative steps to be taken to register all victims by following examples from other countries such as Argentina and Chile which have constantly extended or re-opened the victim registration procedures.¹²⁵² It is submitted that civil society organisations in Burundi's case may play a major role in enforcing the rights of the victims of systematic violations of human rights as it was in the South African case. Notably, there are challenges associated with the implementation of transitional justice mechanisms by transitional governments as discussed hereunder.

5.4.5 Challenges facing transitional governments

There are challenges that are associated with transitional processes. Apart from the success stories in post-conflict countries as stated in chapter three of this thesis, it must be pointed out that the process of transforming a dictatorial, anti-democratic or paternalistic state into a constitutional democratic state which respects the rule of law and the fundamental human rights of their citizens is a difficult and tedious one. Frequently, transitional governments are confronted with the problems of limited resources (human and financial). Unquestionably, many newly elected democratic governments find themselves confronted with diverse problems which may not be solved overnight.

Kutz for example, has designed three universal approaches which can be utilized to deal with the legacies of the past dictatorial regimes. These include:

- Moving on and focusing on the future by simply forgetting the conflicts of the past. This option is generally characterised by a general amnesty for the perpetrators of the old regime, shielding those who committed atrocities and gross violations of human rights from any criminal prosecutions. Spain is probably the most prominent example of a country having chosen this way, but amnesty laws have also been passed, *inter alia*, in other countries like Argentina, Brazil, Chile, Guatemala, Sierra Leone and Uruguay.

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SACTJ Submission on TRC Reparations Regulations, *ibid*.

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Kutz, F.; (1999) *Amnestie für Politische Straftäter in Südafrika*, Berlin: Arno Spitz Gmg, at. pp. 9-10 cited in, Lollini, A.; (2011) *Constitutionalism and Transitional Justice in South Africa*, Berghahn Books.

- Prosecuting and punishing gross human rights offenders and to hold accountable the members of the old regime. In Greece for instance, 18 Generals were convicted of high treason only months after the end of their military dictatorship. Ethiopia is another example of a country having opted for this approach while Rwanda has decided to reappraise its gruesome past by a combination of international and national criminal prosecutions.¹²⁵⁴
- Employing alternative mechanisms and procedures like truth commissions and other non-penal measures.¹²⁵⁵ Schwartz in Kritz has advocated the term "lustration" as derived from the Latin which refers to "purification."¹²⁵⁶ In the transitional justice contexts, lustration refers to how countries deal with the legacy of past human rights abuses through the mass disqualification of those associated with the abuses under the prior regimes. This practice has been prominently in the Post-Soviet Eastern Europe, where many countries adopted some form of lustration to exclude from public office for a certain period, the former Communist Party elites and accomplices who collaborated with the secret police forces. However, the practice described as lustration has occurred in other contexts from Post-World War II expulsions in Europe to Iraq which is referred to as de-Baathification¹²⁵⁷ after the 2003 invasion of Iraq.¹²⁵⁸

The De-Baathification approach finds itself hanging between the two extremes of general amnesties and "lustration" as utilized in countries such as Argentina, Chile, Guatemala, Timor-Leste, Morocco, Sierra Leone and South Africa, just to mention a few. Although, these countries employed diverse approaches, there are commonalities in terms of investigating and validating past and grave human rights violations, to give victims a forum to tell their stories and perpetrators acknowledge officially what they did during certain dark and painful periods in their respective countries' histories.¹²⁵⁹ In other words, this route tries to strike a balance between the need to re-evaluate a country's past, on the one hand, and the necessity to preserve its young and vulnerable democracy on the other.

¹²⁵⁴ Kutz, *ibid* at pp. 6-7.

¹²⁵⁵ Schwartz, H.; (1995) "Lustration in Eastern Europe", in Kritz, N.J.; (ed.) **Transitional Justice** 461-476: United States Institute of Peace Press: Washington, at p. 461.

¹²⁵⁶ Schwartz, *ibid* at p. 461.

¹²⁵⁷ A Coalition Provisional Authority (CPA) which was entered into force on 16 May 2003.

¹²⁵⁸ <http://en.wikipedia.org/wiki/De-Ba'athification>.

¹²⁵⁹ See Hayner, P.B. (1994) "Fifteen Truth Commissions -1974 to 1994: A Comparative Study" **Human Rights Quarterly**: John Hopkins University Press, at. p. 597.

While the first two approaches tend to focus mainly on the role of the perpetrators, the last approach is viewed as a victim-centred approach.¹²⁶⁰ A victim-centred approach is essential because the victims whose rights and needs are usually forgotten during transitional periods because they are not part of the peace negotiating team, they can benefit from reparations initiatives. However, it must be pointed out that most countries which had chosen to combine different options, such as granting amnesty for the less serious crimes while prosecuting the more serious offences¹²⁶¹ or by granting general amnesty, on the one hand, while simultaneously establishing a truth and reconciliation commission on the other hand, have faced criticisms, if South Africa can be used as an example.¹²⁶²

My findings in this study have indicated that South Africa did not prefer to prosecute its Apartheid criminals, however, South Africans refused to grant a general and unconditional amnesty for the numerous crimes committed for many years. It has been revealed also in the case of South African transitional justice model that avoiding prosecution can attract legitimate criticisms from both perpetrator and victim's viewpoints.¹²⁶³ What is unique about the South African model is the establishment of the SATRC which had a far-reaching mandate to identify the perpetrators and victims of past human rights violations. The Commission's ability to recommend reparation measures for victims of gross human rights abuses is still comparable with the competences of other truth and reconciliation commissions worldwide. Furthermore, the SATRC's power to grant amnesty to the perpetrators under certain and specifically defined conditions, was an innovative approach which may not be taken for granted.

This approach which differentiates the SATRC from other transitional justice models, can be viewed as a favoured model for the future transitional processes. But it had also attracted criticisms as to whether the South African transitional model was in compliance with the requirements of transitional justice.¹²⁶⁴ Abrahams, for example, while analysing South African transitional justice model states that immediately after the 1994 national elections, the Post-Apartheid government of national unity proposed that a mechanism be put in place to address

¹²⁶⁰ The South African Truth and Reconciliation Commission was the first commission with the authority to grant amnesty to perpetrators of gross human rights violations.

¹²⁶¹ Like in the cases of Sierra Leone and Timor-Leste. See for example, Linton, S.; (2001) "Cambodia, East-Timor and Sierra Leone: Experiments in International Justice" **Criminal Law Forum**, at pp. 219, 224, 231-232.

¹²⁶² See *McBride* and *AZAPO* cases.

¹²⁶³ Refer to *McBride* and *AZAPO* cases.

¹²⁶⁴ Dugard, J.; (1997) "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" **South African Journal on Human Rights**, at p. 260. Available at: <http://untreaty.un.org/cod/avl/faculty/Dugard.html>.

the political violence that had haunted South Africa for many years,¹²⁶⁵ however, armed violence including Xenophobia have escalated in the Post-Apartheid era. In Abrahams' view, the escalation of armed violence and Xenophobia does not differentiate gross violations of human rights during Apartheid and Post-Apartheid regimes.

As a form of transitional justice, the SATRC in South Africa was tasked with providing a full picture of the nature, causes, and extent of gross human rights violations committed during Apartheid. Between 1960 and 1994, 2,500 people had been hanged for politically-motivated crimes, while about 80,000 people had been detained without trial.¹²⁶⁶ In the process, a sufficiently comprehensive examination and analysis of the extent and impact of the various forms of political violence engendered by Apartheid, for all intents and purposes, were precluded. Additionally, the narrow definition of gross human rights violations as "the killing, abduction, torture or severe ill-treatment of any person or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act of killing, abduction, torture or severe ill-treatment", precluded not only the examination of all variants of political violence spawned by Apartheid, but also of the system of Apartheid itself as a crime against humanity.¹²⁶⁷

In the light of Duncan's views, transitional justice operates in circumstances that often pose challenges to justice because human rights abuses are often carried out in a systemic way, rather than individual acts of brutality which is difficult to measure.¹²⁶⁸ Despite the criticisms against the SATRC model, the transitional government's legal duty to acknowledge and address systematic human rights violations and genocide can limit or prevent recurrence of such violations.

States have legal duties to acknowledge and address widespread or systematic human rights violations in cases where the state had caused these violations or did not prevent them. Reparations initiatives that seek to redress the harms caused by these violations can take the form of compensation for the losses that have been suffered and help to overcome some of the consequences of past human rights abuses. Reparations can also be future-oriented or forward-looking by providing rehabilitation and better life to the victims and affirm that victims

¹²⁶⁵ Abrahams, D. (2010) "A Synopsis of Urban Violence in South Africa" **International Review of the Red Cross**, at pp. 499-500 available at: <http://www.icrc.org/eng/assets/files/other/irrc-878-abrahams.pdf>

¹²⁶⁶ Truth and Reconciliation Commission Report, Vol. 1, 'Executive Summary', available at: <http://www.justice.gov.za/trc/report/index.htm>. Accessed on 24/06/ 2010.

¹²⁶⁷ Truth and Reconciliation Commission Report *ibid*, see also Article 7 (1)-j of the ICC Rome Statute.

¹²⁶⁸ Duncan, N.; (2005) "Understanding Collective Violence in Apartheid and Post-apartheid South Africa in African Safety Promotion" **A Journal of Injury and Violence Prevention** <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7907477>

are the rights bearers who are entitled to redress and value the universal norms of rule of law and democracy.

5.5 THE INTERNATIONAL RECOGNITION OF DEMOCRACY

The concept of democracy is not clearly defined as explained in chapter two of this thesis. Ngarhodjim has referred to as the "third wave of democratisation" which started in the 1970s with political liberalization in Southern Europe, Latin American and some South-West Asian countries.¹²⁶⁹ The uniqueness of the "third wave of democratisation" is the influence of external factors, such as international organisations or foreign countries, which were instrumental in pushing authoritarian regimes to move forward towards democratic constitutions.

Since 1990s, there has been a paradigm shift towards international recognition of democracy as a preferred system of governance.¹²⁷⁰ Its direct implications are shown, for example, in the relationship between African countries and their major political and economic partners.¹²⁷¹ This shift has been justified in the adoption of African regional standards of democracy.¹²⁷² The relevance of regional standards has been appropriately summarized by the Office of the UN High Commissioner for Human Rights in its Fact Sheet Number 19 which states that:

Regional human rights systems have reinforced international standards and machinery by providing the means by which human rights concerns can be addressed within the particular social, historical and political context of the region concerned.¹²⁷³

Unfortunately, regional standards for reinforcing human rights are not observed in line with the maxim of *pacta sunt servanda*.

It is submitted that there is a problem of linking human rights and democracy, if such democracy is largely influenced by the social, historical and political context of the countries concerned, particularly, if these countries had experienced the strife of grave violations of human rights. Taking the example of Burundi, post-conflict reconstruction efforts have not succeeded in preparing the country adequately for its young democracy or democratic rivalry during local or presidential elections. Although various initiatives have been undertaken to

¹²⁶⁹ Ngarhodjim, N.; (2009) "Scrutinising Regional Standards of Democracy in Africa" Available at: <http://www.saflii.org/za/journals/LDD/2009/7.pdf> at pp. 76 -77, [accessed on 30/10/2013].

¹²⁷⁰ Ngarhodjim, *ibid* pp. 76 -77.

¹²⁷¹ See the Washington Consensus "Trade , Foreign Policy, Diplomacy and Health, World Health Organization, available at: <http://www.who.int/trade/glossary/story094/en/>

¹²⁷² Ngarhodjim, *op cit* n. 1269 pp. 76 -77.

¹²⁷³ Office of the High Commissioner for Human Rights, Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights.

promote and facilitate dialogue between the government and different political parties, the unpreparedness for democracy in Burundi is an important factor which has justified the ongoing systematic violations of human rights.

Given the lack of sound political dialogue, misunderstandings and political tensions have been heightened at critical moments in the country's history of transitional justice. Taking 2010 elections for example, the outrages of armed violence resembling the past experiences of the pre- peace agreements era, particularly, the subversion of democracy in 1960s did not advance the values of democracy. Hence, there is a common understanding that rules and values of the electoral processes among political parties were absent and intimidations and politically motivated killings superseded the notion of democracy in Burundi.

It must be stressed that the standards set out in the Fact Sheet mentioned above, can be extended to democratic principles in terms of democracy theory stated in chapter 2 of this thesis. Human rights observance and democracy are largely influenced by the social, economic, historical and political contexts of a given state. However, the mere transplantation of European standards of democracy in the third world countries according to Rustow in Anderson has failed because it ignores the historical, political cultural, economic and social factors.¹²⁷⁴

Thus, scholars had been insisting on social, historical and political factors when one wants to study democratisation in the underdeveloped and developing countries in the Latin America, South-West Asia or Africa.¹²⁷⁵ As Olowu has contended, Africa's response to democracy is manifested in the evolution of a human rights system largely tailored along the trajectories of African socio-cultural and developmental needs.¹²⁷⁶ It is submitted that democracy in contemporary Burundi must be exercised in line with observance and promotion of human rights.

5.5.1 Rustow's model of democratic transition

After analysing the different schools of thought on democracy and reviewing the experiences of various countries, Rustow has concluded that there may be many roads to democracy.¹²⁷⁷ In Africa for example, after the OAU Declaration on the Political and Socio-economic Position

¹²⁷⁴ Rustow, D.; "Transitions to Democracy: Toward a Dynamic Model" in Anderson, L.; (ed) (1999) **Transition to Democracy**, Columbia University Press New York, at p. 20.

¹²⁷⁵ Rustow, *ibid* at p. 20.

¹²⁷⁶ Olowu, D.; (2013) "The African Charter on Human and People's Rights, Its Role of Civil Society in the First Three Decades: Calibrating the Paper Tiger", **NMMU Obiter** at p. 34.

¹²⁷⁷ Rustow, *op cit* n. 1274 at p. 20.

in Africa and the Fundamental Changes Taking Place in the World,¹²⁷⁸ the African Heads of State and Governments clearly emphasised that although African countries have to move towards a more liberal political system, they have to choose themselves the type of democracy that corresponds with the special nature and the aspirations of Africans. The relevance of regional standards is further enhanced by their accessibility, as evidenced by the growing number of African (and non-African) NGOs attending meetings of regional treaty monitoring bodies, and making use of the remedies offered by such bodies, such as the Communication (or complaint) procedure of the African Commission on Human and Peoples' Rights (the "African Commission").¹²⁷⁹

The mechanisms that have been created to monitor the implementation of regional standards of democracy in Africa are closer to Africans and more accessible to them. For example, the Constitutive Act provides for intervention of the AU in Member States' affairs, "in respect of grave circumstances, namely: allegations of war crimes, genocide and crimes against humanity".¹²⁸⁰ This is a legal obligation imposed among the AU Member States to respect democracy in Africa, because respect for democratic principles, human rights, the rule of law and good governance are included in the CA¹²⁸¹ and considered as core principles of the AU to prevent recurrences of genocide and other heinous crimes in Africa.

Furthermore, the CA goes further and provides for the condemnation and rejection of unconstitutional changes of governments.¹²⁸² In terms of the CA, AU Declarations and Resolutions,¹²⁸³ governments that come to power by unconstitutional means are not allowed to participate in AU activities. For instance, in 2009, Andry Rajoelina, the Mayor of Antananarivo was dismissed by Ravalomanana's government which led to the protest that forced the elected President, Marc Ravalomanana to hand over power to the army, which, in turn, was transferred to Rajoelina. Although the transmission of power to Rajoelina was validated by the Constitutional Court, the AU Peace and Security Council (AUPSC) condemned what it considered an unconstitutional change of government and suspended Madagascar from the AU on 20 March 2009.¹²⁸⁴

¹²⁷⁸ Adopted in July 1990 in Addis Ababa, Ethiopia.

¹²⁷⁹ Ngarhodjim, *op cit* n. 1269 at pp. 76 -77

¹²⁸⁰ Article 4(h).

¹²⁸¹ Article 4(m).

¹²⁸² Article 4(p).

¹²⁸³ Before inserting democratic standards in binding instruments, such as the AU Constitutive Act, the major political organs of the OAU/AU, by means of declarations and resolutions, set minimum standards of democracy to be respected by all Member States.

¹²⁸⁴ See the Communiqué of the 181st Meeting of the PSC held in Addis Ababa, Ethiopia, on 20 March 2009 (PSC/PR/COMM. (CLXXXI)).

It should be noted that while emphasising on respect for democracy, human rights, the rule of law and good governance in Africa, the then South Africa's Deputy President (current President) Jacob Zuma, in his opening speech at the 76th Ordinary Session of the AU Council of Ministers on 4th July 2002, stated that the banning of Madagascar from the Durban Summit was a clear indication that African countries must be led differently in order to minimise tensions among the political elites.¹²⁸⁵ Likewise, the CA was invoked against General Francois Bozizé, in the Central African Republic, following his instigation of a coup against the democratically elected President Ange-Felix Patassé, on 15 March 2003. The same principle was applied when President Ould Taya of Mauritania was overthrown on 3 August 2005 which led to the suspension of Mauritania from the AU until constitutional order was re-established. Mauritania was re-admitted to the AU when a new constitution was adopted and free and fair elections successfully organised.¹²⁸⁶

In August 2008, still in Mauritania, the democratically elected President, Sidi Ould Cheikh Abdallahi, was overthrown by Army officers, which caused Mauritania to be re-suspended again from the AU. Likewise, Egypt was suspended from the AU in July 2013 when Mohammed Morsi, the successor of President Hosni Mubarak was overthrown in a *coup d'état*.¹²⁸⁷ Although, the *coup* was perceived as violation of the provisions of the Egyptian Constitution and fell under the AU's doctrine on unconstitutional changes of government,¹²⁸⁸ the AU's Peace and Security Council (AUPSC) maintained that Egypt's suspension from the AU activities should not be misconstrued as a punitive measure.¹²⁸⁹ The AUPSC's decision in the Egyptian's case demonstrate selective morality and double standard nature of international community in dealing with cases of gross violations of human rights.

