

THE TRIALS OF CONCURRENT JURISDICTION: THE CASE OF RWANDA

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I. INTRODUCTION

During three months in 1994, genocide was committed in the central African republic of Rwanda. Two and a half years after those events, and notwithstanding efforts at both national and international levels to bring the perpetrators to justice, the first trials both in the Rwandan courts and before the International Criminal Tribunal for Rwanda (ICTR) were begun only weeks ago. This Article, after briefly describing the context of the Rwandan genocide, examines the approaches to justice that have been employed in Rwanda and considers the obstacles to justice that have been confronted despite—or in some instances, because of—the approaches taken.

The Article scrutinizes the mandate of the ICTR, the terms of the recently enacted Rwandan legislation on the handling of genocide-related cases and, particularly, the interaction of national and international jurisdictions in the Rwandan context. Extrapolating from the Rwandan case, the Article points to areas of difficulty and potential friction—particularly, but not only, including the distribution of defendants—that are likely to arise in regimes of concurrent national and international jurisdiction. In addressing the best approaches to those areas of potential difficulty, the Article argues that the most appropriate approach will depend upon the particular purposes of the international tribunal in question. The Article identifies a range of quite different needs that an international tribunal may

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fulfill in different circumstances, and concludes that greater clarity in identifying the specific purposes of convening an international tribunal in each particular instance is an essential prerequisite to improving the efficacy of future efforts at prosecutions for genocide and crimes against humanity in both national and international fora.

II. THE CONTEXT OF GENOCIDE

In the weeks from April 6 to July 17, 1994, between half a million and a million Rwandans were butchered by their neighbors.¹ The murdered included men, women, and children. The killings, accomplished largely through hacking to death with machetes and other rudimentary instruments,² were accompanied by acts of torture and rape.³

The great majority of the killers were members of the Hutu ethnic group, which constituted approximately eighty-five percent of the population.⁴ The majority of the victims were Tutsi, the group that constituted approximately fourteen percent of Rwanda's population.⁵ Hutu moderates, those identified as favoring the sharing of political power, were slaughtered as well.⁶

Substantial evidence indicates that the mass killings were pre-planned and orchestrated by high officials of the then-government of Rwanda in a desperate attempt to avoid a broadened sharing of power.⁷ During the Rwandan colonial period, the Belgians governed the Rwandan populace through a privileged class of Tutsis.⁸ Shortly before Rwanda gained independence from Belgium in 1959, persecution of Tutsi, including widespread massacres, began and, for the next several years, drove many Tutsi from their homes.⁹ A large proportion of the Tutsi population fled Rwanda during this period, reset-

1. See *Letter Dated 1 October 1994 From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, para. 43, U.N. Doc. S/1994/1125 (1994) [hereinafter *Secretary-General Letter*]. See generally GÉRALD PRUNIER, *THE RWANDA CRISIS* 261-65 (1995).

2. See PRUNIER, *supra* note 1, at 243.

3. See *Report on the Situation of Human Rights in Rwanda Submitted By Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994*, U.N. ESCOR, 51st Sess., Agenda Item 12, para. 28, U.N. Doc.E/CN.4/1995/7 [hereinafter *Degni-Segui Report*].

4. See *Secretary-General Letter*, *supra* note 1, paras. 44-45.

5. See *id.*

6. See *Degni-Segui Report*, *supra* note 3, para. 49.

7. See *id.* para. 26.

8. See PRUNIER, *supra* note 1, at 26-27.

9. See *id.* at 48-54.

ting as refugees in surrounding countries.¹⁰ In the following decades, the government of Rwanda prevented their return. Thirty years later, on October 1, 1990, a rebel group—the “Rwandan Patriotic Front” (RPF)—comprised largely of Tutsi refugees in Uganda, began a military campaign, invading Rwanda from Uganda.¹¹ Intermittent fighting and halting political negotiations ensued for nearly three years until, on August 4, 1993, the Arusha Peace Accords were signed by the Government of Rwanda and the RPF.¹² The Accords provided for political power-sharing in Rwanda and for the repatriation of refugees.¹³

Regime hardliners, displeased with this turn of events, took steps to obstruct implementation of the Arusha Accords.¹⁴ Then, on April 6, 1994, the airplane carrying Rwandan President Juvénal Habyarimana and President Ntaryamira of neighboring Burundi was shot out of the sky as the presidents returned from a meeting in Tanzania.¹⁵ Theories abound on who downed the plane, but no dispositive proof of responsibility has been established.

