

JUSTICE IN THE WAKE OF GENOCIDE: THE CASE OF RWANDA

*Madeline H. Morris **

I.	JUSTICE IN THE WAKE OF GENOCIDE.....	689
II.	THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA	690
III.	NATIONAL JUSTICE.....	690
IV.	THE TRIALS OF CONCURRENT JURISDICTION	692
V.	THE FUTURE IN RWANDA AND BEYOND	696

During three months in 1994, genocide was committed in Rwanda. Two years after those events, and notwithstanding efforts at both national and international levels to bring the perpetrators to justice, the first case has yet to go to trial. Over the past months, I have worked closely with the government of Rwanda on justice issues in the course of a research project that I am doing on the role of national and international tribunals in the former Yugoslavia, Ethiopia, and Rwanda. I would like to share with you some observations arising from that work. I will examine the approaches to justice that have been employed in Rwanda, and consider some of the obstacles that have been confronted despite, or, in some instances, because of, the approaches taken. I will first discuss the recently enacted Rwandan legislation on the handling of genocide-related cases, and then examine the interaction of national and international tribunals as they exercise concurrent jurisdiction in the Rwandan context. I will conclude by briefly considering some of the broader implications of the Rwandan experience.

I. JUSTICE IN THE WAKE OF GENOCIDE

Rwanda was largely destroyed in the spring of 1994. About ten percent of the population was massacred. Another twenty-five percent of the population fled the country. The physical infrastructure of the country was substantially damaged, and the treasury was looted.

* Professor of Law, Duke University, and Advisor on Justice to the President of Rwanda. The author retains the copyright on this article and reserves the right to determine where and when the article may be reprinted.

Along with the overall destruction of Rwanda in the spring of 1994 came the devastation of Rwanda's judicial structures. The great majority of judicial and law enforcement personnel were killed or fled the country. Even the basic materials needed to run a legal system — books, vehicles, even paper — were essentially unavailable. And if there *was* a vehicle available, then there was no gasoline. It was in this context that Rwanda confronted the question of how to pursue justice in the wake of genocide.

II. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In September of 1994, the new government of Rwanda requested that the United Nations establish an International Criminal Tribunal for Rwanda (ICTR). As negotiations over the terms for establishment of an ICTR proceeded, however, Rwanda objected to a number of provisions. The objections related to the absence of a death penalty in the ICTR Statute, that the seat of the ICTR would be outside of Rwanda, and a number of other issues. By strange coincidence, Rwanda held a seat on the United Nations Security Council [hereinafter Security Council] at that time. Ironically, because of its objections to the ICTR Statute, Rwanda cast the sole vote opposing adoption of the Security Council resolution establishing the ICTR.

Nevertheless, the ICTR was established; and Rwanda ultimately expressed its intention to cooperate with its work. Now, two years after its establishment, the ICTR, barring further delays, will begin its first trial in several weeks.¹

But the ICTR is not expected by any means to address the bulk of Rwanda's staggering volume of genocide-related cases. Rwanda's prison population has grown to over 80,000 virtually all awaiting prosecution for genocide-related crimes. The equivalent proportion of the American population would amount to 3,000,000 prisoners. The caseload of the ICTR is expected to be in the hundreds at most.

III. NATIONAL JUSTICE

So Rwanda is faced with the enormous problem of how to handle the other 80,000 plus criminal cases arising from the genocide. Specialized legislation to facilitate handling of those cases was drafted over the course of the past several months and was enacted this past September 1st.

Drafting that legislation required finding a path through an array of profoundly problematic options. The Rwandan criminal justice system had

1. The text of this speech was delivered on Nov. 1, 1996.

never been equipped to handle a large volume of cases, and it had been entirely disabled during the violence. It tried zero cases in 1995. *That* was the justice system that had to manage, in some way, to handle 80,000 serious criminal cases (mostly murders). The defendants in those cases were already in prison, having been arrested by soldiers of the rebel army that halted the genocide. So even just doing nothing was not an option. This criminal justice crisis had to be met with almost no resources, barely any trained personnel and, even worse, in a highly volatile political environment.

