

RWANDAN JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

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A complex and important feature of the International Criminal Tribunal for Rwanda is its concurrent jurisdiction with national courts. In order to provide a context for discussion of this concurrent jurisdiction, I will begin with a brief update on the national justice picture in Rwanda. I will then consider the relationship between Rwandan national justice and the International Criminal Tribunal for Rwanda (ICTR) with an eye to the implications of that ICTR experience for a future permanent International Criminal Court.

Two years ago, in late 1996, the Rwandan parliament passed an “organic” law to govern the handling of the criminal cases arising from the Rwandan genocide. I worked closely with the Rwandan government in designing that law. The organic law consists, essentially, of a confession and guilty plea program that provides very substantial sentence reductions in return for confessions and guilty pleas. This plea bargain arrangement is made available to all perpetrators except the very most culpable category, such as the leaders of the genocide. Those most culpable few are subject to the regular Rwandan Penal Code procedures and penalties. The confession and guilty plea program was intended as a compromise that avoided a complete amnesty on the one hand and averted the need for tens of thousands of full-blown trials on the other. That compromise, it was hoped, also would contribute to national reconciliation.

Unfortunately, political obstacles have prevented the effective implementation of the Organic Law. To date, almost four years after the genocide and two full years after passage of the Organic Law, fewer than ten thousand guilty pleas have been received and only 330 verdicts have been rendered by Rwandan Courts—while 135,000 prisoners are being held on suspicion of genocide-related crimes. The reasons for this impasse are largely political. Just as one would expect, Rwandan politics have been very factionalized on the issue of justice. While there are those within the government who are of good will on the issue, there are also those who do not wish to see justice processes go forward either because they sympathize with the perpetrators on the one hand or, on the other extreme, because they would rather see the prisoners continue to languish in prison. The practical manifestation of the political resistance to justice processes has come in two forms of inaction: first, failure to provide the information and other forms of assistance that prisoners would need in order actually to

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enter a guilty plea under the Organic Law; and second, failure on the part of prosecutors and judges to prepare the files and take the other steps necessary to move the cases.

In 1996, there was a moment of opportunity. At that time it looked as though there was some chance of a positive outcome on the national justice front in Rwanda. That opportunity has largely passed. Political obstructionism has, in large part, prevailed. Events in the former Zaire surely have contributed to this outcome – the security threat and war there strengthened the hand of hardliners on both sides as well as diverting resources and attention away from domestic matters.

Now, in very recent developments, there is the prospect that a large number, perhaps as many as 30,000 prisoners, for whom there are no files or empty files, will be released for lack of evidence. This is a positive development under the circumstances. There is also renewed discussion in Rwanda of utilizing a revised version of the traditional justice mechanism, called “Gacaca,” in dealing with the genocide cases. I will not take the time here to go into that matter, except to flag one issue. The Gacaca traditionally was comprised of the “wise men” of the village who would come together to adjudicate disputes. It has been reported that, under the revised version of a Gacaca now being discussed, the members of each Gacaca would be appointed by a local governmental official who, in turn, is appointed by the central government. The use of a body constituted in that way to adjudicate genocide-related cases clearly could result in a complete circumvention of the judiciary with whatever judicial independence it might have. Persons who wish to bolster respect for the rule of law should have serious questions about going in this direction. We will need to look very carefully at the Gacaca initiative as it develops.

I hope that this update is useful and provides some context for us to now turn our attention to the ICTR and, in particular, its interrelationship with national justice in Rwanda.

The ICTR recently issued its first two opinions. In each of those opinions, reference is made at various points to Rwandan national law. In almost every such reference the ICTR gets Rwandan law wrong. And these inaccuracies are not trivial. For instance, in its *Kambanda* decision, the ICTR states, “Rwanda, like all States that have incorporated crimes against humanity or genocide in their domestic legislation, has envisaged the most severe penalties in the criminal legislation for those crimes.” In fact, Rwanda, has *never* enacted criminal legislation for genocide. While it has ratified the genocide convention, Rwanda never enacted implementing legislation. For that reason, when drafting the Organic Law to govern the genocide-related cases, we had to carefully avoid retroactivity and apply the regular Penal Code offense elements and penalties to the crimes committed.

Also, in the *Kambanda* decision, the ICTR actually misquotes the Rwandan Organic Law provision that defines “Category One” as the most culpable category of perpetrators who will be subject to the death penalty.

The ICTR states that Category One perpetrators include those who, "committed acts of sexual violence." But that is not how the Organic Law reads. Rather, it reads: those who, "committed acts of sexual torture." The difference is very significant under Rwandan law. "Torture," committed in the course of another crime, gives rise to the death penalty under the Rwandan Penal Code; "violence" does not. Since Category One defendants are subject to the death penalty, the Organic Law would enact a retroactive increase in penalties if it read "sexual violence" rather than "sexual torture."