Within hours of the plane crash, the killings in Rwanda began. Roadblocks were thrown up to prevent escape. Leaders viewed as moderate or “pro-Tutsi” were singled out to be killed first, and then the campaign of exterminating all Tutsi began. The events unfolded in what seems clearly to have been a preplanned and organized manner.¹⁶

The killings continued, day and night, for the next fifteen weeks. The international community did virtually nothing to intervene. Indeed, the U.N. Assistance Mission in Rwanda (UNAMIR), which on April 6 had 2,500 troops in Rwanda to oversee implementation of the Arusha Accords,¹⁷ within weeks pulled out all but a token force of 450, and gave the remaining troops no mandate to intervene in the

10. *See id.* at 61-64.

11. *See id.* at 93.

12. *See* Accord de Paix, Aug. 4, 1993, Loi Fondamentale, 1 Codes Et Lois Du Rwanda 5 (1995), Université Nationale du Rwanda Faculté de Droit (Fr.).

13. *See id.* at 7, art. 4, and at 8-18 (Protocole sur le Partage du Pouvoir); *see also* AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 35-36 (rev. ed. 1995) [hereinafter AFRICAN RIGHTS].

14. *See* AFRICAN RIGHTS, *supra* note 13, at 36.

15. *See Secretary-General Letter, supra* note 1, para. 42.

16. For a detailed description of these events, *see* AFRICAN RIGHTS, *supra* note 13, at 177-98.

17. *See* S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg. para. 2, U.N. Doc. S/RES/872 (1993).

killing of civilians.¹⁸

The Rwandan Patriotic Army (RPA) (the army of the RPF) on April 7 began a final offensive to overtake the country militarily.¹⁹ As the RPA forces progressed through the country in the following three months, RPA soldiers incarcerated those whom they identified as perpetrators of the ongoing genocide. Upon entering a village, the RPF forces often found that much of the Tutsi population had been massacred. Soldiers, untrained in law or police work, simply identified those who appeared to them to be the "genocidaires," incarcerated them in a local facility, and moved on with the military operation. There was no systematic collection of evidence; most prisoners were not formally charged; and, for many, no file at all was prepared.²⁰

On July 17, over three months after the killings had begun, the RPF achieved military victory, and formed the core of what would become the new government of Rwanda.²¹ By that time, the Rwandan prisons, designed to hold a maximum of 15,000 prisoners, held far more than that number.²²

III. JUSTICE IN THE WAKE OF GENOCIDE

Rwanda was largely destroyed in the spring of 1994. A substantial part of the population was massacred (half a million to a million out of a population of seven to eight million),²³ and another two million fled the country.²⁴ A large proportion of the remaining population was displaced within Rwanda.²⁵ Those who remained were

18. See S.C. Res. 912, U.N. SCOR, 49th Sess., 336th mtg., U.N. Doc. S/RES/912 (1994); see also AFRICAN RIGHTS, *supra* note 13, at 1117.

19. See AFRICAN RIGHTS, *supra* note 13, at 1062.

20. See James C. McKinley Jr., *76,000 Still in Jail in Rwanda Awaiting Trial in '94 Slayings*, N.Y. TIMES, June 24, 1996, at A1.

21. See *Statement Dated 28 September 1994 on the Question of Refugees and Security in Rwanda*, U.N. SCOR, 49th Sess., Annex, at 2, U.N. Doc. S/1994/1115 (1994) [hereinafter *Refugees Statement*].

22. See UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS FIELD OPERATION IN RWANDA, *THE ADMINISTRATION OF JUSTICE IN POST-GENOCIDE RWANDA*, at 3, para. 18, U.N. Doc. HRFOR/JUSTICE/June 1996/E (1996).

23. See *Secretary-General Letter*, *supra* note 1, at 43.

24. See COMM. ON INT'L RELATIONS U.S. HOUSE OF REPRESENTATIVES AND THE COMM. ON FOREIGN RELATIONS U.S. SENATE, 104TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, at 211 (1996) [hereinafter COUNTRY REPORTS].