¹²⁸⁵ See 2002 Tripartite Alliance Summit: Closing Remarks by Deputy President Jacob Zuma, 7 April, 2002. Available at: <http://www.anc.org.za/show.php?id=2693>

¹²⁸⁶ See communiqué PSC/PR/Comm (LXXVI) on the Situation in the Islamic Republic of Mauritania, adopted at the 76th meeting of the Peace and Security Council held in Addis Ababa, Ethiopia, on 10 April 2007.

¹²⁸⁷ See Maasho, A. "African Union Likely to Suspend Egypt After Army Deposes President", **Reuters**, 4 July, 2013, accessed 2013-07-06 and Gulhane, J.; "African Union Stands by Decision on Egypt Suspension" **Daily News Egypt**, 30 January, 2014.

¹²⁸⁸ See Article 4 of the African Union Constitutive Act which proclaims that respect for democratic principles, human rights, the rule of law and good governance and condemnation and rejection of unconstitutional changes of governments are among AU's principles. Furthermore Africa has also pledged to enforce the strict adherence to the position of the Union on unconstitutional change of government, see AU Doc. AHG/235 (XXXVIII) Annex I, para. 13.

¹²⁸⁹ Gulhane, *op cit* n. 1287.

It is admitted that the legal framework under which democracy can be exercised in Africa is far-reaching,¹²⁹⁰ for example, the African Charter is the portrayal of unique a normative character that connects categories of basic human rights referred to in chapter two of this thesis as essential, interrelated and universal for all Africans.¹²⁹¹ The suspension of Madagascar, Central African Republic and Mauritania from participating in AU activities as stated above, has justified the view that despite the challenges of application of the Rustow's Model of Democracy in African, there is a room for Africans like Burundi to minimise the tensions among Africans based on their normative values of *Ubuntu* and constitutionalism.

However, the above mentioned examples also demonstrate that there are still problems of consolidating constitutional democracy in contemporary Africa. These problems include among others, systematic violations of human rights, dictatorship political instability, endemic corruption, lack of effective legal systems, ethnicity, regionalism, resource constraints (financial and skills) and most of African countries rely on foreign funding for consolidating their democracy.¹²⁹² In some instances, foreign funding can be an impediment to nurturing young democracy in post-conflicts societies like Burundi.

Recognizing the importance of prevention of human rights violations, this thesis asserts that democracy must be considered not only in the context of political, social and cultural configurations, but also in the context of consistent economic development. It is common cause that the prevalence of armed conflicts have a negative impact on socio-political, economic development and democracy. It is important to note further that the true democracy cannot be achieved in Burundi, in the absence of common agenda to democratization.

5.5.2 The constitutional framework and amnesty law in Burundi

Within the constitutional framework in Burundi, there is the need for setting up independent and impartial prosecution agencies in order to have an effective maintenance of democracy, rule of law and respect for human rights. As stated in the Guidelines on the Role of Prosecutors,¹²⁹³ Member States to the UN and regional organisations like AU, are under an obligation to uphold the principles of international and national criminal justice, supported by the Constitution.

¹²⁹⁰ For example, The Constitutive Act, 2000, the African Charter on Human and Peoples' Rights, 1981, the African Charter on Democracy, Elections and Governance, 2007.

¹²⁹¹ Olowu, *op cit* n. 1276 at p. 35.

¹²⁹² Olowu, *ibid* at p. 37.

¹²⁹³ Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 (1990) at p.189.

The Preamble to the Guidelines on the Role of Prosecutors states that:

The Guidelines should be respected and taken into account by governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general.¹²⁹⁴

According to the Guidelines, democracy must be in line with the national legal framework. For example, if substantive democracy can be complemented with procedural democracy in Burundi, national legislation and practice can be measured against the Constitution in terms of respect for the independence of the judiciary, respect for the rule of law and good governance within the constitutional framework. As such, immunity can be granted under national legislation, subject to revealing the truth about the past and reparations for the victims the way South Africa and Chile granted amnesty in exchange for truth-telling. Sadly, there are intricacies associated with temporary immunity in Burundi which have prevented the truth-telling and accountability for the past wrongs.

5.5.3 Justification of temporary immunity in Burundi

There have been debate on the subject of granting immunity for perpetrators of genocide and other crimes in post-conflict Burundi. As Vandeginste has revealed, the granting of temporary immunity in Burundi was justified because the main *Hutu* insurgent groups of CNDD-FDD and PALIPEHUTU-FNL were not parties to the APRA, thus, further agreements were unavoidable.¹²⁹⁵ For example, a number of political leaders who were in exile needed protection, hence, among the conditions for their return was to guarantee them security and assurance that they would not be prosecuted and they had no faith in Burundi's *Tutsi*-dominated judicial system in terms of its biasness and arbitrariness.¹²⁹⁶

Despite of its temporary immunity provisions, the APRA has been criticized as ambiguous. It has been argued that Article 22 of Chapter II, Protocol II did not define "politically motivated crimes" nor specify the scope of the stated "immunity" as well as its "temporary" nature.¹²⁹⁷ Given the uncertainties on the temporary immunity provisions under the APRA, a law was

¹²⁹⁴ Guidelines on the Role of Prosecutors, *ibid* at p.189.

¹²⁹⁵ See Vandeginste, *op cit* n. 67 at pp. at p.194 and Rubli, *op cit* n. 57 p. 6

¹²⁹⁶ Vandeginste, *op cit* n. 67 at pp. 194 and 207.

¹²⁹⁷ See Vandeginste, S.; (2011) "Power-sharing as a Fragile Safety Valve in Times of Electoral Turmoil: The Costs and Benefits of Burundi's 2010 Elections", *Journal of Modern African Studies*, at pp. 16 -17.

enacted during the transitional government of Ndayizeye (2003 - 2005).¹²⁹⁸ Yet, this law which was passed by the National Assembly, was controversial because, a group of 28 Members of Parliament, commonly known as “a coalition of MP’s against genocide”, refused to vote for the temporary immunity law. The opposition parties viewed the temporary immunity law (amnesty law) as a bilateral political arrangement between the UPRONA and FRODEBU parties to grant their members “an auto-amnesty” or shield them from prosecution.¹²⁹⁹

As such, the amnesty law of 2003, defined immunity as “the postponement of criminal prosecution to the amnesty beneficiaries who could not be arrested, indicted or prosecuted”¹³⁰⁰ during the proposed period of temporary immunity.¹³⁰¹ Similarly, the GCA which was concluded in 2003 between the transitional government and CNDD-FDD when CNDD-FDD was still regarded as a rebel movement emphasised the temporary nature of immunity.¹³⁰² For example, the GCA, stipulated that “all leaders and combatants of the CNDD-FDD should receive temporary immunity”.¹³⁰³ It was agreed further that immunity would also extend to security forces and agreed to establish a Joint Commission which would study individual cases to determine persons who should qualify for temporary immunity. Unlike the APRA, GCA extended the temporary immunity to “politically motivated crimes” which were committed since independence in 1962 and the signing of the GCA in November 2003.

The immunity provisions under the GCA as reinforced in the Amnesty Law of 2003, remained unclear in terms of their definition and application. In order to clarify the meaning and implementation, a Decree was issued on 23 March 2004.¹³⁰⁴ The Decree among other things, provided for the establishment of a Commission which would be charged with identifying CNDD-FDD combatants, their “collaborators” as well as members of the security forces in detention who would be eligible for a provisional immunity in accordance with the GCA.¹³⁰⁵ Collaborators were defined under Article 2 of the 2004 Decree to cover a wide range of beneficiaries of the temporary immunity. It included, for example, mere persons who supplied weapons or other equipment, fed combatants, transported combatants, ammunition or equipment, incited the population to join the rebel movements and provided information to

¹²⁹⁸ *Loi N° 1/022 du 21 novembre 2003 portant immunité provisoire de poursuites judiciaires en faveur des leaders politiques rentrant de l'exil*, B.O.B., N° 11/2003 (Amnesty Law). (IRIN, Approval of temporary immunity law sparks heated debate, Nairobi, 3 September 2003).

¹²⁹⁹ Vandeginste, *op cit* n. 67.

¹³⁰⁰ See the French version (“arrêté, inculpé ou poursuivi”).

¹³⁰¹ Article 1 and 3 of the Amnesty Law of 2003.

¹³⁰² Article 2 of GCA Pretoria Protocol on Outstanding Matters of November 2003.

¹³⁰³ Article 2 of GCA, *ibid*.

¹³⁰⁴ *Décret N° 100/023 du 23 mars 2004 portant modalités d'application de l'immunité provisoire prévue par l'Accord Global de Cessez-le-feu du 16 novembre 2003*.

¹³⁰⁵ Article 1 of the GCA.

the combatants. Members of the security forces were further defined as the soldiers who fought against the rebel combatants, members of the police force who supported the army, as well as members of the militia groups or *gardiens de la paix' militia*.¹³⁰⁶ The Decree clearly stated that "combatants and military officials" who would be found guilty of acts of genocide or crimes against humanity, would be disqualified from the benefits of provisional immunity.¹³⁰⁷

In November 2005, a Commission was established to identify persons who could be considered as "political prisoners" and subsequently, be released under the temporary immunity provisions.¹³⁰⁸ Astonishingly, the Commission's Report has never been published or reveal the criteria used to identify persons or recipients of temporary immunity. Between January and March 2006, a new Decree was promulgated which granted collective temporary immunity to a significant number of political prisoners.¹³⁰⁹ Although human rights activists challenged the temporary immunity Decree before the Constitutional Court, the application was unsuccessful.¹³¹⁰

Similarly, temporary immunity was among the fundamentals of peace negotiations between Nkurunziza's government and the PALIPEHUTU-FNL, the last active insurgent group in 2006 when the Comprehensive Ceasefire Agreement (CCA) was concluded. As a result, in September 2008, pursuant to the Magaliesburg Agreement, commonly known as Magaliesburg Declaration, another Commission was established to identify "political prisoners and PALIPEHUTU-FNL prisoners of war". Like the GCA and the Decrees mentioned above, the concept of "political prisoners and PALIPEHUTU-FNL prisoners of war" was also not defined clearly and the criteria used to identify persons who would benefit from the provisional immunity legislation enacted in accordance with the CCA were not spelt out.¹³¹¹ Accordingly, about 250 PALIPEHUTU-FNL members were released in 2009 as required by CCA, culminating into the peak of peace negotiation processes as PALIPEHUTU-FNL was recognised as a political party.

¹³⁰⁶ Article 3 of the 2004 Decree.

¹³⁰⁷ Article 6 *ibid*.

¹³⁰⁸ *Décret No. 100/92 du 7 novembre 2005 portant création, organisation et fonctionnement d'une Commission chargée d'identifier les prisonniers politiques* (Decree No. 100/92 of 7 November 2005 on the establishment, organisation and functioning of a Commission charged with identifying political prisoners). Vandeginste, *op cit* n. 67 at p. 207.

¹³⁰⁹ *Décret No. 100/02 du 3 janvier 2006 portant immunité provisoire des prisonniers politiques détenus dans les maisons de détention de la République du Burundi*. (Decree No. 100/02 of 3 January 2006 on provisional immunity for political prisoners detained in detention centres in the Republic of Burundi).

¹³¹⁰ Vandeginste, *op cit* n. 67 at p. 207.

¹³¹¹ Vandeginste, *op cit* n. 67 at p. 208.

Despite of the temporary immunity legal inventiveness in Burundi, it important to point out that although the APRA, GCA, CCA and Decrees mentioned earlier, exonerated the perpetrators of genocide from criminal liability, in practice the temporary immunity provisions in Burundi have been applied incorrectly. For example, the *Tutsi*-led army officials, “political prisoners and PALIPEHUTU-FNL prisoners of war” have never been charged or prosecuted for genocide, war crimes or crime against humanity under Burundi’s criminal law or international law nor confessing such crimes before a competent judicial or non-judicial body.

Surprisingly, only the suspects or persons who were convicted of general offences under Burundi criminal law committed after 24 November 1994 (the date of creation of the CNDD-FDD) were eligible for immunity.¹³¹² This entails that the perpetrators or suspects of mass killings since independence until 23 November 1994, were not covered by the 2004 Decree, this category of perpetrators or suspects would have fallen within the jurisdiction of the prosed BTRC.¹³¹³ Pursuant to the application of the Decree, about 539 crime suspects and accused persons who were charged and found guilty under Burundi criminal law were released in 2004 while the number increased to about 3300 in 2006.¹³¹⁴ Unexpectedly, political prisoners, primarily those who were suspected or convicted of involvement in the 1993 mass killings were released from prisons on account of the provisional immunity law.

This study notes that the application of immunity or amnesty law in Burundi is still unbalanced. For example, on one hand, it portrays reconciliation or forgiveness while on the other hand, it is silent on the critical issues of truth-telling that can lead to reparations for the victims. Although the former President Buyoya personally made the passing of the Truth and Reconciliation legislation a condition of his handing over power to the transitional President Ndayizeye on 1 May 2003, immunity provisions in terms of the APRA, GCA, CCA and the Decrees, did not define clearly the concept of “politically-motivated crimes”. Moreover, immunity laws clearly excluded the crimes of genocide, war crimes, and crimes against humanity from provisional immunity.

The APRA stipulated that amnesty should be granted to all combatants of the political parties and movements for crimes committed as a result of their involvement in the conflict, but not for acts of genocide, crimes against humanity or war crimes, or for their participation in coups d'état. Furthermore, it was stated that the BTRC could, upon completion of its investigations, adopt or propose measures to promote national reconciliation and forgiveness. In this

¹³¹² Article 5 of the 2004 Decree.

¹³¹³ Vandeginste, *op cit* n. 48 at pp. 16 -17.

¹³¹⁴ Vandeginste, *ibid* at pp. 16 -17.

perspective, parliament was tasked to enact law and provide legal framework for granting amnesty consistent with international law and transitional justice.

This thesis has noted the *lacuna* in the temporary immunity law in Burundi which has attracted criticisms from human rights activists. For example, it has been contended that immunity law contradicts the APRA on fundamental issues of peace, reconciliation, reparation and reconstruction of new Burundi.¹³¹⁵ It has been observed in this study that there is a paradigm shift towards the application of amnesty for serious crimes under international law, including war crimes, crimes against humanity and possibly genocide. At the same time it has been noted in this study that the removal of certain provisions in the final draft of the truth and reconciliation legislation is a matter of serious concern. For example, the Truth and Reconciliation Law of 2004, clearly stated that the work of the BTRC would not prejudice or adversely affect the establishment and the competence of any future special tribunal charged with prosecuting aforementioned crimes.¹³¹⁶ Gradually, important sections relating to criminal prosecutions, definition of key terms with reference to: transitional justice mechanisms, ending of impunity, the mandate and competences of the BTRC, publishing names of alleged perpetrators, the adoption of examining measures to exclude from leadership positions or electoral process, persons accused of committing crimes were removed from the final draft of the legislation.¹³¹⁷

It must be emphasized that the perpetrators of mass shooting from helicopters, killings at close range, killings using pangas or bayonets, killings accompanied with torture, burning people alive and psychological killings of denying basic rights such as education, political and economic positions to the *Hutus* and *Twas* as targeted groups with intention to kill their self-esteem have gone unpunished.¹³¹⁸ The legal underpinnings of these policies were subsequently defended by the government by holding that the lawfulness of each killing was to be determined individually. Equally, there are atrocities committed by insurgent groups against civilians as agreed in the GCA and CCA. Thus, the legal framework in which temporary immunity was granted to the perpetrators of gross human rights violations in Burundi ought to have considered the interests of all Burundi as it was done in other countries such as South

¹³¹⁵ See for example, Human Rights Watch "Rights Groups Criticizes Immunity Deal for Combatants in Burundi, 22 December, 2003, Pambazuka News "Burundi: Approval of Temporary Immunity Law Sparks Heated Debate", 4 November, 2003, IRIN Report, 3 September 2003. Vandeginste, *op cit* n. 67 at pp. 198-202, Impunity Watch "Policy Brief: Burundi's Draft Law on the Proposed TRC", available at: http://www.impunitywatch.org/docs/Policy_Brief_Burundi_TRC1.pdf [accessed on 01/11/2013].

¹³¹⁶ Articles 1, 5, 6 (3) and 78 of Law No. 1/018 of 27 December 2004.

¹³¹⁷ Impunity Watch, *op cit* n. 1315.

¹³¹⁸ Focus group interviews in Bujumbura, Rumonge and Ulyankulu.

Africa and Chile. To the contrary, temporary immunity was negotiated by political elites who considered their political interests at the expense of Burundi interests.

A blanket amnesty that exempts a large group of beneficiaries from liability and prosecution without them having to fulfil certain conditions relating to disclosure of facts or acknowledgement of responsibility on an individual basis when applying for amnesty are not in line with international law. For example, temporary immunity which was initially meant to be granted to the perpetrators and protect them against future prosecution, was henceforth applied to detainees who had already been convicted and were serving sentences. Clearly, this went beyond the conventional application of the concept of immunity in terms of *ratione temporis* and *ratione personae*.

It should be recalled that the Truth and Reconciliation Law of 2004 was enacted as part of implementation of the APRA. However, in real sense this law has never been implemented because the proposed BTRC is yet to be established. Furthermore, the Criminal Code of 22 April 2009 which incorporates the crimes of genocide, crimes against humanity, war crimes and torture in the Burundi criminal law reaffirms that neither amnesty nor pardons can be given for these crimes. It has been observed in this study that the Criminal Code of Burundi remains silent on amnesty for torture.¹³¹⁹ In terms of Burundi criminal law, an amnesty extinguishes the public action (*action publique*) and wipes out past convictions.¹³²⁰ Although it has been emphasized in the UN Security Council Report that¹³²¹ there are outstanding issues in the area of transitional justice, to date nothing much has been done in this regard.

In line with the international law, there can be no immunity for perpetrators of genocide, crimes against humanity and war crimes as demonstrated in the Chilean case. Nevertheless, the choice of immunity arrangements in Burundi was limited. However, these limitations have gradually disappeared and became meaningless because of the constraint laid down in the Amnesty Law of 8 May 2003¹³²² and unnecessary delays in establishing transitional justice mechanisms. It must be emphasised that although the principle of *ratione materiae* excludes temporary immunity from being granted for the crime of genocide, crimes against humanity and war crimes, the application of *ratione materiae* in Burundi has limited the material scope of the immunity as understood under customary international law because immunity or

¹³¹⁹ Vandeginste, *op cit* n. 67 at p. 200.