The specialized criminal justice program laid out in the law that was passed to respond to this situation is quite simple. Suspects will be classified into four categories according to their degrees of culpability. The most culpable category will include leaders and organizers of the genocide and perpetrators of particularly heinous murders or sexual torture. All others who committed homicides will come within category Two. Category Three will include perpetrators of grave assaults against the person not resulting in death. And those who committed property crimes in connection with the genocide will fall into category Four.

This specialized criminal justice program will rely heavily on a system of plea agreements. All perpetrators other than those in category One will be entitled to receive a reduced sentence as part of a guilty-plea agreement. Specifically, a pre-set, fixed reduction in the penalty that would otherwise be imposed is available to all non-category One perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims. A greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who come forward only after prosecution has begun.

The requirement of a detailed confession was thought to be important for purposes of establishing a truthful historical record of the Rwandan genocide; for purposes of allowing for meaningful verification of the accuracy of the confession; and for purposes of assisting in prosecutors' continuing investigations and prosecutions of other cases. The additional requirement that a perpetrator make an apology to the victims is intended to contribute to the process of national healing. While it is true that defendants will have an ulterior motive for making these apologies to obtain reduced sentences, the apologies nevertheless are thought to represent at least some acknowledgment of wrongdoing, which in the aggregate, may contribute to reconciliation.

This specialized criminal justice program represents a complex compromise. While regular criminal prosecution of every suspected perpetrator might in many respects have been most desirable, the resources

demanding by such an approach would quickly overwhelm national capacities. Therefore, a decision has been made in Rwanda to establish a program which, it is hoped, will accomplish the crucial purposes of criminal justice while also respecting resource limitations.

An approach such as that adopted in Rwanda offers the benefit of expediency in the handling of an enormous volume of cases and may make some contribution to national reconciliation. At the same time, there is reason for concern about the potential for miscarriage of justice under such a system. Factually innocent suspects may choose to plead guilty for fear of a worse outcome at trial or to avoid extensive delays before trial. These concerns are exacerbated by the fact that no provision has been made for any form of defense counsel for the many indigent defendants in Rwanda (though a program for training lay defense counsel as counterparts to the lay prosecutors in Rwanda is currently under consideration). Moreover, and on the other side of the equation, survivors and others rightly ask why perpetrators of these horrific crimes should receive leniency, especially when an "ordinary criminal" who committed a murder in Rwanda tomorrow would not receive the same benefit.

The question to ask in evaluating legal responses in the complex situations surrounding crimes of mass violence is: What action will do the most good and the least harm under the circumstances? Full trial of 80,000 defendants, more than one percent of the national population, would be infeasible in even the wealthiest nation and is emphatically not an option in Rwanda. The alternative at the other extreme, releasing prisoners *en masse* under an explicit or implicit grant of amnesty, would perpetuate a culture of impunity in a country with a long history of inter-ethnic violence, would be unacceptable to the survivor population, and would constitute a heightened risk to security, both of the regime and of the individuals released. The value of the system adopted in Rwanda will depend in the end both on the soundness of the design itself and on the quality of its implementation which will unfold in the coming months.

IV. THE TRIALS OF CONCURRENT JURISDICTION

The administration of justice in post-genocide Rwanda is rendered uniquely complex by the fact that concurrent jurisdiction for the genocide-related crimes is actively exercised by two different entities: the government of Rwanda and the ICTR. This concurrent jurisdiction has exposed difficult issues which are likely to recur in future contexts.

Concurrent jurisdiction raises complex questions regarding cooperation in investigations and the sharing of evidence. Obvious advantages are to be gained by close national and international cooperation

in investigations and evidence-gathering. But difficulties concerning confidentiality of evidence, witness protection, due process standards, and the need to avoid any appearance of partiality of the international tribunal raise delicate questions which have yet to be systematically addressed. Discussion of these matters has been ongoing between the ICTR and the government of Rwanda. But the issues, for the most part, remain largely open.