25. See *id.*

gravely traumatized, and many were seriously injured or maimed.²⁶ Crops, in a country that depends on subsistence farming, had been left untended.²⁷ The buildings and physical infrastructure had been substantially damaged.²⁸ The treasury as well as the physical assets of the country had been plundered or destroyed.²⁹

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 had been killed or fled the country.³⁰ Moreover, the basic resources needed to run a legal system—books, vehicles, even paper—were essentially unavailable.³¹ It was in this context that Rwanda confronted the question of how to pursue justice in the wake of genocide.

A. The International Criminal Tribunal for Rwanda

In September 1994, sixteen months after the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY),³² the new government of Rwanda requested that the United Nations establish an International Criminal Tribunal for Rwanda (ICTR) to adjudicate the crimes of genocide, war crimes, and crimes against humanity that had been committed in the country.³³ As negotiations over the terms for establishing an ICTR proceeded, however, Rwanda objected to a number of provisions.³⁴ Some of these original points of tension remain as issues that may tend to limit or at least to call into question the efficacy of the ICTR.

First, Rwanda took exception to the time period over which the ICTR would have jurisdiction. According to the ICTR Statute then being drafted, only crimes committed between January 1 and December 31, 1994 would come within the jurisdiction of the ICTR.

26. See AFRICAN RIGHTS, *supra* note 13, at 854.

27. See COUNTRY REPORTS, *supra* note 24, at 212.

28. See UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS FIELD OPERATION IN RWANDA, *supra* note 22, at 2, para. 12.

29. See *id.*

30. See *id.* at 2, para. 11.

31. See *id.* at 2, para. 12; AFRICAN RIGHTS, *supra* note 13, at 1171.

32. The Security Council established the International Criminal Tribunal for the former Yugoslavia in Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993).

33. See *Refugees Statement*, *supra* note 21, at 4.

34. For an analysis of the politics of establishing the ICTR, see Payam Akhavan, *The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996).

Manzi Bakuramutsa, then Rwandan Ambassador to the United Nations, argued that such limited temporal jurisdiction would prevent the ICTR from fully capturing within its prosecutorial scope the criminal activities that culminated in the genocide of 1994.³⁵ Those activities, he observed, began with planning and sporadic massacres—“pilot projects for extermination” as he called them—dating back to 1990.³⁶

In evaluating this objection, one must understand not only the ICTR’s temporal jurisdiction, but also its subject-matter jurisdiction. While the ICTR was to have jurisdiction over actual killings, rapes, and other acts constituting genocide, war crimes, and crimes against humanity only if those acts were committed in 1994, it is likely that under the terms of the ICTR Statute, the planning, preparation, or aiding and abetting of those 1994 acts also can form the basis for criminal liability through complicity, even if that preparation occurred prior to 1994.³⁷ Final determination of whether that form of accomplice liability will be recognized by the ICTR as coming within its temporal jurisdiction must await a judicial ruling.³⁸ If the aiding and abetting prior to 1994 of crimes that were completed in 1994 is determined to come within the temporal jurisdiction of the ICTR, then not quite as much was lost by the limitation on the ICTR’s temporal jurisdiction as one might at first have imagined.

Nevertheless, even if that liberal interpretation of accomplice liability is adopted by the ICTR, there are certain crimes that the Statute’s temporal limitation will indeed exclude. For example, killings and other crimes committed in massacres prior to 1994 would be excluded. In addition, significant acts of incitement would not be covered. It appears that incitement to commit genocide is punishable under the ICTR Statute even without proof that the incitement actually led to subsequent acts of genocide.³⁹ Unlike planning or aiding and abetting, which form the basis for criminal liability only when they can be linked to a completed crime, it appears under the ICTR

35. See U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 14-15 (1994).

36. *Id.*

37. See S.C. Res. 955, U.N. SCOR, 3453d mtg., Annex, art. 6, U.N. Doc. S/RES/955 (1994) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”) [hereinafter Statute of the ICTR].

38. See Interview with Judge Honore Rakotomanana, Deputy Prosecutor, ICTR, in Kigali, Rwanda (Oct. 8, 1996) (on file with author).