¹³²⁰ Articles 171 and 176 of the Criminal Code of Burundi.

¹³²¹ Fifth Report of the Secretary-General on the United Nations Integrated Office in Burundi of 22nd May 2009.

¹³²² Article 33.

amnesty for gross violations of human rights can be granted with limitations in the course of finding truth and justice.

Immunity *ratione personae* is understood as immunity conferred because of the position held by state official (s), whereas immunity *ratione materiae* on the other hand is granted because of the activity undertaken or performance by state official (s).¹³²³ It has been revealed in the research findings of this study that these immunities are not absolute because they can be waived to allow prosecution or ensure that criminal responsibility and accountability principles are complied with.¹³²⁴

It has been contended that immunity *ratione personae* protects individuals who are regarded as the most important state officials, hence, it protects the dignity of the state by protecting the office held and protect such officials who are inviolable in terms of the Vienna Conventions. Consequently, *ratione personae* can apply to all actions of the individuals, before and after disengaging from assuming state duties which include all civil and criminal proceedings for serious international crimes.

Undeniably, immunity *ratione personae* protects the individuals and thereby protects the state. However, what is ambiguous about immunity from criminal proceedings under *ratione personae*, is the extent to which other state officials may benefit from it. In 2004 the ICJ in the *DRC Arrest Warrant Case* confirmed that *ratione personae* extends to state officials, such as Heads of State, Heads of Government and Foreign Ministers,¹³²⁵ but the Court refrained from clarifying that this immunity did not extend further.

The judgments of the ICJ relating to immunity granted to the former state officials have been criticized.¹³²⁶ The *DRC Arrest Warrant* case for example, which concerned the immunity *ratione personae* of High State officials was distinguished from the *Pinochet* case which concerned the immunity *ratione materiae* afforded to former High State officials for offences they have committed whilst in the office. However, the ruling of the ICJ in the *DRC Arrest Warrant* case has shown the ICJ's clear understanding of customary international law. It must be understood also that national courts may issue a warrant of arrest against former Heads of State or High State officials of a foreign state for torture or grave breaches of the Geneva Conventions which may be linked to state responsibility. Such warrant can be challenged in national higher courts

¹³²³ *Djibouti v France*, *op cit* n.661 and *Jawara v The Gambia*, *op cit* n. 663.

¹³²⁴ Refer to the *Pinochet*'s case.

¹³²⁵ *DRC Arrest Warrant* case, *op cit* n. 670 at para. 51.

¹³²⁶ See for example the cases of *Pinochet*, *op cit* n. 461, *DRC Arrest Warrant*, *op cit* n.670 and *Djibouti v France*, *op cit* n.661.

as proved in the *Pinochet*, *Eichmann* and *Cavallo* cases, as well as, in the international courts like the *Yerodia*, *Al Bashir*, *Taylor* cases.

This thesis has examined the granting of amnesties to perpetrators of human rights violations and limitations that are imposed under international law on countries which have undergone transition processes and the quest for criminal prosecutions, truth-telling, reconciliation and reparation. Burundi's case has suggested that transitional justice is still relevant in order to resolve conflicts which have claimed many lives since independence. Unlike Rwanda, the UN has not explicitly taken its position to deal with genocide issue in Burundi. If there was such commitment, perhaps, insisting on criminal prosecutions would have prolonged the conflicts, resulting in more deaths, destruction, and human sufferings.

If one carefully considers peace agreements which have been concluded over the past two decades in countries like Argentina, Cambodia, Chile, Guatemala, Sierra Leone and South Africa there are important lessons that can inspire Burundi in order to deal with genocide cases. For example, these countries granted amnesty to members of former regimes who were allegedly had committed international crimes. Furthermore, they had Truth and Reconciliation Commissions and prosecution for those individuals who bore the greatest responsibility for gross violations of human rights. Sadly, Burundi has chosen a route different from other jurisdictions.

5.6 BURUNDI FROM APRA TO THE PRESENT

As stated earlier previously in chapter one, transitional justice in Burundi is still among the most contentious issues. Likewise, a series of inter-ethnic violence and ongoing systematic mass killings in Burundi since its independence in 1962 to date are irrefutable.¹³²⁷ Like the conflict between Flemish and Francophone communities in Belgium, the Belgian colonialists in Burundi reinforced systematic inter-ethnic socio-economic and political exclusionary policies through indirect rule and favoured *Tutsis*, the minority ethnic group while marginalising the majority, *Hutus* and *Twas*. Accordingly, *Hutus* and *Tutsis* have been in armed conflicts for more than five decades although the *Batwa* ethnic group has not played a key role in Burundi's armed conflicts.¹³²⁸ The mass killings of *Hutus* of 1960s to 1970s, 1988, 1991 and 1993 were

¹³²⁷ See Nibogora, *op cit* n. 16 at p. 57 citing Schweiger, R.; (2006) "Late Justice for Burundi" *International and Comparative Law Quarterly* at p. 653.

¹³²⁸ See Nibogora, *ibid* at p. 57.

the basis of the conclusion of the APRA and Kalomoh Report's recommendation on establishment of transitional justice mechanisms in Burundi.¹³²⁹

It must be reminded that the APRA was concluded under the Buyoya regime, who came back to power in the 1996 *coup d'état*.¹³³⁰ This coup raised international condemnation and the UN put pressure by imposing economic sanctions or embargo which forced Buyoya to start negotiations in 1998.¹³³¹ Pursuant to long and intensive negotiations, the APRA was concluded in 2000. Article 8 of Protocol I to the APRA emphasized the establishment of a Truth and Reconciliation Commission with the mandate of investigation, reconciliation, arbitration and clarification of the root causes of Burundi conflicts. The proposed Commission's mandate was required to investigate and reveal the truth on grave and systematic violations of human rights committed from 1 July 1962 until 28 August 2000.¹³³² The APRA stipulated that the Commission had to categorize the crimes, identify the perpetrators and victims and establish criminal and civil responsibilities. However, the proposed Commission had limitations in some aspects: it had no jurisdiction to classify acts of genocide, crimes against humanity and war crimes.¹³³³ Furthermore, the Commission had no power to grant amnesties, although the Transitional National Assembly was responsible to grant amnesties for politically motivated crimes, had the Commission found it appropriate to do so.¹³³⁴

Although the international community showed its concerns and the need for a Judicial Inquiry after the assassination of President Ndadaye in 1993 and the subsequent mass killings by sending preparatory and fact-finding missions,¹³³⁵ the issue of transitional justice was inevitable because it became dominant during peace and ceasefire negotiations.¹³³⁶ Admittedly, there has been debate about transitional justice in post-conflict Burundi especially on the issues relating to addressing past human rights violations and how to redress the harm caused by these violations in terms of responsibility and accountability.

¹³²⁹ See Kalomoh Report, S/2005/158, para 11

¹³³⁰ Jeng, *op cit* n. 86 at p.212.

¹³³¹ See Olinga, A.D.; (2005) "The Embargo Against Burundi Before the African Commission" (2005) *African Human Rights Law Journal*, at pp. 425-426.

¹³³² Olinga, *ibid* at pp. 425-426.

¹³³³ Article 8 para 1(a) of Protocol I of APRA.

¹³³⁴ Article 8 para 1(b) of the Protocol I of APRA.

¹³³⁵ See Nibogora, *op cit* n. 16 at p. 57, the UN Report on the preparatory fact-findings mission of 1995 ('Ake Huslid' Report S/1995/157), the 1995 'Nikken' Report, S/1995/631 and the Report of the International Commission of Inquiry on Burundi, S/1996/682. The lack of follow-up to the recommendations of these commissions was criticised in the Kalomoh Report which warned the effect of such inaction on the UN legitimacy and credibility to promote justice and the rule of law in Burundi. See Kalomoh Report, Doc./UN/S/2005/158, para. 72.

¹³³⁶ Articles 6-8 of Protocol I of the APRA.

The UN Basic Principles of 2005 establishes two types of victims' right to remedies.¹³³⁷ These remedies include equal and effective access to justice, adequate, effective and prompt reparations for harm suffered and access to relevant information concerning violations and reparation mechanisms. In other words, procedural and substantive aspects of reparations in various forms are required. Thus, reparations in a broader sense must be proportional to the injury or harm suffered by the victims so as to wipe out all consequences of such harm as it was the case of South Africa, Chile and Hereros in Namibia. It must comply with the principle of *restitutio in integrum*¹³³⁸ or restoration of an injured party to the situation which would have prevailed, had such an injury not been sustained, and/or restoration of the victim to his/her original position. However, the practice of reparations in the aftermath of widespread human rights abuses in Burundi has failed to apply the *restitutio in integrum* principle.

Reflecting on transitional justice generally and examples from the aforementioned countries in chapter three, this thesis argues that despite of the transitional justice discussions, reparations in terms of the Basic Principles in Burundi has not been complied with while the likelihood of the desired individual or state accountabilities remain a pipedream. In furthering the transitional justice debate in Burundi, this thesis critically discusses reparations issues in Burundi and asserts that accountability and responsibility have been ignored.

It is submitted that reparations are key elements of transitional justice because they intend to correct the past wrongs, restore victims' rights through providing compensation, reconciliation and rehabilitation.¹³³⁹ This thesis stresses that reparations must be supported by judicial interpretation, truth-telling and reconciliation. Furthermore, recommendations on individual or collective measures in terms of moral and socio-economic measures including, apologies, monetary compensation and commemoration of the victims as it was done in countries such as South Africa, Chile Guatemala and Cambodia are required. Thus, transitional justice in

¹³³⁷ Article VII of the Basic Principles, *op cit* n. 37.

¹³³⁸ Means integral reparation. *Restitutio in integrum* under Common law means restoration to original condition. It is one of the guiding principles for awarding of delictual damages. The general rule under this principle is that, the amount of compensation awarded should put the victim of unlawful act in a position he or she would have been, had the unlawful action not been committed against the claimant. See: <http://www.oxforddictionaries.com/definition/english/restitutio-in-integrum> [accessed on 18/10/2013].

¹³³⁹ See Theissen, G., (2004) "Undated Supporting Justice, Co-existence and Reconciliation After Armed Conflict, Strategies for Dealing with the Past" in **Berghof Handbook for Conflict Transformation**, available at: <http://www.berghof-handbook.net> [accessed on 27/02/2014]. See further, Lutz, E. L., "After the Elections: Compensating Victims of Human Rights Abuses" in Kritz, N.J. (eds) (2005) **Transitional Justice, How Emerging Democracies Reckon with Former Regimes, Volume 1, General Considerations**: USA Institute of Peace Press: Washington DC.

Burundi must demonstrate the practical aspects of reparations in terms of international standards of human rights.¹³⁴⁰ The Post-conflict government, for example, ought to have officially acknowledged the crimes committed under previous *Tutsi*-led military regimes in terms of criminal and civil liabilities as deterrence to their future recurrences.

5.7 SUMMARY

This chapter has critically evaluated research findings in relation to human rights violations and the respondents' memories of mass killings in Burundi. It has been revealed in this chapter that systematic and politically motivated mass killings in Burundi are viewed as "genocide" beyond the legal definition under the Genocide Convention. These killings have been committed through execution of the "Simbananiye and Sining Plans." At the same time, research findings as echoed in respondents' memories suggest that systematic and politically motivated mass killings in Burundi can be broadly interpreted to mean genocide.

This chapter has evaluated the mass killings and gross human rights violations in Burundi which have gone unnoticed at both national and international levels. Reference has been made to other jurisdictions and revealed that the crime of genocide is inconsistently defined and is fraught with judicial uncertainties. Although the genocide issue is not the focus of this thesis, there is a dilemma on how to deal with the critical issues of individual and/or state responsibility and accountability. An example of Rwanda has been cited as comparable to Burundi and this study shows how Rwanda's case has attracted international attention while the same has not been the case with Burundi. This justifies the intricacies that underlie Burundi's criminal justice system and an incorrect application of amnesty laws which have encouraged a culture of impunity including double standards in dealing with cases which mean genocide. This thesis maintains that although the ongoing mass killings do not fall under the Genocide Convention's definition *stricto sensu*, they can be so classified under other international crimes of aggression, war crimes and crimes against humanity.

¹³⁴⁰

On framework for state responsibility see Crawford, J., (2013) **Cambridge Studies in International and Comparative Law**, Cambridge University Press, at pp. 1-2, 111-112, 113-140 and 141-165. Crawford points out that state is a corporate entity which cannot carry out its functions and activities without the collaboration with others. Hence a state conduct or an act of a natural person or other intermediary under international law can give rise to state or other organs' responsibility and accountability.

Rustow's model of democracy has been evaluated. It has been confirmed in my research findings that within the international legal framework, participatory democracy, normative values of *Ubuntu*, the role of civil society, reparations and reconstruction are essential for constitutional dispensation in Burundi. Finally, the chapter has emphasized that a comprehensive transitional justice model is required to respond to Burundi's outcry for justice and prevent recurrences of grave human rights violations in Burundi.

Burundi's return to constitutional democracy in 2005 was premised on the hope for human security and economic development. On one hand, the rights and freedoms of Burundi have been theoretically guaranteed whilst on the other hand, the new political order has encouraged impunity for human rights abuses to flourish. The APRA, Constitution and the UN Security Council Resolution provide for the establishment of transitional justice mechanisms such as a Truth and Reconciliation Commission and Criminal Tribunal pending the Commission's findings. The tensions among the political elites present themselves in the *de facto* application of the transitional justice provisions.

Having critically evaluated human rights violations and transitional justice in Burundi in the previous chapters of this thesis the following chapter six makes conclusions and recommendations.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

This thesis has been concerned with issues relating to the ongoing violations of human rights in Burundi. This chapter summarises and makes concluding remarks on post-conflict reconciliation and transitional justice in that troubled country. It interrogates the government's failure to prosecute the perpetrators of gross human rights violations.

Chapters one and two identified the problems that are still facing post-conflict Burundi such as ongoing human rights violations and the failure to establish transitional justice mechanisms. It has been revealed that non-compliance with International and Regional Human Rights Laws, Peace and Ceasefire Agreements, the Constitution, Penal Code and lack of an effective transitional justice model in post-transition arrangements have encouraged the culture of impunity for international crimes such as aggression, war crimes and crimes against humanity. This thesis has argued for a broader interpretation of the crime of genocide in Burundi.

It has been indicated in this study that for more than fifty years Burundi have been waiting for justice and that there is no political will to address human rights abuses in a comprehensive manner. Since 2000, after the conclusion of the APRA and the subsequent agreements, most efforts focused on the restoration of democracy in Burundi while ignoring the fundamental issue of impunity. The Vienna Declaration of 1993 affirms that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually-reinforcing. Democracy, for example, is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their participation in all aspects of their lives.

The research findings in this study suggest that Burundi is on a path leading towards democracy and constitutionalism. However, systematic mass killings which are politically motivated have aggravated human insecurity in Burundi in particular and the Great Lakes Region in general where, for example, one of the suspect assassins of President Ndadaye on 21st October 1993, Philbert Nduwumukama, commonly known as "Alias Kiwi" and other Burundi army officials were released by the post-transition government in Burundi under the immunity legislation. As mentioned in chapter, the two were arrested on 15th September 2012 by the Congolese armed forces in Bunagana in the Eastern DRC for their involvement in the DRC's armed conflicts.¹³⁴¹

¹³⁴¹ See Nyabuserongo News, *op cit* n. 234.

Undoubtedly, Burundi does not only face security concerns but also socio-economic and developmental challenges. The post- conflict government's failure to deal with the country's past political, social, and economic injustices is also a failure of international and regional organisations such as the UN, AU and EAC. From the interviews and focus group discussions with Barundi and non-Barundi respondents and literature survey in this study, it is evident that human rights violations in Burundi have been reinforced by ongoing armed conflicts in the region. As aforementioned in the previous chapters, Burundi's sullied human rights is in stark contrast to universal human rights and humanitarian norms. However, it must be remembered that while Burundi chose to embrace constitutionalism, major reforms are still required in order to strengthen state institutions of the judiciary, legislature and executive in order to uphold the rule of law, democracy, equality and tolerance of diversity in the country. Burundi's judicial system, for example, has been inconsistent in its application of human rights norms which are currently vulnerable to executive influences.

Although the thesis has interrogated human rights and transitional justice issues in post-conflict Burundi, other jurisdictions have been considered and discussed in chapter three, citing persuasive authorities in order to support the arguments herein and proffer lessons to Burundi. The case of Burundi underscores the need for political leadership that addresses vigorously past human rights violations as demonstrated in other contemporary post-conflict societies like South Africa, Chile, Guatemala, Cambodia, Rwanda and Sierra Leone, just to mention a few. Political apathy has impeded this quest for justice. Certainly, judicial and non-judicial innovations are required in Burundi to ensure the observance of human rights, rule of law and good governance.

The cases of *Ngirincuti*, *Minani*, *Avocats Sans Frontières* (on behalf of Bwampamye) and *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* and *Gatumba*, as discussed in chapter two, are among examples that can be used in support of the call for individual and state accountabilities. As demonstrated in the cases of Argentina, Chile, South Africa, Cambodia and Sierra Leone, impunity for gross violations of human rights in Burundi can be confronted through the establishment of an effective transitional justice model which can be used to recover "a shared historical memory" by conducting in-depth investigations of past systematic human rights violations that have been officially denied or concealed.

This thesis has assessed the issues of human rights and transitional justice in post-conflict Burundi. Accountability for the past wrongs or crimes committed during past *Tutsi*-led military regimes have not been pursued with the necessary rigour as research findings in this study have revealed. Constitutional and judicial reforms are still far from being effective. Burundi's

experience has been portrayed negatively in the eyes of the international community due to its delayed transitional justice, while gross violations of human rights have escalated not only in the pre-transition era but also since 2005 with the establishment of the post-transition government.