Perhaps most egregious, the ICTR, still in *Kambanda*, claims that "According to the list drawn up by the Attorney General of Rwanda . . . Kambanda figures in Category One." But the "list" in question, drawn up pursuant to the Organic Law, is a list of persons *suspected* of Category One offenses. To use that list as a legal finding that someone *is* a Category One perpetrator flagrantly violates the presumption of innocence and the core of due process of law. Here, the ICTR both misstates Rwandan law and, in an effort to apply Rwandan law, overlooks the most basic principles of due process. I could go on with further examples of ICTR error on Rwandan law but I will allow these few illustrations to suffice.

We can respond in one of two ways to the International Tribunal doing poorly in its rendition of national law. One response would be to require the International Tribunal to do better. An international court should be able to accomplish this task, even while it may have some difficulty in light of the paucity of materials on Rwandan law and the paucity of lawyers, especially after the genocide in Rwanda. The second response that we might have to the International Tribunal's poor performance on national law would be to say that an International Tribunal should, as much as possible, stick to international law, resorting to national law only when truly necessary. This would seem like a wise practice both because of the demonstrated perils of international courts applying bodies of national law with which they are unfamiliar, and also because this would promote the uniform development of international law. Where there are gaps in international law, these will need to be filled. In the short run, it might seem fair to defendants to fill those gaps with national law from their own countries. But this would either result in indefinite non-uniformity as different national laws are applied in different international cases or would result in an arbitrary international adoption of the national law that happened to have applied to the first international case where the issue arose. Given those problems, together with the inherent difficulties of international courts applying national law, it would seem preferable to have international courts do so as rarely as possible.

The Rome Treaty for a permanent International Criminal Court or "ICC" gets this issue about right, I believe. It provides that the law applicable by the ICC will include, first, international law from all relevant sources and only "*failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as

appropriate, the national laws of states that would normally exercise jurisdiction over the crime.” We may hope that this approach will help to avoid problems such as those of the ICTR that I have just discussed.

The other aspect of the relationship of the ICTR with Rwandan national justice that I want to mention involves the distribution of defendants between the national and international fora. I will touch on this issue only very briefly here as I have written about it at some length elsewhere.¹ The distribution of defendants between the ICTR and the Rwandan national justice system is essentially controlled by the ICTR. Under the ICTR Statute, the International Tribunal has “primacy,” meaning it can take jurisdiction over any given defendant and require national courts to relinquish jurisdiction. The ICTR has exercised its primacy with a policy of “stratified concurrent jurisdiction,” as I will call it, in which the international tribunal seeks to try the leadership-level stratum of defendants and leaves the followers to be tried in national courts, if at all. This stratified concurrent jurisdiction approach predictably gives rise to two sorts of problems.

First, stratified concurrent jurisdiction systematically produces anomalous outcomes in the handling of more and less responsible defendants. This is so because the leaders, by virtue of being tried in the international forum, typically receive more favorable treatment than the followers, who are tried in national courts. The advantages for defendants of international prosecution include: absence of the death penalty (applicable in many national courts); greater due process protections (including appointed defense counsel) than many national fora offer; better conditions of incarceration than those in some countries; and, not infrequently in post-conflict contexts, greater assurance of impartiality than national courts can provide. A policy of stratified concurrent jurisdiction thus leads to “anomalies of inversion” in which these crucial advantages flow to the leaders who are, by hypothesis, most responsible for the mass crimes while the followers are subject to harsher treatment.

Such anomalies of inversion have been pronounced as the ICTR has pursued its policy of stratified concurrent jurisdiction relative to Rwandan national courts. In Rwanda, many defendants who were not high-level leaders in the Rwandan genocide have been sentenced to death in national courts (and some executed) after summary trials, sometimes without defense counsel, while leaders of the genocide have received lighter sentences after trials with full due process at the ICTR. Anomalous outcomes of this type will predictably occur where an international forum with primacy pursues a policy of stratified concurrent jurisdiction.