39. See Statute of the ICTR, *supra* note 37, art. 2(3)(c).

Statute that incitement to genocide is a crime in itself.⁴⁰ Here, the temporal jurisdiction limit of the ICTR would be significant: incitements to genocide that occurred prior to 1994 (and they did) would be excluded from the prosecutorial scope of the International Tribunal.⁴¹

The Rwandans also objected that the proposed ICTR Statute provided for so little personnel, both judicial and prosecutorial, that the ICTR could not possibly be expected to fulfill the monumental task set before it.⁴² Not only was the total number of judges very small (six trial judges and five appellate judges), but the appellate judges were to be shared with the ICTY.⁴³ Moreover, the ICTR and ICTY were to share one Prosecutor.⁴⁴

One can perhaps concur with the rationale behind maintaining a shared appellate chamber for the two International Tribunals: the importance of developing a coherent body of international criminal law may weigh against having separate appellate courts potentially rendering conflicting statements of international law. But that rationale does not explain why a larger *total* number of judges could not be provided.

Nor is it clear exactly what benefit was to be gained by the two Tribunals sharing one Prosecutor. The explanation that having one Prosecutor would ensure consistency in prosecutorial approach is less than compelling. (Indeed, exploration of a range of prosecutorial approaches might be most valuable in the nascent enterprise of inter-

40. This point is not, however, entirely uncontroversial. Common law systems generally provide for liability for incitement regardless of whether that incitement led to commission of the crime incited, while civil law systems generally require for liability that the incitement was successful. The *travaux preparatoire* of the Genocide Convention leave this issue open, allowing "the legislators of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable." U.N. GAOR, 49th Sess., 84th mtg., U.N. Doc. A/49/PV.84, at 220-221 (1994). Final determination of whether an incitement conviction before the ICTR will require proof that the incitement actually led to acts of genocide must await a judicial ruling. See generally Akhavan, *supra* note 34.

41. The case of Leon Mugasera exemplifies the effects of this limitation. Mugasera is known to have made public speeches in 1992 that presumably would constitute incitement to genocide. But that incitement would be excluded from the temporal jurisdiction of the ICTR. Any ICTR prosecution of Mugasera would therefore have to rest on a theory of complicity before the fact which would require proof of a sufficient nexus between the 1992 speeches and the 1994 acts of genocide to constitute complicity, and would also require a favorable judicial interpretation of Article 6 of the ICTR Statute. See discussion *supra* note 37 and accompanying text.

42. See U.N. Doc. S/PV.3453, *supra* note 35, at 15.

43. See Statute of the ICTR, *supra* note 37, art. 12(2), 12(3)(d).

44. See *id.* art. 15(3).

national prosecutions). Those who viewed the ICTY and ICTR as important precedents for and perhaps forerunners of a permanent International Criminal Court (ICC) would presumably have favored establishment of a single prosecutorial authority. One advantage, at least in the short term, of having only one Prosecutor was that a protracted selection process such as that which preceded selection of the ICTY Prosecutor was avoided in the case of the ICTR.

Now having the benefit of two years' experience, some personnel at the Office of the Prosecutor for the ICTY and ICTR (ICTY/R) observe that having a single prosecutorial office fosters the development and efficient deployment of the specialized expertise required for the unique mission of international criminal tribunals.⁴⁵ One point that seems clear is that, since the two Tribunals share one Prosecutor who has substantial responsibilities for oversight and coordination of the two prosecutorial efforts and for relations with the United Nations and other international and national agencies, the prosecutorial effectiveness of the two Tribunals will depend heavily on strong leadership by the *Deputy* Prosecutors (there is one Deputy Prosecutor for each Tribunal) in the day to day execution of the prosecutorial mission. Some commentators, within and outside the Tribunals, have argued that this has not been the role, to date, of the Deputy Prosecutors.⁴⁶

Another major objection raised by the Rwandans concerned the death penalty.⁴⁷ The Statute of the ICTR provided for imprisonment as the most severe sentence, precluding imposition of capital punishment by the ICTR.⁴⁸ The Rwandan Penal Code, by contrast, does provide for the death penalty.⁴⁹ Since the ICTR was expected to try the leaders and organizers of the genocide, the specter of disparate sentencing was raised: The leaders of the genocide, tried before the International Tribunal, would escape the death penalty while lower-level perpetrators, tried in Rwandan national courts, might be exe-