This study has interrogated concepts of individual responsibility and accountability through case law and transitional justice models from other jurisdictions, especially South Africa, which facilitated Burundi's peace and ceasefire negotiations. The South African transitional justice model has been considered in this thesis as the best because of its well documented collective memories from which future generations may draw lessons and say "never again".¹³⁴²

Chile also has been used as a good example of an ongoing search for truth and justice, for example, that country's revival of prosecutions of former members of the armed forces and individuals who committed heinous crimes under the previous military regime.¹³⁴³ The renewed interest in Chilean domestic laws has helped post-conflict Chile to continue dealing with legacies of Pinochet's military regime. Scholars have studied Chile as a leading example of delayed accountability whereby injustices have been addressed after the establishment of a new democratic government.¹³⁴⁴

It has been noted in this thesis that the obligations to guarantee individual civil and political rights are embedded in national constitutions and in the International Bill of Rights whose principles transcend national law. Thus, case law has been used as an example of judicial assertiveness in dealing with human rights violations despite internal and external pressures that may be obstructive to the pursuit to justice. Equally, the ongoing search for justice can overcome judicial impediments as shown in the Chilean case if there is political will.

This thesis submits that accountability remains unbalanced because there are inconsistencies in the judicial decisions at national, regional and international levels. The manner in which constitutional reforms have been applied internationally and nationally is inconsistent. Thus, jurisprudence from case law provides significant authority in terms of judicial innovations under national, regional and international laws. Although courts may depart from their previous decisions as demonstrated in the Chilean and South African cases, yet, a set of social,

¹³⁴² Sachs, *op cit* n. 417 at pp 86-89.

¹³⁴³ See the Valech Commission's Report, *op cit* n. 553, Law 19.980 of 2004, *op cit* n. 560 and Supreme Decree No. 43 of 2010 Concerning the Valech Commission, *op cit* n. 559.

¹³⁴⁴ Requa, *op cit* n. 531 at p. 80.

economic and political factors remain significant influences on judicial decision-making.¹³⁴⁵ Therefore, the failure of successive governments in post-conflict societies like Burundi to ensure justice for victims of gross violations of human rights, is a failure not only of the government of Burundi but also of the international community at large.

As compared to supportive authorities from South Africa and Chile, it is submitted that truth-telling and reconciliation are critical to the resolution of ongoing conflicts in Burundi. Prosecution of those individuals who bear the greatest responsibility must not be ignored as stated in high profile cases such as the *Eichmann*, *Pinochet*, *Charles Taylor*, *Kenya*, *East Timor* and *Cambodian* cases. Clearly, these types of cases have implications in terms of international criminal responsibility for individual persons who provide direct or indirect support to the perpetrators of mass atrocities against civilians.

6.2 THE FINDINGS

As the main purpose of the qualitative review and empirical research in this study was to investigate why the post-conflict government in Burundi has failed to comply with transitional justice mechanisms proposed in the peace and reconciliation agreements established since 2000 and the extent to which Burundi abides by the international human rights instruments, this empirical research enabled the participants to raise their opinions freely pertaining to violations of human rights in Burundi. The findings from the primary and secondary data thereof have suggested that there are still gross violations of human rights taking place in post-conflict Burundi similar to those committed in the pre-peace agreements era. The analysis undertaken in this study demonstrates the conceptual and practical means through which a paradigm of legal transformation may help to reconstruct a new Burundi.

A total number of 113 Burundi respondents participated in this study (refer Table 6 and Figure 9 below). The respondents were interviewed by either face-to-face (63.7%) or through self-administered questionnaires (36.3%). Both male and female respondents participated in the study and they had attained different levels of education as summarized in Table 6. A total number of 13 (11.5%) respondents had no formal education. The respondents included those still living in exile or returnees who had either settled or still living in transit camps as shown in (Figure 9 below). The majority of the respondents (65.5%) were Burundi refugees still living in countries of exile. This was followed by returned refugees settled in areas of origin (31.0%). There were a number of refugees returned and settled by the government who participated in this study. An equal proportion (1.8%) of refugees who had integrated in country of exile and

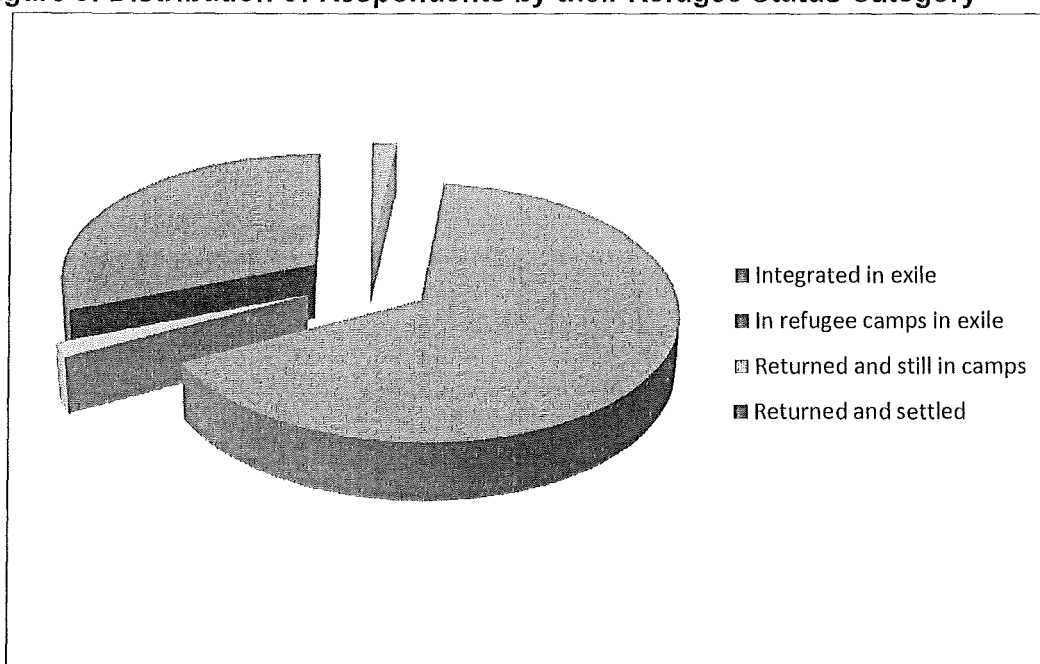
¹³⁴⁵ See Sachs, *op cit* n. 417, *AZAPO and Others v Truth and Reconciliation Commission and Others*, *op cit* n. 597 and *The Citizen 1978 (Pty) Ltd and Others v McBride* *op cit* n. 614 and the *Hermosilla's case*, *op cit* n. 547.

those returned but still in transit camps inside Burundi were also interviewed. Most of respondents were subsistence/crop farmers followed by salaried employees (Table 6). Only two respondents (1.8%) reported that they depended on livestock keeping as a major source of their income.

Table 6: Characteristics of Barundi Respondents Interviewed

<i>Variable</i>	<i>Category</i>	<i>Number (n=113)</i>	<i>Per cent</i>
Mode of questionnaire administration	Face to face	72	63.7
	Self-administered	41	36.3
Sex of respondent	Female	41	36.3
	Male	72	63.7
Source of income	Business	7	6.2
	Livestock keeping	2	1.8
	Crop farming	40	35.4
	Salaried employment	24	21.2
	Self-employment	19	16.8
	Student/pupil	21	18.6
Highest level of education	Primary school	36	31.9
	Secondary school	24	21.2
	College	19	16.8
	University	21	18.6
	No formal education	13	11.5

Figure 9: Distribution of Respondents by their Refugee Status Category



6.2.2 Description of respondents: non-Barundi

A total number of 16 respondents who belonged to Non-Barundi respondents' category participated in this study. The respondents were from different countries, level of education and sex categories are shown in Table 7. An equal number of male and female respondents participated in the study. The mode of the questionnaire administration employed either face to face (43.8%) or self-administration (56.2%) method. The 16 respondents were from 10 African countries as shown in Table 7 All 16 respondents (100.0%) had attained university education.

Table 7: Characteristics of Non- Barundi Respondents Interviewed

<i>Variable</i>	<i>Category</i>	<i>Number (n=16)</i>	<i>Per cent</i>
Mode of questionnaire administration	Face to face	7	43.8
	Self-administered	9	56.2
Sex of respondent	Female	8	50.0
	Male	8	50.0
Nationality of respondent	Botswana	1	6.3
	Cameroonian	1	6.3
	Kenyan	2	12.5

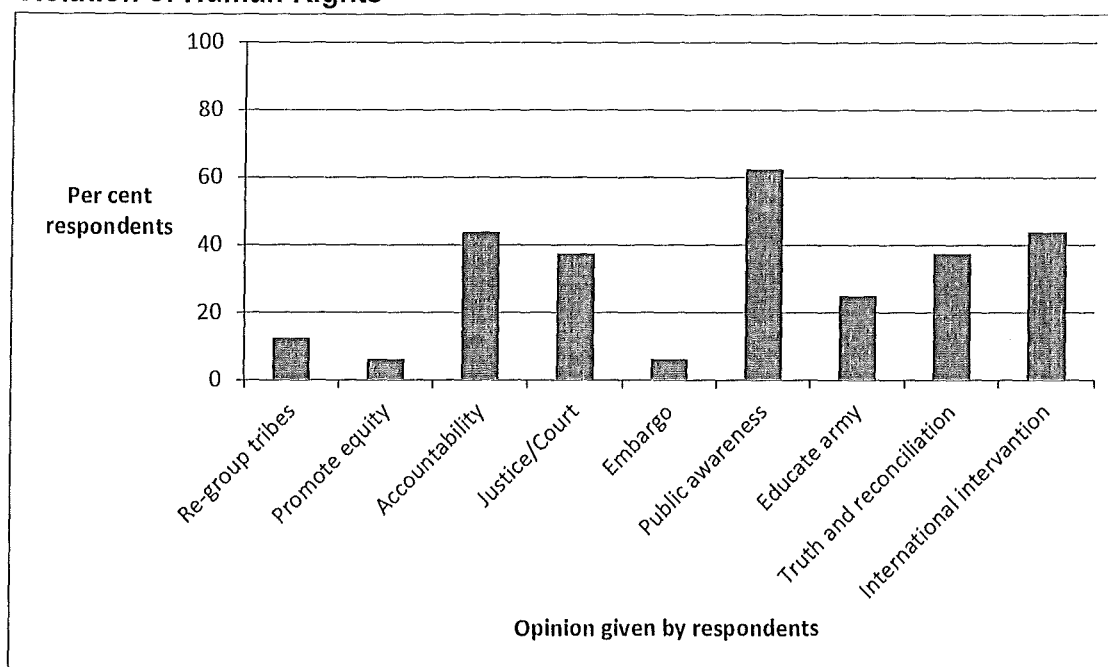
	Malawian	2	12.5
	Nigerian	1	6.3
	Rwandese	2	12.5
	South Africans	3	18.8
	Sudanese	1	6.3
	Tanzanian	2	12.5
	Zambian	1	6.3
Highest level of education	Primary school	0	0.0
	Secondary school	0	0.0
	College	0	0.0
	University	16	100.0
	No formal education	0	0.0

6.2.3 The Views of non-Barundi respondents

6.2.3.1 What can be done to stop violation of human rights?

Different views were provided by non-Burundian respondents on how to stop violations of human rights in Burundi (Figure 10 below). The majority of the respondents proposed the adoption of programmes to promote awareness of human rights among civilians (62.5%), intervention of international bodies (43.8%) and the promotion of accountability and good governance (43.8%). Other views expressed by the respondents included investigation of past deeds through a truth and reconciliation commission (37.5%) and promotion of justice through the hearing of cases related to violation of human rights in courts of law (37.5%). A few of the respondents also had opinions on educating the army (25.0%), re-grouping tribes in the country (12.5%), promotion of equitable distribution of resources (6.3%) and imposing sanctions/embargo on the country (6.3%).

Figure 10: Opinions by Non-Barundi (n=16) on What Should be Done to Stop Violation of Human Rights



6.2.3.2 What can be done to stop genocide in Burundi?

A number of alternative solutions were proposed to stop the recurrence of genocide in Burundi as summarized in Table 8 and Figure 11 below.

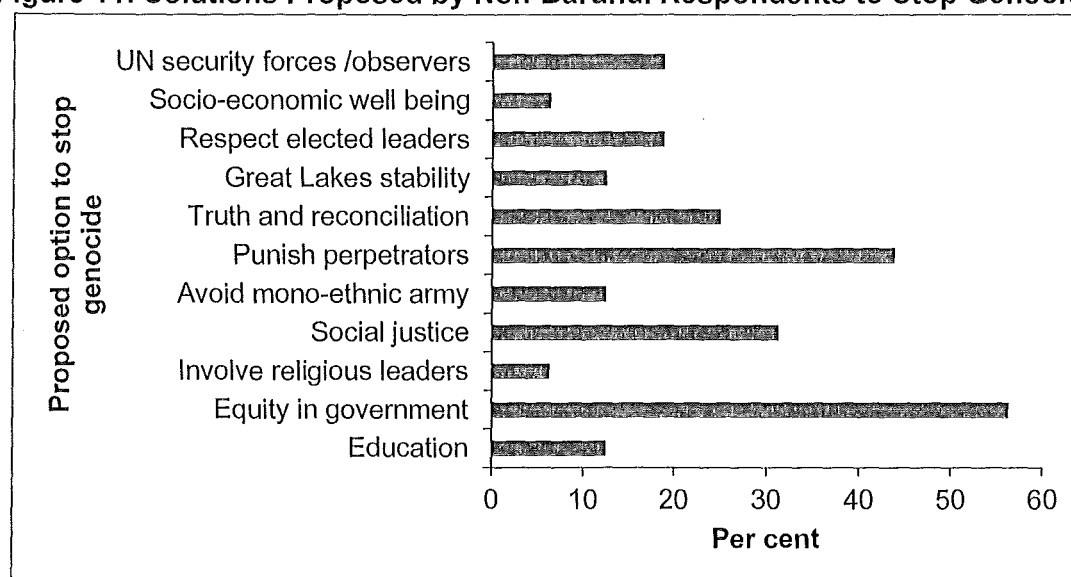
Table 8: Non-Burundi Respondents Proposal to Stop Genocide

Proposed solution	Number of respondents	Per cent
1. Educate the general public on human rights	2	12.5
2. Promote equitable representation in the government	9	56.3
3. Involve religious leaders to preach peace	1	6.3
4. Promote social justice	5	31.3
5. Avoid mono-ethnic army in Burundi	2	12.5
6. Punish perpetrators of genocide	7	43.8
7. Promote truth and reconciliation	4	25.0
8. Promote stability in the Great Lakes	2	12.5
9. Respect democratically-elected leaders	3	18.8
10. Promote socio-economic well-being of all people	1	6.3
11. Deployment of UN security forces and/or observers	3	18.8

The majority of respondents were of the opinion that mass killings akin to genocide can be prevented by promoting equitable representation of all tribes in the government as well as punishing perpetrators of gross violations of human rights in the country. Other solutions proposed included promotion of truth and reconciliation, avoiding the ousting or the killing of democratically elected leaders, deployment of UN Security Council military forces and/or observers, avoiding mono-ethnic army in Burundi, promoting peace and stability in the Great Lakes Region as well as educating Burundi on the importance of living in peace and harmony. A few respondents also proposed involving religious leaders in preaching peace and promotion of socio-economic well-being of all citizens in Burundi.

According to non- Burundi respondents' views, contemporary international prosecutions for mass killings have been through specially convened international tribunals. Since 2002, the International Criminal Court may exercise its jurisdiction under its Rome Statute if national courts are unwilling or unable to investigate or prosecute cases involving genocide.¹³⁴⁶ For example, the Kenyan and Libyan cases have shown that perpetrators of gross violations of human rights can be prosecuted under the ICC if there is unwillingness of the national courts to prosecute the accused persons. In Burundi's case, prosecution accompanied by truth and reconciliation mechanisms were highly favoured but also dealing with political and socio-economic issues in order to prevent the recurrence of genocide was recommended.

Figure 11: Solutions Proposed by Non-Barundi Respondents to Stop Genocide



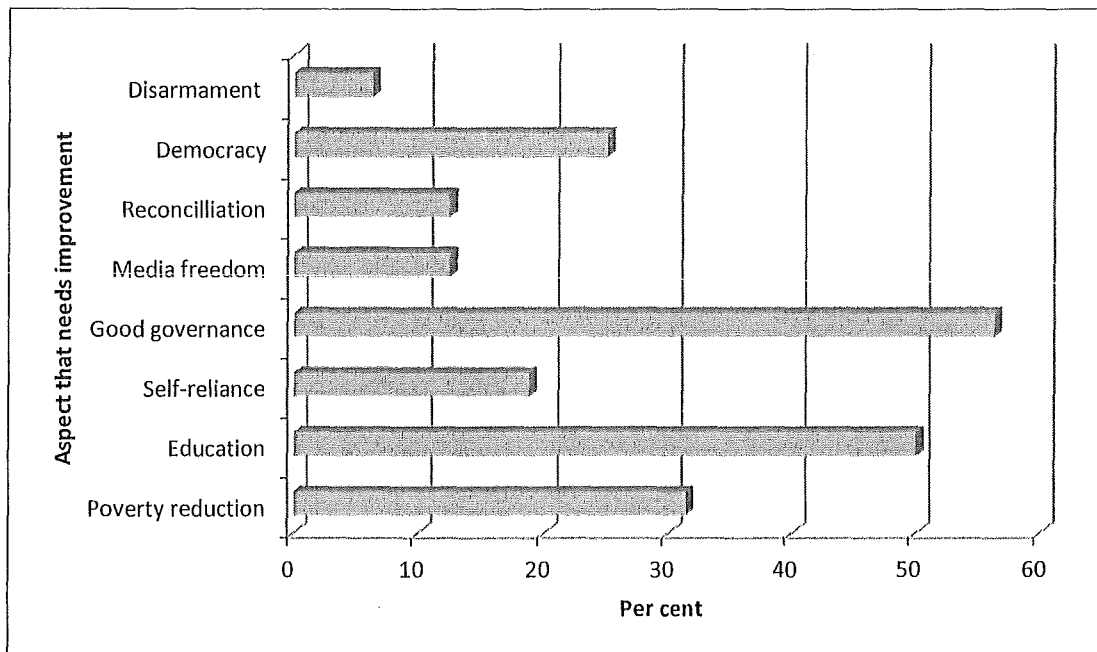
¹³⁴⁶

See the Kenyan and Libyan cases under section 5.3.5 and 5.4.1 of chapter five of this thesis.