Stratified concurrent jurisdiction also tends to impede national plea bargaining arrangements. National justice systems may see fit to grant

1. Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *DUKE J. COMP. & INT'L L.* 349 (1997).

defendants benefits (such as sentence reductions) in return for guilty pleas or other cooperation. This may be done to facilitate investigations or to expedite prosecution of a large volume of cases. While plea bargaining may be an advantageous strategy, governments instituting such a system must avoid the appearance of excessive leniency toward perpetrators. One way to achieve the necessary balance is to offer such "bargains" to some or all *followers* while punishing *leaders* to the full extent of the law. Herein lies the second problem with stratified concurrent jurisdiction. If the international forum takes jurisdiction over the leaders to be prosecuted, then the national forum will lack leaders to prosecute. Indeed, far from being able to show that at least the leaders are being "prosecuted to the full extent of the law," the national government seeking to institute a plea bargaining arrangement will have to acknowledge that the leaders are receiving substantial advantages in the international forum. National justice systems, consequently may be impeded in their plea bargaining arrangements.

This problem has been exemplified, once again, by the Rwandan experience. As I discussed earlier, the Rwandan government adopted a specialized plea bargaining system to deal with the enormous volume of cases related to the Rwandan genocide. The ICTR's repeatedly taking jurisdiction over the leadership-level suspects has posed an obstacle to the political acceptability within Rwanda of the plea-bargaining system, and has led to conflict and acrimony between the government of Rwanda and the ICTR.

These difficulties that have arisen in the ICTR's exercise of concurrent jurisdiction with Rwandan national courts should alert us to potential problems that may confront a permanent International Criminal Court. The Rome Treaty establishing an ICC creates the framework for a permanent international institution whose jurisdiction over the most serious international crimes will, by the terms of the Treaty, be "complementary" with that of national courts.

The Rome Treaty's complementarity framework provides, in essence, that cases will be "admissible" before the ICC only where national justice systems are unable or unwilling genuinely to prosecute the cases in question. ICC complementarity incorporates a vestigial form of the primacy of jurisdiction exercised by the ICTR in the sense that, under the ICC Statute, it is the ICC that is to determine whether a case otherwise coming within its jurisdiction is "admissible."

If admissibility is challenged, the ICC will make the final admissibility determination. Thus, the ICC has the power to exercise jurisdiction where the admissibility criteria are met, even over the objection of a State that would otherwise have jurisdiction. ICC jurisdiction over an admissible case will be exclusive, precluding national prosecution of the case, under the Statute's *ne bis in idem* provisions. In the sense that it can assert exclusive jurisdiction, even over the objection of a State, ICC complementarity incorporates a revised form of primacy.

The ICC may thus decide, even over the objection of a State that would otherwise have jurisdiction, to exercise exclusive jurisdiction over a given case. The ICC's taking of jurisdiction over one prosecution would not, however, preclude the State's prosecution of other cases arising from the same context of mass crimes. Where a State decides to do so, concurrent jurisdiction with the ICC will be actively exercised. Where active concurrent jurisdiction is exercised, the problems of anomalies of inversion and impediments to plea bargaining will predictably arise, as they have in Rwanda, if the international forum pursues a policy of stratified concurrent jurisdiction.

For the complementarity principle of the ICC Statute to be meaningful, the ICC's operations must foster as much as possible (and impede as little as possible) *bona fide* efforts to achieve justice at the national level. Consistent with that premise, the appropriate response of the ICC to the potential problems arising in the context of active concurrent jurisdiction will depend, in part, upon why, in a given instance, State courts are actively operating concurrently with the ICC. If the State's justice efforts are *bona fide* and legitimate, then the ICC should take care to operate in a manner that is indeed complementary to those national efforts. If, on the other hand, the State's exercise of jurisdiction is not *bona fide*, then complementarity may require non-cooperation with the national jurisdiction.

A State might pursue cases arising from the same situation with which the ICC is occupied for a number of different reasons. First, a State might exercise active concurrent jurisdiction because, while it has a functioning judiciary, it is unable to handle the particular cases being brought before the ICC because the State cannot obtain extradition of those defendants or cannot obtain necessary evidence abroad for those cases.

In this case, avoiding anomalies of inversion or impediments to plea bargaining should present little problem. The ICC, consistent with its role as a complement to national jurisdictions and thus acting only where States are unwilling or unable to act, would pursue only those cases that the State cannot. In practice, this may result in the ICC disproportionately prosecuting leaders (because those are the individuals likely to have had the resources to flee the country and the political connections to block intergovernmental cooperation). Nevertheless, the "leader-drain" effect is likely to be far less pronounced than it would be under a deliberate policy of stratified concurrent jurisdiction. Therefore, the problems of anomalies of inversion and impediments to plea bargaining will be reduced if not eliminated.