An area which has been of particular concern in the exercise of concurrent jurisdiction is the distribution of defendants between the national and international fora. This issue has been the cause of uncertainty, and, at times, of tension between national governments and the ICTR. On more than one occasion, the ICTR and the government of Rwanda have sought to obtain custody of the same suspect. In one case, not only the ICTR and the Rwandan government, but also the Belgian government were attempting to gain custody of the same suspects who were being held in Cameroon. As an aside, I should also note that, while many speculated that these conflicts over custody were really illusory because no country would be willing to transfer a suspect to Rwanda, that speculation has proven false. At least one defendant has already been transferred to Rwanda by Ethiopia, and other countries have expressed a willingness in principle to do the same.

The tensions between the government of Rwanda and the ICTR over distribution of defendants have resulted, in part, from a lack of communication over time and perhaps in part from a more fundamental conflict of interests or, at least, of agendas. When the ICTR was established, the Rwandan government had not yet decided upon an approach to national prosecutions. The approach ultimately adopted was one that relies heavily on plea agreements, as I have discussed. That plea-agreement program turned out to be somewhat incompatible with the operation of an international tribunal that views its mandate as prosecuting the top-level leaders of the genocide.

The reasons for this incompatibility are easy to understand. The leniency in sentencing that goes with plea agreements can easily create a perception that impunity has prevailed — unless at least the leaders are fully prosecuted and punished. If, however, the leaders are taken to an international tribunal, and there receive more favorable treatment than they would in the national courts, then this leaves a gap in the national justice picture. This more favorable treatment enjoyed by defendants at the international tribunal includes escaping the death penalty (which may be imposed by Rwandan courts, but not by the ICTR); likely being imprisoned in more favorable conditions than those in Rwandan prisons; and being guaranteed various due process safeguards including appointed

defense counsel, among other factors. So, then, if the leaders are away receiving *international justice* which is perceived as lenient, and the followers are at home getting *bargains* in the national justice system, then no one is punished fully and severely, relative to national standards, for the horrors that were committed. A perception may thus be created, especially among the survivor population, that the plea-agreement program is really a program of impunity. So you can see why trying at least some category One defendants is so important to Rwanda.

This problem became apparent over time. After the ICTR had been in place for many months, and when ICTR personnel thought that the Tribunal was finally showing results and deserved to be congratulated, the Tribunal, instead, was reaping the wrath of the Rwandans each time it pursued a leader to be prosecuted. ICTR personnel and supporters found this wrath especially difficult to accept since Rwanda had not managed actually to begin *any* trials, of leaders or otherwise. The Rwandans, in reply, noted that the ICTR had been no swifter, and had so far also tried no one. This friction was caused at least in part by the fact that the parties had not communicated regarding policies to govern the distribution of defendants in light of the national justice program as it evolved.

On the authority of the Security Council Resolution that brought the ICTR into being, the ICTR enjoys primacy of jurisdiction. This means that, where the ICTR and a national body each have a legal basis for jurisdiction over a given case, the ICTR is entitled, but not obliged, to exercise jurisdiction to the exclusion of the national body (a defendant cannot be tried by both). But the criteria to be employed in deciding whether to exercise jurisdiction in any particular case have yet to be articulated by the ICTR. Conflicts over exercise of jurisdiction that have arisen have been resolved on an ad hoc basis.

A more satisfactory basis for consistent decision making regarding the distribution of defendants will have to rest upon a careful analysis of the purposes of the ICTR and of its concurrent jurisdiction with national courts. This analytic process still remains to be completed.

Identifying the appropriate criteria for distribution of defendants between national and international fora is tricky within any one context. The issues are further complicated when one recognizes the need to articulate underlying principles and guidelines that will serve across contexts — in Bosnia or in Croatia as well as in Rwanda, and very likely, in future instances as well.