6.2.3.3 Aspects that need improvement in order to restore peace, human security, good governance, rule of law and social development in Burundi and Africa in general

Aspects that needed further investigation are shown in Figure 12 below. A majority of the respondents favoured the promotion of good governance, education and poverty reduction as these were perceived as sources of conflict that normally lead to human insecurity, lack of peace and social justice and ultimately genocide. Other aspects that were perceived to be important were: the promotion of democracy; avoiding over-dependency on foreign aid and loans (i.e. self-reliance); media freedom; reconciliation and disarmament of civilians who still possess arms illegally.

Figure 12: Aspects that Need Improvement, as Reported by Non-Barundi Respondents



From the literature review it was evident that there is a superficial transformation as indicated in the BNUB Report of 2011. In this perspective priorities should have been given to human rights related issues such as establishing, without delay, transitional justice mechanisms in accordance with the APRA of 2000, Post-Transition Constitution of 2005 and UN Security Council Resolution 1606 of 2005 in order to deal with a culture of impunity. However, the proposed Truth and Reconciliation Commission is yet to be established. This thesis has pointed out how Burundi is a Member State to the UN and AU. As a monist state Burundi is a signatory to most international and regional human rights instruments such as the Genocide and Torture Conventions, Rome Statute, CRC and African Charter. However, for a long time Burundi has been accused of conducting itself contrary to what these human rights instruments

dictate and lagging behind in submitting periodical reports on the country's compliance pursuant to the African Charter and ICPCR.¹³⁴⁷ For example, the Human Rights Watch Report of 2012, while referring to universal human rights periodic review, confirms that human rights violations in Burundi remain pervasive because Nkurunziza's government has not taken sufficient appropriate measures to address the issue of impunity for monstrous killings and other gross human rights violations.

Given the country's sullied human rights record, lack of progress towards truth and reconciliation initiatives in post-conflict Burundi calls for restorative processes to be implemented in order to minimise land disputes, the influx of refugees and IDPs. Thus, truth-telling and reconciliation are fundamentals of defining transitional justice in post-conflict Burundi as summarised herein.

As underlined in the above examples from respondents, it has been revealed in research findings that respect for human rights, forgiveness, abiding by the principles of rule of law, justice and fairness, upholding the African philosophy of *Ubuntu* or humanity, national reconciliation and reconstruction are indispensable to national-building and reconciliation in post-conflict Burundi.

6.2.4 Human Rights Violations

As stated in chapters one, two, four and five of this thesis, the ongoing violations of human rights and mass killings in Burundi are germane to genocide and indicative of the enormous challenges facing Burundi in particular and the Great Lakes Region in general. The failure by the post-conflict government to implement an effective transitional justice model according to its promises has undermined the letter and spirit of constitutionalism. It has been posited in this study that violations of human rights in Burundi have hindered the country's progress towards the establishment of transitional justice mechanisms and socio-economic development.

The aims, objectives and methodological approaches which have been adopted in this study suggest that what is deemed true and just in post-conflict Burundi should be understood in the context of historical, political, administrative and legal setting inherited from the colonial system and previous *Tutsi*-led military regimes. For example, research findings have revealed that the ineffectiveness of organs of state calls for further research to be conducted and reviews in terms of policy making, legislative and judicial reforms in order to deal with the problems of the past, current and future injustices, upholding the rule of law and good governance.

¹³⁴⁷ Amnesty International Report (2012), *op cit* 328.

For more than fifty one years after the attainment of independence, Burundi continue to suffer from gross human rights violations and mass killings and ongoing marginalisation of the *Hutu* majority at the hands of the *Tutsi* minority. The consolidation of the social system which can be traced back to the colonial era, post-independence injustices during military regimes, intra-regional disparities, a weak economy, poverty and external interference are some of the fundamental factors stoking the current human rights violations in post-conflict era. These problems have created protracted armed conflicts and counter-insurgencies. Consequently, conflicts in Burundi have resulted in the proliferation of massive IDPs and refugee problems that have affected the economies of Burundi and of the other countries that receive and host refugees.

Given the lack of sound political dialogue, misunderstandings and tensions have escalated at critical moments in Burundi's history. Although efforts have been made to respect, protect and promote human rights through legal or constitutional measures, these measures have been inadequate.

Internationally, there has been a paradigm shift towards the recognition of reparations as a fundamental right.¹³⁴⁸ This right is not enforceable but constitutes an obligation which all State Parties to the UN and the international community must accomplish in order to protect and preserve the basic human rights of citizens. This study has suggested that the UDHR is still an important document that can be used to apply moral and political pressure on Burundi as a State Party to the UN to refrain from violating the basic human rights of its people. This thesis puts emphasis on the need to comply with the reporting requirements under human rights laws and to put in place transitional justice mechanisms which can be supplemented by national and international prosecution authorities in order to deal with the problem of impunity for gross human rights violations.

6.2.5 Post-conflict reconciliation and transitional justice

Transitional justice in post-conflict societies generally has been understood as political and legal means to confront the wrongdoings of the repressive past regimes and seek to establish a new constitutional order or democratic regime in order to bring about national reconciliation and reconstruction. Thus, transitional justice must operate within a sound legal framework where the right to amnesty can be provided for in the Constitution which can be enjoyed only under the terms and conditions established by law.

¹³⁴⁸ The Basic Principles, *op cit* n.18.

Agreements such as APRA, GCA, CCA, Magaliesburg Declaration and Bujumbura Agreement contain provisions that dealt with transitional justice.¹³⁴⁹ However, this thesis has noted discrepancies in terms of their implementation.

Like most contemporary peace agreements, Burundi's peace accords were aimed at addressing the question of human rights violations committed by the successive military regimes and insurgent groups. However Vandeginste has identified a sophisticated by-passing mechanism which has been put in place to benefit a wide range of former political elites and opponents who agreed to share power so that their interests could continue to be protected while provisional immunity law has been used to protect perpetrators of human rights violations thereby ossifying impunity.¹³⁵⁰

Burundi's constitutional democracy which was proclaimed in 2005 after the transitional government of 2003-2005, is subject to criticism because of the failure of the post-transition government to resolve Burundi conflicts and endemic conflicts. It has been pointed out further that the desire to share political power and economic resources in Burundi has forced some *Hutu* politicians who have been unfairly discriminated against by *Tutsis* for a long time to use the same discrimination as a motivating factor to seek better bargaining political positions and powers as demonstrated in the peace and ceasefire agreements. The result has been government inflexibility in response to these aspirations which makes confrontation unavoidable as revealed in the political tensions after 2010 elections.

Harassment and intimidation of political opponents, journalists and human rights activists have increased during the Nkurunziza governments of 2005 and 2010. For example, political leaders like Leonard Nyangoma of CNDD, together with Agathon Rwaswa of PALIPEHUTU-FNL and others were forced to flee the country after the 2010 elections. Certainly, the right to freedom of expression in Burundi is limited by criminal laws in terms of what is referred to as "press offences". These offences impose criminal sanctions such as fines, imprisonment or both on journalists and media employees who are charged with defamation, discrediting the state, insulting the Head of State and threatening state security.

Research findings in this study have further revealed that there is no political will to promote and observe human rights in Burundi. This is demonstrated by the ongoing political instability, ethnic strife and wars, poverty and homelessness, refugee and problems of internal displacement as stated in chapters two, four and five of this thesis. Gross violations of human rights in Burundi are not confined to a single event; rather they are traceable from the sequence

¹³⁴⁹ Refer to Table 5.

¹³⁵⁰ Vandeginste, *op cit* n.67.

of mass killings of civilians in the incidents of 1960's, 1972, 1988 and 1992 and 1993 which the previous and current regimes have failed to address in a comprehensive manner.

Over hundreds of thousands of Barundi fled their homes in 1972, 1988, 1990s and 2000 in order to escape the mass killings caused by the armed conflicts between the *Tutsi*-led army and *Hutu* insurgent groups. In the early 1990s, many Barundi, predominantly *Hutus*, were forcibly displaced after President Ndadaye's assassination and others became refugees in other countries. The receiving countries such as Tanzania, DRC, Rwanda, South Africa and others, have been overburdened to grant the applicants with refugee statuses.

In the premise, there will be no durable solution to the refugee problems if there are still ongoing human rights violations and mass killings. For example, it has been revealed in this study that the integration of refugees in exile and returnees in Burundi is not always a smooth process. As indicated in this study, post-conflict Burundi has not done enough to protect Barundi refugees as revealed in the research findings. The majority of Barundi refugees in exile and returnees, for example, are still fearful because there are no transitional justice mechanisms which have been established to prosecute the perpetrators for the past international crimes committed during the *Tutsi*-led military regimes. Furthermore, the land issue is still a burning problem for returnees especially those returnees who fled Burundi in 1972 who have constantly been accusing the post-conflict government in Burundi of not honouring the promises it made to refugees in exile before repatriation processes.

According to the information obtained from the interviews with Barundi, the ongoing conflicts between the *Tutsi*-led army and insurgent groups had played a major role in weakening the government in post-conflict which is characterised by incompetence, corruption, autocratic leadership that has employed and embraced mostly the colonial and *Tutsi*-led military administrative techniques and failed to observe and promote human rights.¹³⁵¹ Tensions among the warring parties not only followed along ethnic lines but also discrimination of returnees who are considered as "foreigners".¹³⁵²

The current government in Burundi has also failed to solve the plight of Barundi IDPs. For example, most of the IDPs children in Bujumbura hinterland like Muhuta and other places in the southern parts of Burundi where there have been ongoing armed conflicts between the ruling party CNDD-FDD and opposition parties like PALIPEHUTU-FNL, are denied their right to education. For instance, there is substantial number of IDPs children who cannot go to school.

¹³⁵¹ Focus group interviews with returnees in Bujumbura and Rumonge.

¹³⁵² Focus group interviews with returnees in Bujumbura and Rumonge.

Likewise, Burundi women's rights are constantly being violated in post-conflict Burundi. This includes single mothers and widows or 'women-headed households' who constantly become the most vulnerable groups during armed conflicts. Although Burundi is a signatory to the CEDAW, it has still not ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) or the Optional Protocol to CEDAW to ensure the full protection of women's rights. This is a gap in the law which has to be filled. Furthermore, this thesis has interrogated the issue of minority group rights of *Batwa* and people with albinism in Burundi who are also among the most vulnerable groups whose rights are not protected.

It must be emphasized that the key theories on transitional justice call for revealing the truth about systematic and gross violations of human rights. This can lead to national reconciliation, peace-building, reconstruction and reparations to the victims of these violations. However, ethnicity and political turmoil that have divided Burundi society over five decades as re-iterated in the peace and ceasefire agreements have not vanished. The APRA and the UN Resolution of 2005 proposed the establishment of a Truth Commission and a Special Chamber within Burundi's judicial system. To date, these proposals remain the pipedream because of the volatile security condition and ongoing violations of human rights.

It has been argued and stressed in this thesis that past human rights violations in Burundi should amount to the crime of genocide, war crimes and crimes against humanity in terms of the emerging norms of criminal international law. The major concern in post-conflict Burundi is the fact that the post-transition governments of 2005 and 2010 to date have failed to address and bring the perpetrators of these gross violations of human rights to justice in order to comply with the requirements of the proposed transitional justice mechanisms.

This thesis has identified gaps in the literature and has taken these gaps as a point of departure from the existing literature on the argument that the crime of genocide has been committed in Burundi. The issue of whether these violations of human rights amounts to genocide in Burundi needs further investigation in order to deal with impunity and consolidate the rule of law and constitutionalism. This thesis argues further that politically motivated mass killings of *Hutus*, mass killings of *Batwa* and people with albinism as distinct groups in Burundi can be argued as amounting to "genocide", beyond the legal definition of the crime of genocide provide for under Article 2 of the Genocide Convention. The phases of mass killings can be clustered into the periods of 1960s-1972, 1972-1993, 1993-2005 and 2005 to date . It has been clearly indicated that mass murders and other heinous crimes which have been committed in Burundi not only explain the reality of individuals' physical harm, but also social, economic and psychological injuries. For instance, apart from mass murders, violence against vulnerable

groups like women during and after armed conflicts has been committed in Burundi with complete impunity. Furthermore, children and minority rights have consistently been violated through sexual abuses and servitude at the hands of *Tutsi*-led army and insurgent groups. The rights of children and those of minority groups have been constantly violated at the hands of the *Tutsi*-led army and insurgent groups.

In order to answer the question formulated in chapter one, this thesis asserts that the crime of genocide is not only morally disgraceful but also incurs legal liabilities. Globally, attempts have been made to internationalise criminal prosecution through bilateral and multilateral treaties including unilateral declarations.

Although the initial interpretation was narrow or “intentionalist” which aimed at holding accountable the military elites only, however, the paradigm shift after the Nuremburg Trials, has moved from “intentionalist” to “functionalist” or a broader approach which considers criminal responsibility as a universal norm.¹³⁵³ This thesis has referred to the killings in Burundi and asserts that Burundi’s case is a complex one that needs joint efforts as it was in the cases of German Holocaust, Rwanda, Chile, Guatemala and Cambodia. For example, the legacy of previous *Tutsi*-led military regimes in Burundi as stated earlier in the previous chapters has had been associated with systematic mass killings of *Hutus* for which criminal responsibility and accountability have been undermined. It is submitted that in order to heal Burundi and prevent recurrences of human rights violations in the future, transparency about the past is unavoidable.

It is common cause that the main task of the post-conflict government in Burundi was to try to heal Burundi through establishing transitional justice mechanisms as proposed in the peace and ceasefire agreements and to prosecute the perpetrators of systematic mass killings in order to prevent their recurrence and to provide legal remedies to the victims. However, the post-conflict government to date has not established transitional justice mechanisms.

Regrettably, Burundi’s tragedy has failed to attract the attention of the international community and scholars are not *id idem*. For example, it is difficult for Burundi’s mass killings which the majority of respondents in this study have viewed as “genocide” to meet the set criteria required by the Genocide Convention. The UN Commission of Inquiry Report, 1993 on Burundi refers to the genocide of *Tutsi* civilians, but, has failed to acknowledge the genocide of *Hutus* of 1972 pointed out earlier in Ruhashyankiko and Whitaker Reports of 1978 and 1985.

¹³⁵³ See Bessel, *op cit* 1025.

The main argument in this study is that substantive aspects of "genocide" have not been evaluated from an adjective dimension so as to ensure responsibility and accountability. It is submitted that gross violations of human rights in Burundi can be interpreted against the Stanton's eight stages of genocide, being classification, symbolization, dehumanization, organization, polarization, preparation, extermination and denial.¹³⁵⁴ The first stages precede later stages but continue to operate throughout the systematic mass killing process, thus, each stage reinforces the other.

Burundi's case holds that successive military regimes led by *Tutsi* army officers as the main perpetrators of systematic mass killings have been targeting other ethnic groups especially *Hutu* political elites in the pre- peace agreement era. In a broader context, these killings are akin to "genocide". Similarly, politically motivated killings in post-conflict Burundi or the targeting of minority and distinct groups of *Batwa* and people with albinism with intention to destroy these groups in whole or in part can also be interpreted broadly to mean "genocide".

It is an indisputable fact that the *Tutsi*-led army elites' insatiable appetite to cling on to power has been associated with the mass killings of *Hutus* and military coups. A voracious appetite for power has been also demonstrated in post-conflict Burundi and viewed as a major hindrance towards the establishment of comprehensive transitional justice mechanisms in order to deal with impunity, prosecute the suspected perpetrators of genocide, make reparations to the victims and bring about national healing through revealing the truth and reconciliation.

It has been observed in this study that to complement an independent judiciary with a legal system based on respect for the rule of law needs an effective, independent and impartial judiciary willing to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity in order to prevent their recurrence. Otherwise, the rule of law will slowly and gradually be eroded while effective protection of human rights of individuals will be adversely affected and prevention of genocide in Burundi will remain a pipedream.

There are four international crimes recognisable under international criminal law namely, genocide, crime against humanity, war crimes and aggression whose *actus reus* and *mens rea* elements must be proved. The conduct element in terms of Article 2 of the Genocide Convention includes killing, causing serious bodily or mental harm, deliberately inflicting conditions designed to destroy a particular group; imposing measures to prevent birth and

¹³⁵⁴ Stanton, *op cit* n. 1039.

forcibly transferring children of the group to another group. Case law suggests inconsistencies in applying the principles of international criminal law to factual situations.¹³⁵⁵

War crimes and crimes against humanity in the contemporary world are viewed as two autonomous and self-sustained categories of crimes that are often linked with modern armed conflicts in societies like Burundi. Mass murders, deportation and gross violations of human rights against civilians are clear examples of the connection and overlap between war crimes and crimes against humanity. Hence, the intention to commit these crimes must be considered in terms of investigations, persecutions and punishment. For example, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudicing the health or survival of the population is part of recognisable international crimes.

The ICC Statute refers to concepts like “personal dignity”, the prohibition of “humiliating and degrading treatment”, “judicial guarantees”, the prohibition of “persecution” and severe deprivation of fundamental rights, contrary to international law or the deprivation of identity of the group or collective discrimination and Apartheid as provided for under Article 7 of the Statute.¹³⁵⁶ Humanity is at the core of International Humanitarian Law and forms the basis of political, social and economic developments as discussed in this thesis.

Although the Constitution of 2005 emphasizes the need for investigating, prosecuting, punishing of the perpetrators of human rights violations and the rehabilitation of the victims in a substantive sense, however, the post-conflict government lacks political will and adequate legal enforcement to investigate and prosecute international crimes committed over fifty years. My research findings have revealed that the effective application of transitional justice mechanisms such as truth and reconciliation may result into healing Burundi should they be accompanied by the observance of, respect for and promoting human rights articulated in the International Bill of Rights. This thesis accepts that when analysing mass killings in Burundi in the context of transitional justice, for example, responsibility and accountability must be the core principles. In this regard, this thesis submits that studying Burundi’s mass killings in the context of accountability for genocide and other crimes committed call for an interdisciplinary approach. Therefore, it is from this premise that this thesis favoured an holistic approach that links legal and non-legal materials as being inextricably intertwined.