The second reason for active concurrent jurisdiction would be that, while the ICC considers the State unable to prosecute because of a collapsed justice system, the government's constituencies, including victim populations, view the number or character of the prosecutions being brought by the ICC as inadequate, and the State therefore views it as worthwhile to proceed with prosecutions notwithstanding the impaired

condition of its justice system. Here, it may be fruitful for the ICC Prosecutor to negotiate with the national government to agree upon an ICC prosecutorial strategy, regarding the number and character of ICC cases, that would both satisfy the ICC's goals *and* adequately fulfill the justice interests of the national population, thus obviating the need for national trials. The existence and results of such a negotiation could be made public so that the State government's relevant constituencies would be aware of their government's role in securing the desirable prosecutorial approach. Such negotiations would not constitute improper influence on the Prosecutor or Court. While an overall approach as to the volume and character of cases would be agreed upon, the agreement need not involve commitments to prosecute particular defendants and, obviously, would not influence the outcome of the cases brought.

The situation is more complex where the third reason for active concurrent jurisdiction applies. Here, a State actively exercises jurisdiction concurrently with the ICC because, while the ICC considers the State unable to prosecute because of a collapsed justice system, the government desires to consolidate the rule of law or reinforce the authority of the national judiciary and therefore, on balance, views it as worthwhile to proceed notwithstanding the impaired condition of its justice system. In this situation, the State is interested not only in assuring a certain range of prosecutions, but also, specifically, in conducting some or all of those prosecutions in its national courts in order to reap national benefits.

Where the national justice system is completely collapsed and there clearly is no hope of any national prosecutions of acceptable quality occurring within an acceptable period, the ICC Prosecutor should attempt to convince the State to forego national trials. But, the completely collapsed justice system is the worst case scenario. Not all countries with substantially collapsed justice systems will be completely incapable of conducting absolutely any satisfactory trials. Where a largely disabled justice system is capable of conducting one or two or a handful of adequate prosecutions (perhaps with substantial international assistance), and that State desires to pursue justice at the national level for rule of law-strengthening and nation-building purposes, it may be possible to accommodate both national and international interests. Here, a useful strategy may be to reverse the traditionally-envisioned order of things and have the national courts conduct a very small number of high-profile prosecutions of prominent defendants while the international court conducts a somewhat larger number of other prosecutions.

A different strategy may be necessary where the fourth reason for active concurrent jurisdiction applies. Where a State is actively exercising jurisdiction concurrently with the ICC because State actors seek through national prosecutions to suppress, discredit or wreak vengeance upon political adversaries, the ICC Prosecutor may wish to negotiate with the national government regarding an ICC prosecutorial strategy that would fulfill legitimate national justice interests sufficient to obviate any real need

for national trials. Obviously, where political suppression is the State's motive, it is less than likely (though not impossible, given states' needs to maintain acceptable international appearances) that such an agreement could be reached.

In all cases where negotiations fail to forestall national prosecutions, the ICC's subsequent relations with the national jurisdiction should depend upon the quality of the national prosecutorial efforts as they are actually carried out. If national prosecutions are conducted with impartiality and something approaching adequate due process, then the ICC should attempt to foster those national justice proceedings. Such measures to foster national justice efforts should include the ICC Prosecutor's taking into account potential anomalies of inversion and impediments to plea bargaining when designing criteria governing the defendants over which the ICC will exercise jurisdiction. This will often require the ICC Prosecutor to pursue a prosecutorial policy other than stratified concurrent jurisdiction. If, on the other hand, national justice processes seriously lack impartiality or adequate due process, then the ICC may have to refuse to foster or cooperate with those national proceedings.

Evaluation of national justice processes to determine whether they should be fostered would, of course, be an exceedingly sensitive matter. Indeed, this necessarily is the case with a number of similar determinations that the ICC must make. For instance, under the Statute, the Court will make determinations of whether States are "unwilling or unable genuinely to [prosecute];" and of whether national prosecutions are undertaken "for the purpose of shielding the person concerned from criminal responsibility . . ." and of whether national proceedings were not "conducted independently or impartially . . ." The need for the ICC to make such sensitive determinations is an inherent feature of the overall complementarity structure.

ICC complementarity thus raises some of its most sensitive and complex issues when the ICC operates concurrently with active national fora. Based on an extrapolation from the Rwandan experience, it is clear that the ICC will have to employ a carefully constructed range of policy responses in exercising active concurrent jurisdiction if it is to foster justice both directly within the ICC and within the national fora with which it interacts.

Let me add, before closing, that the potential difficulties of ICC complementarity that arise when concurrent jurisdiction is actively exercised are only half the problem. The other half will arise, as you may have guessed, when concurrent jurisdiction is not actively exercised. When the ICC is the sole active jurisdiction, there are significant risks that, for structural reasons, the ICC will fail to address the distinct interests of the nations most affected and, particularly, the victim populations. That discussion, however, will have to be taken up on another day.