In anticipation of such future instances, a statute for a permanent International Criminal Court is currently under consideration by the United Nations. That draft statute to some extent averts potential conflicts over defendants by giving deference to national-level prosecutions under most

circumstances. But those provisions giving deference to national jurisdictions would not apply where the international criminal court's jurisdiction had been invoked by the Security Council, as can occur under the draft statute. In such instances, the same difficulties regarding distribution of defendants as have arisen in Rwanda would be likely to recur.

Further, the draft statute for a permanent International Criminal Court does not directly address whether an international court's role is especially tied to trying leadership-level defendants. Article 35(c) of that draft statute provides that the International Criminal Court may decide "that a case before it is inadmissible on the ground that the crime in question . . . is not of such gravity to justify further action by the Court." One might imagine that such a provision, if adopted, would form the basis for an admissibility challenge by a defendant, such as Dusko Tadic, the defendant currently being tried at the Hague, who was not in a leadership position in the overall criminal enterprise. Such a challenge would be based on the proposition that *gravity* includes within its meaning the notion of leadership or other special responsibility. The claim, in other words, would be that it is not the role of an international court to try small fry, as President Cassesse of the ad hoc International Criminal Tribunals recently implied.

Not only those issues concerning distribution of defendants, but also the dilemmas that arise more generally from concurrent jurisdiction are starkly posed in the context of Rwanda. But Rwanda is unlikely to remain unique in this respect. The same problems predictably will arise in future contexts where concurrent jurisdiction is actively exercised. Many of these issues are currently under debate by the United Nations Preparatory Committee on the Establishment of an International Criminal Court. The broad range of issues concerning the interaction of national and international jurisdictions forms the basis for ongoing debates on *complementarity* between national criminal jurisdictions and a permanent international criminal court.

A threshold requirement for greater coherence in the interaction of national and international jurisdictions is a clear articulation, in each case in which an international tribunal is to be convened, of the needs which that particular tribunal is intended to meet. The needs that are likely to be present in greater or lesser degree, singly or in combination include: responding to an overwhelmed national justice system; substituting for a national system in which the fact or appearance of bias would substantially undermine justice processes; substituting for a national justice system where the national system would be unable to obtain custody of suspects, and expressing, through the exercise of international jurisdiction, a

universal condemnation of some special feature of the crimes in question such as the special international responsibility of certain perpetrators. So, the purposes for an international tribunal will not be identical across contexts.

Two important benefits can be gained by articulating in each context the particular needs to be met by convening that international tribunal. First, such an articulation will permit confirmation of whether an international tribunal will best serve the goals sought in that particular context. For instance, if the purpose is to respond to a situation where the national justice system is overwhelmed, then we can analyze whether it is best to provide an international tribunal or to provide assistance to the national system, or some combination of the two. Second, having reference to clearly articulated purposes for convening an international tribunal will allow the operation of that particular tribunal, and especially its interaction with national jurisdictions, to be appropriately tailored to those goals. For example, if the purpose is to substitute for national courts where they cannot obtain custody, then arguably, that international tribunal should defer to the national justice system if that national system *can* gain custody in a particular case. By contrast, if the purpose is to express universal condemnation of certain crimes, then that international tribunal may wish to exercise jurisdiction even where the national court *could* gain custody. In that sort of instance, a very careful analysis would be required of how the international interest in *universal condemnation* should be weighed against the national (and international) interest in successful operation of the national justice system if the two should conflict. In sum, it will be essential to the fruitful operation of an international court that its purposes are clearly articulated *in each instance* and that its operations are appropriately tailored to those purposes in each case.

V. THE FUTURE IN RWANDA AND BEYOND

In Rwanda, the performance of the national justice system and that of the ICTR remain to be seen. Two years after the massacres and yet before the first trial in either jurisdiction, it is clear that the best form of justice that the ICTR or the national courts will be able to render will be justice delayed. The slow progress of justice in Rwanda points to needs for protocols for prompt international assistance to national justice systems; for permanent bodies, such as an International Criminal Court, that can be put readily into service when warranted; and for clear articulation of the purposes of each international tribunal in order that both national and international jurisdictions may be as effective as possible in responding to crimes of mass violence.