¹³⁵⁵ See Gill, *op cit* n. 35.

¹³⁵⁶ Article 7 of the ICC Statute defines ‘crime against humanity’, *inter alia*, as an Apartheid especially when the criminal acts are committed as part of a widespread or systematic attacks directed against any civilian population, with knowledge of such attacks.

Research findings in this study have shown largely that the *Hutu* mass killings have not been interpreted legally to meet the Genocide Convention criteria. The mass killings in Burundi should be expanded beyond the Genocide Convention's definition to include other groups apart from racial, national, ethnic and religious as narrowly defined. For instance, the persecution of *Batwa*, people with albinism and elite groups should be included if prosecution is an option to deal with impunity as Schabas has suggested.¹³⁵⁷

As primary data and some literature have pointed out in chapters one, two, four and five, there is irrefutable evidence that mass killings akin to "genocide" have been committed in Burundi under successive military regimes. Similarly, the international community has also failed to establish an *ad hoc* international criminal tribunal similar to the ICTY and ICTR Special Chambers to prosecute vigorously perpetrators of mass killings and other international crimes committed in Burundi. In practice, states are neutral to exercising universal jurisdiction. The neutrality aspect of jurisdiction tends to bring confusion if the case of Rwanda can be used in comparison with the case of Burundi. Currently, there are indications that universal criminal jurisdiction for international crimes committed can be invoked in terms of customary international and complementary principle under international criminal law with reference to such cases as *Eichmann*, *Pinochet*, *Kenyatta* and *Gaddafi*.

In principle, the requirements *ratione materiae* and *ratione personae* are granted for the benefit of the state or international organisation which the state officials represent but not for individuals' interests. Hence, the official position, of any accused person, whether as Head of State or Government official, should not exonerate such person of criminal responsibility and accountability as demonstrated in the examples cited earlier from other jurisdictions. At the same time truth-telling is crucial in order to establish accountability and ensure that justice is done including reparations to the victims of genocide and other serious crimes.

In comparison with other jurisdictions, since 1990, former Heads of States or governments have been prosecuted for serious human rights violations with arguably reparations having been paid for the victims. Lessons can be drawn from case studies of high-profile prosecutions of former government officials such as: Augusto Pinochet (Chile), Alberto Fujimori (Peru), Slobodan Milosevic (former Yugoslavia), Charles Taylor (Liberia and Sierra Leone) and Efraín Ríos Montt (Guatemala) just to mention a few.

¹³⁵⁷ Schabas, *op cit* n. 362 at p.6.

It must be pointed out that in Burundi, the crime of genocide is still ambiguous. However, the cases of Chile, Guatemala as well as Argentina have shown that there are limited criminal sanctions emanating from transitional justice arrangements. It is submitted that in contemporary societies, there has been a paradigm shift in favour of criminal justice in terms of punishment. This study uses Guatemala's case as an example of revealing truth on the past wrongs and criminal accountability of Head of State and government officials. The criminal prosecution in the *Montt's* case was intended to deal with among other things, the past injustices and prevention of recurrences of human rights violations.

In Chile, truth-telling was considered as an essential component of the Rettig Commission in Chile because it provided for, *inter alia*, measures of reparations for the victims and prevention of future recurrence of the outrages of the Pinochet's military regime. The Rettig Commission Report stated clearly that truth should be known to the public on what ought to be repaired and prevented.¹³⁵⁸ In Chile, for example, justified the social benefits on account that many individuals who were killed or disappeared might have qualified for social benefits, which their relatives had never received or had received partially were considered. The Rettig Commission was also empowered to validate new classes of cases of victims and to investigate the whereabouts of the victims who disappeared after being arrested and of those whose bodies have not been found although they have been legally recognized and declared as dead.

Similarly, the South African transitional justice model which has been discussed in chapter three of this thesis is among examples which Burundi can learn from in terms of constitutional reforms and reparations. The South African transitional justice model which was inspired by the African philosophy of *Ubuntu* put emphasis on national reconciliation and healing, public apology and placed the value of forgiveness and not revenge is relevant to the case of Burundi.

In the case of Cambodia, there have been a commitment to deal with genocide or other international crimes. Cambodian's French colonial past as well as the political compromises preceded the ECCC creation meant that procedures had to differ in a number of respects from previous international and hybrid criminal courts. Two important differences concerned the broad focus on national reconciliation and the role of victims in the proceedings, including their right to claim moral and collective reparations

This thesis submits that there are lessons that can be drawn from transitional justice initiatives and criminal or civil responsibilities in terms of truth-telling, reconciliation, criminal investigation

¹³⁵⁸ The Rettig Commission Report, *op cit* n. 519.

and prosecution as demonstrated in the cases of Chile, South Africa, Guatemala. The Cambodian case may inspire Burundi in terms of reparations to the victims and establishment of the rehabilitation centres, have public apology and Remembrance Day and combining the retributive procedures with restorative processes in order to deal with the problem of impunity.

The transitional justice models which has been discussed in chapter three and six of this thesis are among examples which Burundi may learn from in terms of constitutional reforms, judicial transformation, prosecution of the perpetrators of gross violations of human rights and reparations. The post-conflict societies referred to in chapter three are examples of dealing with the outrages of the previous military or repressive regimes. Thus, Burundi may draw lessons from these jurisdictions in order to deal with the outrages of human rights violations.

State responsibility for gross human rights violations as discussed in chapter three of this thesis is still among the most contentious issues under emerging international criminal law. Although the Genocide Convention imposes a number of obligations in the respect of state accountability for international crimes, there have been debates on whether state criminal responsibility is equal to state civil liability. This thesis has pointed out the gaps in international law on state responsibility. By looking at the example of the Great Lakes Region with specific reference to Burundi, it argues that contrary to the requirements of the International Bill of Rights, the attribution of international crimes to states for violations of human rights is still elusive. Hence, there are noticeable gaps in the international criminal justice system.¹³⁵⁹

Relying on the African Commission's ruling in the *Jawara, Sierra Leonean Refugees* and *Rencontre Africaine* cases there is a call on Burundi to bring its Constitution and criminal legislation in conformity with its obligations emanating from the international and regional human rights law, such as, the African Charter¹³⁶⁰ on exhausting legal remedies. For example, criminal investigations ought to be undertaken by the government of Burundi and be regarded as a positive step towards exhausting domestic legal remedies. However, the government has no capacity and willingness to investigate the systematic violations of human rights as stated in the *Ngirincuti's* case. As such, Burundi cannot rely on the principle of the *Jawara's* case of utilising regional courts' remedies because of ignorance, financial constraints and lack of enough legal experts. Likewise, domestic remedies cannot be exhausted in Burundi due to an ineffective judiciary.

¹³⁵⁹ See the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *op cit* n. 673.

¹³⁶⁰ *Avocats Sans Frontières (on behalf of Bwampanye) v Burundi*, *op cit* n. 392.

In the light of the objective of this study which simultaneously sought to interrogate among others the notion of reparation, it is acknowledged that in all reparation programmes, victims are not fully compensated in proportion to the harm they suffered. However, judicial reparation may be more suitable than administrative reparation. That means, if perpetrators of serious crimes in the case of Burundi are still influential in the transitional justice mechanisms, the possibility of prosecutions remains deceptive, thus, an interim reparation can be a viable option if it is accompanied with truth-telling and other transitional justice processes. Sadly, neither judicial nor administrative reparations may be effective if there is no effective Truth and Reconciliation Commission to study the root causes of human rights violations, identify the perpetrators and victims which must be followed by reparation measures.

Based on the above discussion, this thesis recommends practical strategies that should be put in place to establish accountability and responsibility for gross human rights violations and mass killings as listed hereunder.

6.3 RECOMMENDATIONS

This thesis has proposed a model to be designed to deal with these problems and has identified areas that need further research.

First, the government must form a partnership with civil society in order to establish a National Independent Human Rights Commission, including technical assistance for strategic planning and resource mobilization.

Secondly, the National Monitoring Unit as provided for in the Constitution must be established as a matter of priority, be efficient and focus on the protection of human rights and prevention of recurrences of human rights violations. This may be possible by:

- Establishing a Truth and Reconciliation Commission whose findings may be used for further criminal investigation and prosecution if deemed just in order to assuage collective memories, national healing, reparations for the victims and national reconstruction.
- Having national dialogue on truth-telling, forgiveness or reconciliation grounded in the African philosophy of *Ubuntu* in the context of the South African transitional justice model and reconstruction which consist of all ethnic groups, political parties and civil society to overcome mistrust, fear and grief in society. In other words, the culture of

respecting diversity must be promoted. Getting to know the feelings of ordinary people from each ethnic group may help to change the stereotype and hostilities amongst diverse groups. It may help parties at the ordinary level to discover the truth about what has happened, and may provide opportunities for apology and forgiveness the way it was done in countries like South Africa and Chile.

- Strengthening a legal system that may combine litigation, legal advocacy, technical assistance and dissemination of knowledge in order to strengthen areas such as combating corruption, equality and citizenship education, freedom of movement and expression, international and national criminal justice.
- Creating an International Criminal Tribunal for Burundi (ICTB) or the prosed Special Criminal Tribunal to prosecute and punish perpetrators of past, present and future international crimes such as, aggression, war crimes and crimes against humanity as a way of dealing with impunity. This can be effective after the Truth and Reconciliation Commission's findings.
- Introducing capacity building or empowering programmes in terms of training especially the youth. Job creation strategies should be given priority including vocational training and educational reforms in order to meet regional and international competitiveness.
- Improving human rights culture whereby the government must respect the freedom of expression and create a conducive environment for foreign investors in order to boost the country's economy as a way of dealing with poverty related issues.
- Judicial and law reforms are required in order to deal with the legacy of the past military regimes and meet constitutional requirements for a "new Burundi".¹³⁶¹ Judicial transformation and independence of judiciary are required in Burundi in order to strengthen the rule of law and fight against impunity and must respect diversity in terms of gender, ethnicity and minority groups.
- Regional Courts such as the African Court on Human and People's Rights which compliments the functions of the African Commission, must be financially and technically empowered in order to act in accordance with the requirements of the CAAU, ACHR and other regional and international treaties and conventions. If

¹³⁶¹ Respondent 93's view.

necessary, they must be complemented with sub-regional courts like the East African Court of Human Rights (EACHR) in order deal with the increasing number of allegations of human rights abuses.

- The government of Burundi must put in place concrete poverty alleviation plans to deal with socio-economic disparities among ethnic groups in terms of representation in public and private institutions.
- Government must establish and implement projects that will focus on national goals in ensuring that development projects have national image rather than a specific locality, ethnic or regional group image.
- Leaders must strive to promote democracy, the rule of law and respect human rights; they should serve as examples of representatives and custodians of the rule of law, justice and fairness.
- Government must administer and distribute public resources and natural resources (such as land) fairly to avoid the risk of violence and in order to comply with the principles established in the *Armed Activities* case.
- Education about human rights must become part of the general education curriculum. Technical and financial assistance should be provided to increase knowledge about human rights. Members of the army, police and security forces must be trained to ensure the observance of human rights and standards required by law enforcement.
- Research institutes and learning institutions like universities and law schools in Burundi must be strengthened to train competent legal experts who should assist in designing and monitoring legal and non-legal transformation policies and laws, including the implementation thereof. Programmes such as Street Law, under the auspices of universities' law clinics, must be designed to train and educate Burundi on human rights law. These programmes must provide a practical legal understanding in terms of the International Bill of Rights, the Constitution and the international standards of democracy such as active participatory democracy. Establishing dissemination programmes at all levels ought to be part of reconstructing Burundi. This may be possible if these programmes might be regarded as a new beginning based on lessons drawn from the history of root causes of mass killings and grave human rights

violations. This may help Burundi to say “never again” and focus on national healing and economic development.

- The question of the reintegration of refugees and IDPs must be dealt with rigorously to avoid violation of refugees’ human rights and marginalisation.

6.4 SUMMARY

This thesis has critically examined human rights violations in post-conflict Burundi and transitional justice mechanisms. This chapter has summarised current critical issues of killings and recommended practical guidelines which should be put in place to deal with human rights violations.

It is imperative to point out that further studies in judicial transformation, Burundi refugees’ right to education and integration of returnees, rehabilitation of ex-combatants, social and health care services, gender equality, protection of minority rights, reparations, resolution of land disputes and restitution and the impact of Burundi’s armed conflicts on environmental rights need further scholarly inquiries. Scholars on violations of human rights in Burundi should not only expose the commission of international crimes in a limited manner, but also, make a proper scholarly inquiry on human rights violations as to why there no criminal investigations and prosecutions have taken place since 1960s to date . Scholarly and juristic expertise can be utilised to offer legal assistance and provide guidance in drafting effective policies and legislation relating to truth and reconciliation underpinning the Burundi Constitution which enshrines basic human rights and fundamental freedoms.

It must be reminded that impunity for past human rights violations in Burundi in the light of the *Ngirincuti*’s case is still a major problem. Temporary immunity for political crimes, for example, has been perceived as among the hurdles towards the establishment of effective transitional justice mechanisms because it shields the perpetrators of heinous crimes from prosecution. This thesis acknowledges that immunity generally, is among the most contentious issues under international law. The extent to which individuals benefit from immunity and avoid prosecution for criminal offences they have committed is not always clear. This area of law has been developing, particularly during the past two decades, responding to post-conflict challenges of contemporary society.

It must be recalled that there are is an exception to the general rule of immunity of the former High State officials because, such officials can face prosecution before an International Criminal Tribunal which has jurisdiction as demonstrated in the Nuremburg and Tokyo, ICTY,

and ICTR Trials as well as the Special Chambers like the Sierra Leonean SCSL and Cambodian ECCC Trials. The Rome Statute provides for the prosecution of perpetrators of human rights violations under the traditional notions of nationality and territoriality principles. However, universal jurisdiction can be invoked for the prosecution of the perpetrators before the ICC if the State Parties are unwilling or unable to prosecute the perpetrators of gross human rights violations in their respective countries under the "Complimentary Principle" as it was done in Kenya and Libya.

Finally, as stated in the above discussion, there is paradigm shift in the international community's commitment to developing mechanisms to prosecute High State officials accused of international crimes in the Municipal Courts, Regional Courts, *ad hoc* International Criminal Tribunals, Special Chambers, the ICJ and ICC, which may inspire Burundi to deal with its entrenched culture of impunity, should Burundi resolve to have an effective or comprehensive transitional justice model. Accordingly, the Rome Statute provides for a coherent hierarchical order and clear guidelines on where the trials of former state officials who have been accused of committing international crimes should be prosecuted in pursuit of justice. It is asserted that without the necessary resolve to put an end to the culture of impunity and to establish responsibility and accountability for past wrongs there will be no lasting peace in Burundi.

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APPENDICES

APPENDIX A- Certificate from an Independent Expert in Statistical Analysis



SOKOINE UNIVERSITY OF AGRICULTURE
FACULTY OF VETERINARY MEDICINE
DEPARTMENT OF VETERINARY MEDICINE & PUBLIC HEALTH
P.O BOX 3021 CHUO KIKUU MOROGORO TANZANIA
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FAX: +255 232 604 647, TELEX 55308 UNIVMOG-TZ
TELEGRAMS "UNIAGRIC" MOROGORO
E-Mail: karimuribo@suanet.ac.tz

Our Ref: PG/Students/2012

Your Ref:

Date: 8th March 2012

TO WHOM IT MAY CONCERN

RE: CONFIRMATION OF ACADEMIC SUPPORT TO MRS. LEAH NDIRURWIMO IN STATISTICS AND QUESTIONNAIRE DEVELOPMENT

I hereby confirm that Mrs. Leah Ndirurwimo consulted me in 2010 on academic support to plan her data collection for her PhD Thesis. Specific areas I assisted her are statistical approaches and development of data collection tools (questionnaires) relevant to her work.

I am a Senior Lecturer employed with Sokoine University of Agriculture (SUA, www.suanet.ac.tz) in the Department of Veterinary Medicine and Public Health. In addition to teaching Veterinary Epidemiology at SUA, I teach Statistics and Data Management (VM 622) and Research Methods (VM 621) courses which are taken by MSc students.

I am also willing to provide further information or clarification if required.

Yours,

A handwritten signature in dark ink, appearing to be 'E. Karimuribo'.

Dr Esron D. Karimuribo.
(Senior Lecturer)

DEPARTMENT OF VETERINARY MEDICINE & PUBLIC HEALTH
SOKOINE UNIVERSITY OF AGRICULTURE
P.O. BOX 3021
MOROGORO

APPENDIX B: Questionnaire Barundi



Private Bag X2046, Mmabatho
South Africa 2735

Web <http://www.nwu.ac.za>.

Faculty of Law

21th October, 2010.

Covering letter,

Re: VIOLATION OF HUMAN RIGHTS AND GENOCIDE IN BURUNDI: POST PEACE AGREEMENTS

(UTAFITI JUU YA UKIUKAJI WA HAKI BINADAMU NA MAUAJI YA KIMBARI BAADA YA MAKUBALIANO YA AMANI NCHINI BURUNDI)

Dear Participant,

Due to the challenges facing the African continent with specific reference to the gross violations of human rights, genocide and endless wars which are viewed generally as major contributory factors towards Africa's underdevelopment, I am currently studying towards a Doctorate Degree in Public International Law at North West University in South Africa.

In order to meet the requirements of this qualification, I am undertaking a thesis with the title "Violation of Human Rights and Genocide in Burundi: Post Peace Agreements". The research questionnaire is directed to Barundi (residing inside and outside of Burundi and non-Barundi). I would like to request your assistance in completing and returning the attached questionnaire related to the thesis. There are six sections, please answer all questions.

Please note that all information shall be handled with great confidentiality and is for academic purposes hence your time and cooperation will be highly appreciated.

Yours sincerely,

Leah A. Ndimurwimo

Cell: +27(0) 72 222 8277

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E-Mail: landimurwimo@nmmu.ac.za OR 22074538@student.nwu.ac.za.

Researcher.