45. See Interviews with ICTY/R Personnel in The Hague, The Netherlands (Jan. 28, 1997) (on file with author).

46. See, e.g., Stephen Buckley, *Arusha Tribunal Employees Say Difficulties Worsened By Racial Tensions*, WASH. POST, Jan. 29, 1997, at A15 (stating that ICTR personnel believed Deputy Prosecutor Rakotomanana lacked leadership skills); Interviews with ICTY/R Personnel, academics, and Political Officials, in Rwanda (1996) (names withheld) (on file with author).

47. See U.N. Doc. S/PV.3453, *supra* note 35, at 16.

48. See Statute of the ICTR, *supra* note 37, art. 23(1).

49. See Republic of Rwanda Décret-Loi No. 21/77, Code Pénal art. 26., 1 Codes et Lois du Rwanda 391 (1995), Université Nationale du Rwanda Faculté de Droit (Fr.).

cuted. As Mr. Bakuramutsa noted, "That situation is not conducive to national reconciliation in Rwanda."⁵⁰

These, then, were some of Rwanda's objections to the Statute that would establish the ICTR.⁵¹ By the end of the process of promulgating the ICTR Statute, some Rwandans involved in those negotiations were convinced that the United Nations had no real commitment to contributing to justice in Rwanda. Rather, the attributed motives for establishing the ICTR were, first, to provide a fig-leaf-after-the-fact to cover the shameful failure of the international community to intervene in the genocide and, second, to establish an additional precedent contributing to momentum toward establishment of an ICC.⁵² By strange coincidence, Rwanda held a seat on the UN Security Council at the time when the ICTR was being established. Ironically, because of its objections to the ICTR Statute as it was finally drafted, Rwanda cast the sole vote opposing adoption of the Security Council resolution establishing the ICTR.⁵³

Nevertheless, the ICTR was established. And, notwithstanding its vote against the ICTR Statute, Rwanda expressed its intention to support the ICTR and cooperate with its work.⁵⁴

But the ICTR is not expected by any means to address the bulk of Rwanda's staggering volume of genocide-related criminal cases. As of January 1997, Rwanda's prison population has grown to over 90,000, virtually all awaiting prosecution for genocide-related crimes.⁵⁵ The caseload of the ICTR is expected to be in the hundreds at most.

B. National Justice

Rwanda thus is faced with the enormous problem of how to handle the other 90,000-plus criminal cases arising from the Rwandan genocide. Specialized legislation to facilitate handling of the genocide-related caseload was designed and drafted over the course of

50. U.N. Doc. S/PV.3453, *supra* note 35, at 16.

51. The Rwandan delegation to the Security Council also voiced certain other objections to the ICTR Statute. These can be found at *id.* at 14-16.

52. See Discussions with Rwandan Officials, in Geneva, Switzerland (June 19-21, 1996) (names withheld) (on file with author); Discussions with Rwandan Officials in Cape Town, South Africa (Jan. 20-26, 1997) (names withheld) (notes on file with author).

53. See U.N. Doc. S/PV.3453, *supra* note 35, at 16.

54. See Richard D. Lyons, *U.N. Approves Tribunal on Rwandan Atrocities*, N.Y. TIMES, Nov. 9, 1994, at A12.

55. See Conversation with Simeon Rwagasore, Procureur General Before the Supreme Court of Rwanda, in Cape Town, South Africa (Jan. 22, 1997) (on file with author).

several months in 1995-96. On September 1, 1996, after prolonged debate over the legislation's controversial provisions, the "Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990"⁵⁶ came into force as the law that will govern national prosecutions for the genocide in Rwanda.