QUESTIONNAIRE: BARUNDI (REFUGEES IN EXILE, RETRNEES AND IDPs)

Ndugu mtahiniwa,

Kutokana na tatizo la ukiukaji wa haki za binadamu na mauaji ya kimbari barani Afrika, eneo la maziwa makubwa kwa mfano nchini Burundi, ninafanya utafiti kwa ajili ya PhD (Digrri ya Uzamili) kuangalia swala zima la ukikiukaji wa haki za binadamu na mauaji ya kimbari nchini Burundi baada ya mikataba ya kurudisha amani. Masailiano haya yana sehemu sita. Tafadhali sana maswali yote husika yajibiwe.

SECTION 1: RESPONDENT'S PARTICULARS

SEHEMU YA 1: TAARIFA BINAFSI ZA MTAHINIWA

To be filled by ALL respondents/Ijazwe na WOTE

1.1 Mode of administration/ Njia iliyotumika (tick/weka alama ya vema):

Face to face Uso kwa uso	☐

Self-administered (email, etc.) Amejaza mwenyewe (mf email)	☐

1.2 Date of interview/Tarehe ya kutahiniwa: ____/____/20____

1.3 Sex/Jinsia (tick/weka alama)

Male Mme	☐

Female Mke	☐

1.4 Age/ Umri (yrs/ miaka): _____

1.5 Highest level of education/Kiwango cha juu cha elimu (tick/weka alama panapohusika)

Primary School Shule ya msingi	☐
Secondary School Elimu ya sekondari	☐
College education Elimu ya Chuo cha kawaida/ Ufundi	☐
University education Elimu ya Chuo Kikuu	☐
No formal education Sikusoma kabisa	☐

1.6 Category/*Kundi la anayejibu maswali*, (tick the most appropriate category/ *weka alama panapohusika*)

Refugee in exile <i>Mkimbizi ambaye bado yuko uhamishoni</i>	
Returning refugee in transit camps <i>Mkimbizi aliyerejea lakini bado yuko kambini</i>	
Returned refugee settled in homeland area <i>Nimerudi toka ukimbizini niko nyumbani</i>	
Returned refugee settled by government <i>Nimerudi toka ukimbizini na serikali imenipatia makazi</i>	

1.7 Present main source of income/ *Njia kuu ya kujipatia kipato* (tick the most appropriate category/ *weka alama*)

Salaried employment <i>Ajira/ mshahara</i>	
Peasant (crop farming) <i>Mkulima (mazao)</i>	
Livestock keeper <i>Mfugaji</i>	
Business <i>Mfanyabiashara</i>	
Self-employment <i>Ajira binafsi/ Mjasiriamali</i>	
Other, specify <i>Nyinginezo/ taja</i>	

SECTION 2: PAST EXPERIENCE IN EXILE (*UZOEFU WA MAISHA YA UHAMISHONI*)

Question 2.0 to be filled by ALL respondents and the rest to be filled by those who fled and lived in exile only/

Swali Na. 2.0 Ijazwe na WOTE na sehemu iliyobaki Ijazwe na wale waliowahi kukimbia na kuishi nje ya nchi tu

2.0* Have you ever fled your country? Y/N/ Je umewahi kuikimbia nchi yako?

Ndiyo/ Hapana _____

2.1 When did you flee Burundi for the first time/ Lini ulikimbia kutoka Burundi kwa mara ya kwanza (specify year/taja mwaka): _____

2.2 Which was your country of exile/Ulikimbilia nchi gani kwa mara ya kwanza?

2.3 Were you born in exile/ Je, ulizaliwa uhamishoni? Y/N/ Ndiyo/ Hapana _____

2.4 Did you flee your country more than once/ Je ulikimbia nchi yako zaidi ya mara moja? Y/N / Ndiyo/ Hapana _____

2.5 If yes specify number of times and countries you went to/Kama ndiyo taja ni mara ngapi, mwaka gani na nchi zipi ulikokimbilia?

Exile (Uhamishoni)	Year /Mwaka	Country/Nchi
First /mara ya kwanza		
Second/mara ya pili		
Third/mara ya tatu		
Fourth/mara ya nne		

Did you move to the second country of exile? /Je ulihamia nchi ya pili baada ya kukimbia? Y/N/

Ndiyo/ Hapana _____. If yes, mention the country (ies) /Kama ndiyo, taja nchi

Ulizohamia

Country 1	Country 2	Country 3	Country 4	Country 5
Nchi ya 1	Nchi ya 2	Nchi ya 3	Nchi ya 4	Nchi ya 5

SECTION 3: HUMAN RIGHTS SITUATION AND VIOLATION IN EXILE

SEHEMU YA 3: HAKI ZA BINADAMU NA UKIUKAJI WAKE

To be filled by those who fled and lived in exile/ljazwe na wale waliowahi kukimbia na kuishi nje ya nchi tu

Are you aware of the following basic human rights that a refugee deserves?

Je unafahamu haki za binadamu anazostahili kuapata mkimbizi?

Right	Yes	No
Life/ <i>Uhai</i>		
Shelter/ <i>Makazi</i>		
Food/ <i>Chakula</i>		
Asylum/ <i>Hifadhi</i>		
Health care services/ <i>Matibabu</i>		
Social security (e.g. social grants)/ <i>Ustawi wa jamii</i>		
Education / <i>Elimu</i>		
Employment/ <i>Ajira</i>		
Freedom of trade/ <i>Uhuru wa kufanya biashara</i>		
Freedom of occupation and profession/ <i>Uhuru wa kupata utaalamu</i>		
Not subjected to slavery, servitude or forced labour/ <i>Kutofanywa mtumwa</i>		
Freedom of movement/ <i>Uhuru wa kutembea</i>		
Freedom of expression/ <i>Uhuru wa kujieleza</i>		
Freedom of association / <i>Uhuru wa kujishirikisha</i>		
Access to court / <i>haki mahakamani</i>		
Freedom of religion, belief and opinion/ <i>Uhuru wa kuabudu</i>		
Housing / <i>Nyumba</i>		
Ownership of property / <i>Kumiliki mali</i>		
Environment / <i>Mazingira</i>		

3.2 While you were a refugee in exile in the following countries, did you have access to the following rights: Please indicate Y= Yes, N = No and U = Unsure

Je ulipokuwa ukimbizini katika nchi zifuatazo ulipata haki zifuatazo: tafadhari jibu ndiyo (Y), Hapana (N) au Sijui (U)

	Rwanda	DRC	Tanzania	Kenya	RSA	Zimbabwe	USA	UK	Cameroon	Other
Education? / <i>Elimu</i>										

Employment/ <i>Ajira</i>										
Health services/ <i>Matibabu</i>										
Housing / <i>Makazi</i>										
Freedom of / <i>uhuru wa</i> Movement/ <i>kutembea</i>										
Expression/ <i>kujieleza</i>										
Association/ <i>kujishirikisha</i>										

SECTION 4: REPATRIATION/INTEGRATION PROCESS AND HUMAN RIGHTS

SEHEMU YA 4: KURUDISHWA NCHINI KWAKO /KUPEWA URAIA NA HAKI ZA BINADAMU

To be filled by those who fled and lived in exile/Ijazwe na wale waliowahi kukimbia na kuishi nje ya nchi tu

Category of respondent/ *Kundi la anayejibu* (tick/weka alama)

Applied for repatriation/ <i>niliomba kurudishwa Burundi</i>	
Applied for local integration/ <i>niliomba uraia</i>	
Other category, specify/ <i>Kundi jingine, taja</i>	

When did you apply for repatriation/local integration/ *Lini uliomba kurudishwa nchini mwako/ kupewe uraia* (specify date/*taja tarehe*) __/__/20__

When did you receive response of your application/ *Lini ulipata majibu kuhusu maombi yako?* (Specify date /*taja tarehe*) __/__/20__ OR/AU Not yet/I don't know/*Bado / Sijui:* _____

Was the process of repatriation voluntary? Y/N____ For any response, give reasons to support your response

Je, zoëzi la kurudishwa lilikuwa la hiari? Ndiyo/ Hapana _____

Reasons /*Toa sababu au maelezo kuhusiana na jibu lako ikiwa ni ndiyo au hapana*

1_____

2_____

3. _____

4. _____

SECTION 5: RETURNING AND INTEGRATION PROCESS IN BURUNDI

SEHEMU YA 5: KURUDISHWA NA KUTENGAMAA KAMA RAIA NCHINI BURUNDI

To be filled by those who returned from exile/

Ijazwe na wale waliorudi toka uhamishoni/ukimbizini tu

5.1 Was the process of returning in your home country smooth? Y/N: _____

Kwa mtazamo wako zoezi la kurudishwa nchini mwako lilikuwa rahisi? Ndiyo/Hapana: _____

If No to 5.1, give reasons/Kama hapana Kwenye kipengere 5.1 toa sababu

1. _____

2. _____

3. _____

4. _____

Do you agree with the following observations (rank using a scale of 1-5)

Kwa kiasi gani unakubaliana na maoni yafuatayo (tumia kigezo 1 – 5) yaani na. 1 Sikubaliani kabisa na Na. 5 Nakubaliana sana kwa asilimai 100%

Observation/comment Maoni/ Mtazamo	1	2	3	4	5
Returning refugees were provided with reliable transport <i>Wakimbizi waliorudishwa walipewa usafiri wa kuaminika</i>					
Returning refugees were provided with adequate health care services <i>Wakimbizi waliorudishwa walipewa huduma ya matibabu ya kutosha</i>					
Returning refugees were provided with food <i>Wakimbizi waliorudishwa walipewa chakula</i>					
Returning refugees were provided with shelter (tents or other alternatives) <i>Wakimbizi waliorudishwa walipewa hifadhi (mfano mahema au hifadhi nyinginezo)</i>					
Returning refugees were provided with building materials <i>Wakimbizi waliorudishwa walipewa vifaa vya ujenzi</i>					

Returning refugees were allocated with land <i>Wakimbizi waliorudishwa walipewa ardhi</i>					
Returning refugees who were allocated land were also given title deeds <i>Wakimbizi waliopewa ardhi walipata na hati miliki</i>					
Returning refugees were told about all Burundian citizens rights such as <i>Wakimbizi waliorudishwa walifahamishwa haki za kirala kama ifuatavyo :</i>					
Life / <i>Uhai</i>					
Voting / <i>Uchaguzi</i>					
Association / <i>Kujishirikisha</i>					
Expression / <i>Kujieleza</i>					
Education / <i>Elimu</i>					
Freedom of movement / <i>Kutembea</i>					
Work / <i>Kazi</i>					
Citizenship / <i>Uraia</i>					
Dignity / <i>Heshima</i>					
Equality / <i>Usawa</i>					
Health care services / <i>Matibabu</i>					
Property ownership / <i>Kumiliki mali</i>					
Religion and culture / <i>Dini na utamaduni</i>					
Social security / <i>Ustawi wa jamii</i>					
Returning refugees were given identification documents <i>Wakimbizi waliorudishwa walipewa vitambulisho</i>					

Did you face land-related problem on returning home? Y/N: _____

Je, ulipata matatizo yo yote yanayohusiana na ardhi uliporudi nyumbani? Ndiyo/ hapana: _____

If yes to 5.4, specify (tick all correct answers below):

Kama jibu ni ndiyo kwenye kipengere 5.4 (weka alama mahali panapohusika)

1	My land had been acquired by relative/family member	

	<i>Nilikuta ardhi yangu imechukuliwa na ndugu zangu</i>	
2	My land had been acquired by another person (not relative) <i>Nilikuta ardhi yangu imechukuliwa na mtu mwingine (si ndugu)</i>	
3	My land had been acquired by local government <i>Ardhi yangu ilichukuliwa na serikali za mitaa</i>	
4	My land had been acquired by the central government <i>Ardhi yangu ilichukuliwa na serikali kuu</i>	

If yes to 5.4, how was your dispute settled? *Kama jibu ni ndiyo kwenye kipengere 5.4 je mgogoro ulitatujiwa?*

1	Resolved through discussion between family members <i>Kwa njia ya majadiliano na wanandugu</i>	
2	Through local government/commune hearing <i>Kwa njia ya serikali za mitaa kwenye mahakama ya mwanzo</i>	
3	Through Land Tribunal disputes <i>Kwa njia ya Mahakama ya Ardhi</i>	
4	Through National commission on Land hearing <i>Kwa njia ya Tume ya Ardhi ya kitaifa</i>	
5	Not yet resolved <i>Mgogoro bado haujatatujiwa</i>	
6	Other means, specify <i>Njia nyinginezo, zitaje</i>	

SECTION 6: GENERAL COMMENTS*

SEHEMU YA 6: MAONI YA JUMLA

To be filled by ALL respondents/Ijazwe na WOTE

6.1 In your views what can be done to stop violations of human rights in Burundi?

Kwa maoni yako, nini kifanyike ili kuzuia ukiukaji wa haki za binadamu nchini Burundi?

.....

.....

.....

.....

.....

.....
.....

6.2 In your views what can be done to stop genocide in Burundi?

Kwa maoni yako nini kifanyike ilikuzuia mauaji ya kuangamiza/ ya kimbari?

.....
.....
.....
.....
.....

6.3 Which aspects do think need improvements in order to restore peace, human security, good governance, rule of law, economic and social development in Burundi and Africa in general?

Unafikiri ni maeneo gani yanahitaji marekebisha ili kurudisha amani, uongozi bora, uongozii wa sheria, uchumi na ustawi wa jamii Burundi na Afrika kwa ujumla?

.....
.....
.....
.....
.....

*NB: All questions in section 6 to be answered by Barundi and non- Barundi

Maswali yote sehemu ya sita yanaweza kujibiwa na raia au wasio raia wa Burundi

THANK YOU

ASANTE SANA

APPENDIX C: Questionnaire Non-Barundi



Mmabatho

<http://www.nwu.ac.za>

Private Bag X2046,

South Africa 2735
Web

Faculty of Law

28th October, 2010.

Covering letter

Re: VIOLATION OF HUMAN RIGHTS AND GENOCIDE IN BURUNDI: POST PEACE AGREEMENTS

Dear Participant,

Due to the challenges facing the African continent with specific reference to the gross violations of human rights, genocide and endless wars which are viewed generally as major contributory factors towards Africa's underdevelopment, I am currently studying towards a Doctorate Degree in Public International Law at North West University in South Africa.

In order to meet the requirements of this qualification, I am undertaking a thesis with the title "Violation of Human Rights and Genocide in Burundi: Post Peace Agreements". The research questionnaire is directed to Barundi (residing inside and outside of Burundi and non-Barundi). I would like to request your assistance in completing and returning the attached questionnaire related to the thesis. There are two sections, please answer all questions from page one to two.

Please note that all information shall be handled with great confidentiality and is for academic purposes hence your time and cooperation will be highly appreciated.

Yours sincerely

Leah A. Ndimurwimo

Cell: 0722228277

Fax 041-504-9332

E-Mail: landimurwimo@nmmu.ac.za OR 22074538@student.nwu.ac.za.

Researcher.

SECTION 1: RESPONDENT'S PARTICULARS**SEHEMU YA 1: TAARIFA BINAFSI ZA MTAHINIWA**

To be filled by **ALL** respondents/Ijazwe na **WOTE**

Mode of administration/ *Njia iliyotumika* (tick/weka alama ya vema):

Face to face <i>Uso kwa uso</i>	☐

Self-administered (email, etc.) <i>Amejaza mwenyewe (mf email)</i>	☐

Date of interview/*Tarehe ya kutahiniwa*: ____/____/20____

Sex/*Jinsia* (tick/weka alama ya vema)

Male	☐
Mme	☐

Female	☐
Mke	☐

Age/ *Umri* (yrs/ *miaka*): _____

Nationality _____

Highest level of education/ *Kiwango cha juu cha elimu* (tick/ weka alama ya vema *panapohusika*)

Primary School <i>Shule ya msingi</i>	☐
Secondary School <i>Elimu ya sekondari</i>	☐
College education <i>Elimu ya Chuo cha kawaida/ Ufundi</i>	☐
University education <i>Elimu ya Chuo Kikuu</i>	☐
No formal education <i>Sikusoma kabisa</i>	☐

SECTION 2: GENERAL COMMENTS***SEHEMU YA 2: MAONI YA JUMLA**

To be filled by ALL respondents/ *Ijazwe na WOTE*

2. 1 In your views what can be done to stop violations of human rights in Burundi?

Kwa maoni yako, nini kifanyike ili kuzuia ukiukaji wa haki za binadamu nchini Burundi?

.....

.....

.....

.....

.....

2 In your views what can be done to stop genocide in Burundi?

Kwa maoni yako nini kifanyike ilikuzuia mauaji ya kuangamiza (umbari)?

.....

.....

.....

.....

3 Which aspects do think need improvements in order to restore peace, human security, good governance, rule of law, economic and social development in Burundi and Africa in general?

Unafikiri ni maeneo gani yanahitaji marekebisho ili kurudisha amani, uongozi bora, uongozii wa sheria, uchumi na ustawi wa jamii Burundi na Afrika kwa ujumla?

.....

.....

.....

.....

*NB: All questions in section 2 to be answered by Burundi and non- Burundi

Maswali yote katika sehemu ya 2 yajibiwe na raia/wasio raia wa Burundi

THANK YOU

ASANTE SANA.

APPENDIX D –Check- lists for In-depth Interviews



Private Bag X2046, Mmabatho
South Africa 2735
Web <http://www.nwu.ac.za>.
Faculty of Law
28th October, 2010.

Check -list: Politicians

1. Personal particulars

Remember to record:

- Title of the official
- Background on education
- Roles and responsibilities
- Work experience
- Category (e.g. politician, party leader, MP etc)

2. Awareness of peace and ceasefire agreements in Burundi

- belong to a political party (ruling /opposition)
- participated in peace negotiations
- success in peace negotiations
- failure
- contributory factors towards failures if any
- Inquire the awareness of human rights
- inquire the awareness of genocide in Burundi

3. Experience and opinion on how to deal with human rights and genocide issues

- Ask for personal opinion on what should be done to have permanent solution of human rights violations and genocide problems in Burundi (recommendations)

Check -list: MPS, Senators, Local Administrators and Technical Officials



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28th October, 2010.

1. Personal particulars

Remember to record:

- Title of the official
- Background on education
- Roles and responsibilities
- Work experience
- Category (e.g. politician, party leader, MP etc)

2. Awareness of peace and ceasefire agreements in Burundi

- belong to a political party (ruling /opposition)
- participated in peace negotiations
- success in peace negotiations
- failure
- contributory factors towards failures if any
- Inquire the awareness of human rights
- inquire the awareness of genocide in Burundi

3. Experience and opinion on how to deal with human rights and genocide issues

- Ask for personal opinion on what should be done to have permanent solution of human rights violations and genocide problems in Burundi (recommendations).

Check-list: Land Officials



Private Bag X2046, Mmabatho
South Africa 2735
Web <http://www.nwu.ac.za>

Faculty of Law

28th October, 2010.

1. Personal particulars

Remember to record:

- Title of the official
- Background on education (relate to land issues)
- Roles and responsibilities
- Work experience
- Category (e.g. government official, employed with NGOs, National Commission of Land etc.)

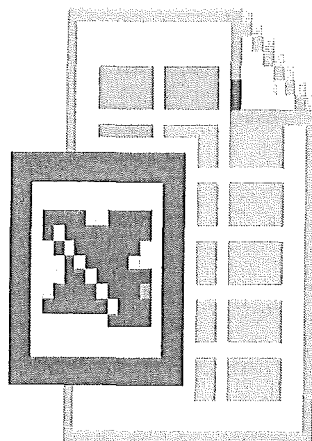
2. Awareness of legal aspects of land in Burundi

- Ownership of land in the country (private vs. public)
- Assess level of awareness of private and public laws related to land allocation and resolution of land-related disputes
- If possible ask for copies of the documents mentioned e.g. Land Act, Land Policy etc.
- Inquire on how land allocation is normally done (i.e. both formal and informal land acquisition)

3. Experience and opinion on how to solve land disputes

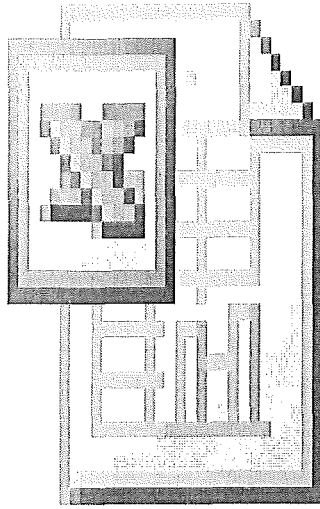
- Assess if the participant is aware of any land-related dispute in his/her working experience
- Ask for common factors/reasons contributing to land disputes
- Ask for awareness and normal process used to resolve land-related disputes
- Ask for personal opinion on what should be done to have permanent solution of land-related problems in Burundi (recommendations)

Appendix E: Spread Sheet Barundi Responses



BARUNDI-edk (3).xls

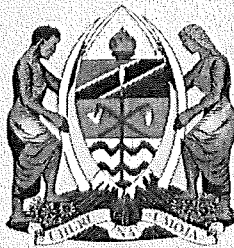
Appendix F: Non –Barundi Spread Sheet



NON BARUNDI RESPONSES.xls

Appendix G: Tanzania Government Notice to Close Old Barundi Refugee Camps

JAMHURI YA MUUNGANO WA TANZANIA



OFISI YA WAZIRI MKUU
Tawala za Mikoa na Serikali za Mitaa

Taarifa ya Jumla
Ufungaji wa Makaazi ya Zamani na Uhamaji kutoka
Katumba, Mishamo na Ulyankulu

I. Ufungaji wa makaazi matatu ya zamani

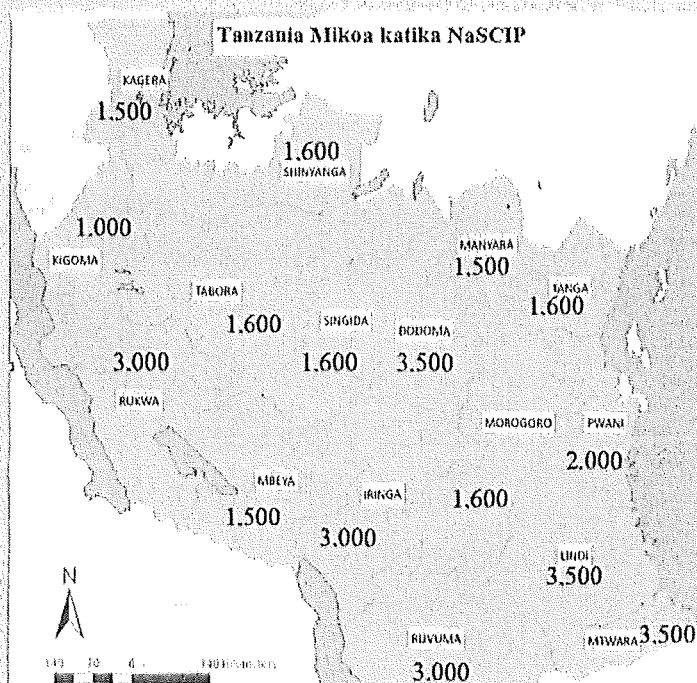
1. Serikali ya Tanzania imeamua kuyafunga makaazi ya wakimbizi ya **Katumba, Mishamo na Ulyankulu**. Kwa hiyo kila makaazi katika makazi hayo atatakiwa kuyahama makaazi hayo ifikapo mwisho wa zoezi hili.

II. Uandikishaji na Uhamaji

1. Serikali ya Tanzania inafanya uandikishaji kwa rala wanaohamisha makaazi yao ili kusaidia utangamanishaji jamii na uhamaji kutoka makaazi ya Katumba, Mishamo na Ulyankulu kwenda katika Mikoa iliyopangwa.
2. Serikali ya Tanzania kupitia mpango mkakati wa Taifa wa Utangamanishaji Jamii (NaSCIP) imeamua kuwa wale wote ambao wamekuwa wakishi maeneo mengine ya Nchi waendeleo kuishi huko na hawana haja ya kurudi katika makaazi. Wanafamilia ambao bado wanaishi katika makaazi wanaruhusiwa kuungana na ndugu zao wanaoishi katika maeneo mengine ya Tanzania ikiwa tu ndugu hao watakuwa tayari kuwahifadhi. **Kwa kuchagua kuishi na ndugu zao ambao wamekuwa wakaazi nje ya makaazi, kaya zitaruhusiwa kuishi popote kati ya mojawapo ya mikoa 26 ya Tanzania.** Wakati wa uandikishaji, mkuu wa Kaya atahitajika kumtaarifu Afisa uandikishaji kuwa kaya yake ina haja ya kuungana na ndugu zao walio nje ya makaazi.
3. **Wakati wa uandikishaji:**
 - Kila Kaya ambayo inafahamu wapi inataka kwenda na iko tayari kupanga yenyewe uhamaji, itapata fursa ya kuchagua **Mikoa 5** kama maeneo watakayokwenda kuishi kwa mpangilio wa kuchagua upi wanaoupenda kwanza. Uandikishaji utafanywa kwa Wakuu wa Kaya waliopata uraia tu. Kama mkuu wa kaya, tafadhali washirikishe wanafamilia yako ili kupata uamuzi wa pamoja wa uchaguzi kabla ya kufanya uandikishaji.
 - Serikali itajitahidi kuzipa kaya makaazi kwa kadri ya mapendekezo yao. Lakini hata hivyo baadhi ya kaya zinaweza kuhamishiwa katika Mikoa tofauti na mapendekezo yao **kutokana na uwezo wa upokeaji wa kila mgawanyo wa Kaya kwa kila Mkoa.**
 - Kama kaya halihamu wapi itahamia na haichagui Mkoa wowote wakati wa uandikishaji, serikali itachagua Mkoa kwa niaba yao na kusaidia uhamaji wao kwenda mojawapo ya mikoa 16.
4. Kama inavyoonekana kwenye jedwali lifuatalo, serikali imechagua mikoa 16, (wilaya 52) kwa ajili ya uhamaji na kugawa robo ya kaya zitakazohama kwa kila Mkoa.

Mikoa iliyoliyoteuliwa na idadi iliyopangwa ya Kaya kwa kila Mkoa

Na	Mikoa	Wilaya					Kaya
1	Dodoma	Bahi	Dodoma	Kondoa	Kongwa	Mpwapwa	3,500
2	Iringa	Kilolo	Ludewa	Njombe	Makete	Mufindi	3,000
3	Kagera	Bukoba	Chato	Muleba			1,500
4	Lindi	Liwale	Machingwe	Ruangwa			3,500
5	Manyara	Simanjiro	Kileto	Hanang			1,500
6	Mbeya	Chunya	Lleje	Mbalali			1,500
7	Mtwara	Nanyumbu	Newala	Masasi			3,500
8	Pwani	Kisarawe	Mkuranga	Rufiji			2,000
9	Ruvuma	Mbinga	Namtumbo	Tunduru	Songea		3,000
10	Shinyanga	Kishapu	Shinyanga				1,600
11	Morogoro	Kilombero	Mvomero	Ulanga			1,600
12	Tabora	Urambo	Sikonge	Tabora			1,600
13	Tanga	Handeni	Kilindi	Mkinga			1,600
14	Kigoma	Kasulu	Kibondo	Kigoma			1,000
15	Rukwa	Nkasi	Sumbawanga	Mpanda			3,000
16	Singida	Iramba	Manyoni	Singida			1,600
Total							35,000



5. Kila kaya inatarajiwa kuondoka na wanafamilia wake wote, hata hivyo kila aliye na umri wa miaka 18 na zaidi au wanandoa wanaweza kuchagua Mikoa mingine tofauti na ile iliyochaguliwa na wazazi wao.
6. Matokeo ya kwanza ya uandikishaji yatatangazwa Aprili 2011 na uhamaji hasa wa Kaya utaanza mara moja baada ya matangazo haya. Mara tu kaya itakapokuwa imepangiwa mkoa wake wa kuhamia, itakuwa na muda wa matayarisho wa miezi 4 ya kujiandaa kuyahama makazi. Kama familia ipo tayari kuhamia mara tu baada ya matangazo itasaidiwa kufanya hivyo ndani ya mwezi mmoja.
7. Hakutakuwepo na vituo vya kuondokea:
 - Kila kaya itapanga njia ya usafiri wao yenyewe ili kuondoka.
 - Familia inayoondoka itapata Cheti cha Kuondokea kutoka Wizara ya Mambo ya Ndani ya Nchi ambacho kitatumika kama nyaraka ya utambulisho wakiwa safarini mpaka wafikapo katika Mikoa ya makaazi yao.
 - Kaya zinaruhusiwa kwenda na mali zao binafsi ikijumuishwa mifugo. Hivyo utahitajika kutoa taarifa ya idadi na aina ya mifugo wakati wa uandikishaji kwa ajili ya kuhamia.
8. Wakuu wa Kaya wanaweza kutembelea Mikoa waliyopangiwa ndani ya miezi 4 ili kuandaa malazi ya familia zitakazokua zinawasilili. Wizara ya Mambo ya Ndani ya Nchi itasaidia utoaji ruhusa kwa ajili ya safari hizi. Wanafamilia watajiipia wenyewe gharama za safari hizi.
9. Hakutakuwepo na vituo vya upokeaji katika Mikoa ambayo mtafikia. Hata hivyo, jamii husika katika maeneo mtakayoshihi zitaandaliwa kuwapokea ninyi katika maeneo yao. Jamii ambazo zitapokea idadi kubwa ya kaya kwenye Mikoa mtakayofikia, zitafahamishwa na kuhamasishwa kabla. Serikali, itazifahamisisha jamii kuunda kamati za mapokezi hasa kwa ajili ya kuwapokea na kuwasaidia watu wenye mahitaji maalumu (PSNs) wakati wanapowasilili. Shughuli mbalimbali za utangamanishaji zitaanza mara baada ya uhamaji.
10. Taarifa kuhusu Kilimo:

Mazao yafuatayo yanalimwa na kustawi katika Mikoa mtakayohamia. Baadhi ya mazao yanayolimwa yanatumika kwa ajili ya chakula na mengine yanatumika kwa ajili ya biashara na yapo yanayotumika kwa ajili ya chakula na biashara.

JINA LA MKOA	MAZAO MAUU YANAYOLIMWA
Dodoma	Mahindi, mlama, uwele, maharage, zabibu, karanga, mbegu za ufuta
Iringa	Mahindi, maharage, chai, pareto, miwazi, alizeti, ndizi, viazi vilamu, mboga (kabichi, nyanya, pilipili hoho, kabichi maua), miwa, na matunda (peasi, epo, matunda damu na maparachichi)
Kagera	Ndizi, viazi, maharage, mahindi, miwa, kahawa na ndizi
Lindi	Mahindi, uwele, mlama, maharage, nazi, korosho
Manyara	Ndizi, mahindi, maharage, ngano
Mbeya	Ndizi, viazi mvingo, maharage, mahindi, chai, kahawa
Mtwara	Mahindi, korosho, nazi
Pwani	Mahindi, muhogo, nazi, korosho na mananasi
Ruvuma	Mahindi, viazi vilamu na tumbaku
Shinyanga	Mchele, mahindi, uwele, mahindi na mbegu za pamba
Morogoro	mboga (kabichi, nyanya, pilipili hoho, kabichi maua) na matunda (peasi, epo, matunda damu, mapesheni na maparachichi) maharage, mahindi, tumbaku, miwa,
Tabora	Mahindi, mchele, viazi, mlama, muhogo, pamba, karanga, tumbaku, alizeti
Tanga	Mahindi, muhogo, maharage, tangawizi, nazi, katani, kakao, mboga (kabichi, pilipili hoho, kabichi maua) na matunda (peasi, epo, matunda damu, mapesheni na maparachichi)
Kigoma	Ndizi, viazi vilamu, mahindi, maharage, mafuta ya michikichi
Rukwa	Viazi vilamu, mchele, mahindi, tumbaku, alizeti

III. Misaada

1. Kaya za wale waliopata uraia ambazo zinaishi nje ya makaazi zitapokea msaada wa kiasi cha fedha cha Tshs. 150,000/= kwa kila mtu mmoja bila kuzingatia umri baada ya kupokea vyeti vyao vya uraia. Wanafamilia waliopewa uraia na wanaoishi ndani ya makaazi watapokea kiwango hicho hicho kwa kila mmoja watakapokuwa wanaondoka kutoka katika makaazi.
2. Kaya za wale waliopata uraia ambazo zinaishi ndani ya makaazi zitapokea kiasi cha fedha cha Tshs. 300,000/= kwa kila mmoja, bila ya kuzingatia umri wao, kupitia Benki ya NMB kwa mikupuo miwili. Mkupuo wa kwanza kabla ya kuondoka na Mkupuo wa pili baada ya kufika katika maeneo ya makaazi mapya. Msaada huu unakusudiwa ugharamie usafiri, mahitaji wakati wa safari, malazi, vifaa vya ujenzi, utafutaji wa ardhi, viwanja na chakula.
3. Msaada wa fedha utatolewa kwa wakuu wa kaya. Iwapo wanafamilia walio na umri wa miaka 18 na zaidi watataka kupokea msaada wa fedha kibinafsi wanaweza kufanya hivyo.
4. Watu wenye mahitaji maalumu watapokea msaada wa nyongeza kulingana na ushauri wa wafanyakazi wa huduma kwa jamii. Wakati wa kuhamia, muungano wa familia utazingatiwa na wale wanaowahudumia wanafamilia wenye mahitaji maalumu watahamishwa pamoja wakati wa kusafiri. Mara tu baada ya kuwasili katika maeneo ya makaazi katika Mikoa, ofisi za kanda za utangamanishaji Jamii (LISOs) zitatoa misaada inayohitajika kama vile taarifa sahihi zinazohusu maofisa na watoaji wa misaada ya kijamii.
5. Kutegemeana na umbali kutoka katika makaazi kwenda kule mtakapolishi, kaya zinaweza kupewa nyongeza ya msaada kwa ajili ya usafiri. Mtapewa taarifa zaidi mara tu uchanganuaji wa uandikishaji utakapofanywa. Kaya zinahimizwa kuhamia pamoja na ndugu na jamaa zao ili kupunguza gharama za usafiri.
6. Kaya hazitalipwa fidia kwa ajili ya nyumba zao katika makaazi. Hata hivyo mtatakiwa kubomoa nyumba zenu kabla ya kuondoka, hivyo basi mnashauriwa kubeba vitu na vifaa mbalimbali kwa ajili ya ujenzi mtakavyoweza kuokoa baada ya kubomoa nyumba zenu mtakavyoweza kusafirisha. Kila kaya itatakiwa kujijengea nyumba baada ya kufika katika mikoa wanayohamia.
7. Kaya zinawajibika kupata taarifa za shule za watoto wao wanaosoma ili kurahisisha uhamisho wao katika shule nyingine katika Mikoa wanakokwenda kuishi. Hakutakuwa na msamaha kuhusiana na karo za shule. Mamlaka ya ngazi za chini, ofisi za utangamanishaji Jamii na washirika wengine watasaidia katika uandikishaji wa watoto katika shule. Kaya zinaweza zikaendelea kuishi katika makaazi angalau mpaka watoto wao wamalize muhula uliopo.
8. Kila raia anayehamisha makaazi ambaye ni mfanyakazi wa Serikali anapaswa kujadiliana na mamlaka husika kuhusiana na hatima ya mkataba wake wa ajira ili kuangalia uwezekano wa kuendelea na ajira katika Mkoa anaokwenda kuishi. Mamlaka za Mikoa na Wilaya zitawasiliana na Wizara zinazohusika ili kutafuta njia ya kuwasaidia wajimu wa shule, wauguzi, wakunga n.k. waliokua wameajiriwa katika makaazi ya zamani kuendelea na kazi zao katika Mikoa na Wilaya wanakokwenda kuishi.

IV. Vyeti vya Uraia

1. Serikali itatoa vyeti vya uraia baada ya kaya kufika katika mikoa watakayokwenda kuishi.
2. Kaya zitapokea taarifa kuhusiana na mambo ya uraia wakati wa michakato wa uhamaji na utangamanishaji Jamii.
3. Mpaka mwishoni mwa mwezi Desemba, 2010, Idara ya uhamiaji imepokea jumla ya maombi ya rufaa ya familia 843. Uamuzi wa Waziri wa Mambo ya Ndani ya Nchi kwa wale waliomba uraia wa Nchi bado unasubiriwa.