Drafting that legislation required finding a path through an array of profoundly problematic options. The Rwandan criminal justice system had never been equipped to handle a large volume of cases, and it had been entirely disabled during the violence. It tried no cases in 1995. That was the justice system that had to manage, in some way, to handle tens of thousands of the most serious criminal cases. (Since the defendants in those cases were already in prison, 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, in essence, quite simple. Suspects will be classified into four categories according to their degrees of culpability in the Rwandan genocide. The first 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.⁵⁷

This specialized criminal justice program will rely heavily on a system of plea agreements. All perpetrators other than those in Category One (who will be subject to the death penalty)⁵⁸ will be entitled to receive a reduced sentence as part of a guilty-plea agreement.⁵⁹ Specifically, a pre-set, fixed reduction in the penalty that would otherwise be imposed for their crimes 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

56. *Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Organic Law No. 08/96 (August 30, 1996), in OFFICIAL JOURNAL OF THE REPUBLIC OF RWANDA (Sept. 1, 1996) [hereinafter *Genocide Law*].

57. *See id.* art. 2.

58. *See id.* art. 14.

59. *See id.* arts. 5, 15, 16.

to the victims.⁶⁰ 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.⁶¹

The sentences provided under the specialized legislation are as follows. Category Two perpetrators will receive a sentence of seven to eleven years imprisonment if they plead guilty prior to prosecution, a sentence of twelve to fifteen years imprisonment if they plead guilty after prosecution has begun, or a sentence of life imprisonment if convicted at trial.⁶² Category Three perpetrators will receive a penalty of one third the prison sentence normally applicable for their crimes if they plead guilty before prosecution, a sentence of half the term of years normally applicable if they plead guilty after prosecution has begun, and the sentence ordinarily applicable if convicted at trial.⁶³ All Category Four defendants convicted will receive suspended sentences.⁶⁴

A substantial reduction in sentence is thus provided where a Category-Two or -Three defendant submits a guilty plea before prosecution. This leniency is extended in order to encourage perpetrators to come forward before prosecution.⁶⁵ A perpetrator who pleads guilty prior to prosecution eliminates the need for the prosecutor to conduct a full investigation and prepare a completed dossier for the case in question. Similarly, the penalties imposed pursuant to a guilty plea submitted after prosecution has begun but before conviction at trial are less severe than the penalties imposed pursuant to a conviction at trial. This structure is intended to maintain incentives for perpetrators to plead guilty even after the initiation of prosecution.⁶⁶

Plea agreement systems, while pervasive in adversarial systems such as that of the United States, are uncommon (and largely unac-

60. *See id.* art. 6.

61. *See id.* arts. 15, 16.

62. *See id.* Thus, the death penalty is excluded even for those Category Two perpetrators convicted at trial. *See id.* This exclusion of the death penalty constitutes a reduction from the severity of sentence that could ordinarily be imposed under the Rwandan penal code, which provides capital punishment for murder. This reduction reflects a policy decision regarding the undesirability, for the society generally and for national reconciliation and security, of undertaking the execution of literally thousands of perpetrators. *See* Notes of Madeline Morris from Legislative Drafting Sessions, in Kigali, Rwanda (Nov. 1995-July 1996) (on file with author).

63. *See Genocide Law, supra* note 56, arts. 15, 16.

64. *See id.* art. 14(d).

65. *See* Notes of Madeline Morris, *supra* note 62.

66. *See id.*

knowledge) in inquisitorial criminal justice systems such as those of Rwanda and of continental Europe. The specialized plea-agreement system in Rwanda thus is an unprecedented feature in Rwandan law. This somewhat alien mechanism will be relied upon to do much to relieve the extraordinary burden posed by the enormous criminal caseload arising from the genocide.

The Rwandan specialized criminal justice program, as noted earlier, requires that the defendant, as part of the plea-agreement package, make an accurate and complete confession of the crimes committed, including disclosure of any accomplices.⁶⁷ This requirement of a detailed confession was considered important for establishing a truthful historical record of the Rwandan genocide, allowing for meaningful verification of the accuracy of the confession, and assisting in prosecutors' continuing investigations and prosecutions of the genocide-related crimes.⁶⁸

The additional requirement that a perpetrator participating in the confession and guilty plea program make an apology to the victims of his or her crimes⁶⁹ is intended to contribute to the process of national healing and reconciliation.⁷⁰ While it is true that defendants may often have an ulterior motive for making these apologies (to obtain the reduced sentences offered in the plea agreement program), the apologies will nevertheless represent at least some statement of recognition of wrongdoing which, in the aggregate, may contribute to national reconciliation.⁷¹

The Rwandan specialized criminal justice program represents a complex compromise. While full and regular criminal prosecution of every suspected perpetrator might in many respects be the most desirable course of action, the resources demanded 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 and contribute to reconciliation while also respecting resource limitations.

An approach such as that adopted in Rwanda offers the benefit of expediency in handling an enormous volume of cases and may contribute to national healing and reconciliation. At the same time, however, there is reason for concern about the potential for miscar-

67. See *Genocide Law*, *supra* note 56, art. 6(b).

68. See Notes of Madeline Morris, *supra* note 62.

69. See *Genocide Law*, *supra* note 56, art. 6(c).

70. See Notes of Madeline Morris, *supra* note 62.

71. See *id.*

riage 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 to date has been made for any form of defense counsel for many of the indigent defendants in Rwanda.⁷² On the other side of the equation, survivors and others rightly ask why perpetrators of these horrific crimes should receive leniency, especially while an “ordinary criminal” who committed a murder in Rwanda tomorrow would not receive that same benefit.

The question to ask in designing 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 90,000 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. At the other extreme, releasing prisoners en masse under an explicit or implicit grant of amnesty would perpetuate a culture of impunity, be unacceptable to the survivor population, and constitute a heightened security risk within the country. The value of the system adopted in Rwanda will depend in the end both upon the soundness of the design itself and on the quality of its implementation, which shall unfold in the coming months.

72. See Conversation with Faustin Ntezilyayo, Rwandan Minister of Justice, in Cape Town, South Africa (Jan. 20, 1997) (on file with author).

On 3 January 1997, two Category-One defendants were sentenced to death after a brief trial in which the defendants appeared without counsel. See *Rwanda to Execute 2 Hutu; First Verdict on '94 Killings*, N.Y. TIMES, Jan. 4, 1997, at 6.

It has been clear for many months that there is no provision for defense counsel for many of the thousands of indigent defendants in Rwanda. Various national aid agencies, U.N. organizations, and non-governmental organizations (NGOs) have for months discussed making some provision for a defense bar for the Rwandan national trials. See Discussion with Marthe Mukamurenzi, then-Minister of Justice of Rwanda, in Rwanda (March, 1996) (on file with author). The Rwandan Ministry of Justice has repeatedly expressed its interest in such arrangements. See *id.* But such arrangements have yet to be made. Now, as the first death sentences have been pronounced in Rwanda on defendants who were without legal representation, human rights NGOs and U.N. and various national officials have come forward to deplore the indeed deplorable fact that capital defendants are being tried without counsel. See, e.g., *Rwanda to Execute 2 Hutu; First Verdict on '94 Killings*, *supra*; Telephone Conversations with U.N. and NGO Personnel, in Athens, Georgia (Jan. 4-14, 1997) (names withheld) (on file with author). The NGO *Advocats Sans Frontières* has begun provision of some defense counsel but not at a level approaching that required to address the needs of 90,000 prisoners. The Rwandan government's position is that it would welcome the provision of defense counsel by U.N. or national agencies or NGOs, but that it cannot provide defense counsel at Rwandan governmental expense and will not postpone prosecutions awaiting provision of a defense bar by some party in the indefinite future. See Conversation with Faustin Ntezilyayo, *supra*.

C. The Trials of Concurrent Jurisdiction

The administration of justice in post-genocide Rwanda is rendered particularly 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.⁷³ This concurrent jurisdiction has exposed certain difficult issues which will likely recur in future contexts in which similar structures of actively shared jurisdiction are undertaken.⁷⁴

Concurrent jurisdiction raises complex questions regarding cooperation in investigations and sharing of evidence. Obvious advantages in efficiency and effectiveness 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 tribunal⁷⁵ 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.⁷⁶

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. The question of appropriate distribution of defendants 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

73. See Statute of the ICTR, *supra* note 37, art. 8(1).

74. Concurrent jurisdiction exists also in the context of the ICTY. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 9(1), U.N. Doc. S/25704 (1993). As domestic prosecutions in the former Yugoslavia proceed, we may see the reiteration of these issues in that very different context.

75. In addition to the issue of the ICTR's impartiality generally, there is also the question of impartiality regarding claims against members of the current Rwandan regime. The jurisdiction of the ICTR includes any crimes against humanity committed in Rwanda in 1994. Statute of the ICTR, *supra* note 37, art. 8(1). The Tribunal's impartiality must therefore include objective assessment of allegations that crimes against humanity were committed by members of the RPA during the 1994 war. The ICTR Prosecutor has stated that, if any such allegations were substantiated, the ICTR would investigate but that, to date, no evidence has been presented to support such allegations. See Richard Goldstone, Prosecutor, ICTR, Address at the Justice in Cataclysm Conference, Brussels, Belgium (July 21, 1996) (on file with the *Duke Journal of Comparative & International Law*). Were the Rwandan government and the ICTR to be closely allied in prosecutorial pursuits, then the ICTR's objectivity in evaluating claims against RPA members could be called into question.

76. See Discussions with Rwandan Officials and ICTR Personnel (1995-1997) (names withheld) (on file with author).

to obtain custody of the same suspect.⁷⁷ In one case, not only the ICTR and the Rwandan government, but also the Belgian government were engaged in efforts to gain custody of the same suspects who were being held in Cameroon.⁷⁸

It is worth noting that, while many speculated that these conflicts over custody were 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),⁷⁹ and other countries have expressed a willingness in principle to do the same.

The tensions between the Rwandan government and the ICTR over distribution of defendants have resulted in part from a lack of communication over time and also 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 relies heavily on plea agreements, as discussed above. 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.⁸⁰

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

77. See Philip Gourevitch, *Justice in Exile*, N.Y. TIMES, June 24, 1996, at A15.

78. See Chris Tomlinson, *Tug of War Over Rwanda Suspect*, INDEP., Mar. 13, 1996, at 10; Matthew Bigg, *U.N. Rwanda Genocide Tribunal Adjourns*, REUTERS WORLD SERV., Jan. 9, 1997.

79. See Paul Cullen, *Trial Opens of Man Said to be Ringleader of Genocide*, IRISH TIMES, Jan. 15, 1997, at 12.

80. Numerous statements indicate that personnel composing the ICTR (as well as the ICTY) do view the Tribunals' mandates as prosecution of the top-level leaders. Richard Goldstone states, for example, that "I still remain unpersuaded that there would be any advantage were the ICTR, as a policy, to pursue the 'small fish'." Letter from Richard Goldstone, Prosecutor, ICTY/R 1993-96, to Madeline Morris (Dec. 22, 1996) (on file with author). My conversations with ICTY/R personnel consistently indicate that there is a presumption within the Tribunals that their role is to try top-level leaders. The view expressed recurrently is that the trials of lower-level perpetrators (e.g. Tadic, tried before the ICTY, or Akayesu, before the ICTR) are to be viewed either as second-best outcomes necessitated by the lack of higher-level defendants in custody or as "building-block cases" that will lead to prosecutions of "higher-ups."

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),⁸¹ likely being imprisoned in more favorable conditions than those in Rwandan prisons,⁸² and being guaranteed various due process safeguards including appointed defense counsel, among other factors.⁸³ 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. One can readily see, then, why trying at least some Category-One defendants in domestic courts would be 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 incurring the wrath of the Rwandans each time it pursued a leader to be prosecuted.⁸⁴ 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.⁸⁵ The Rwandans, in reply, noted that the ICTR had been no swifter, and had also tried no one so far.⁸⁶ 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. But the friction also reflects what may be a more fundamental conflict between a national and an international jurisdiction each of which aspires to prosecute leaders.

On the authority of the UN Security Council Resolution that brought the ICTR into being, the ICTR enjoys primacy of jurisdic-

81. See Republic of Rwanda Décret-Loi No. 21/77, *supra* note 49; Statute of the ICTR, *supra* note 37, art. 23(1).

82. A prison sentence imposed by the ICTR may be served in Rwanda or in any other State that has “indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda.” Statute of the ICTR, *supra* note 37, art. 26.

83. Compare Statute of the ICTR, *supra*, note 37, with *Genocide Law*, *supra* note 56.

84. See Discussions with Rwandan Officials and ICTR Personnel, *supra* note 76.

85. See *id.*

86. See *id.*

tion.⁸⁷ 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.⁸⁸ But the criteria to be employed in deciding whether to exercise jurisdiction in any particular case have yet to be articulated by the ICTR.⁸⁹ Certainly, no articulation of principles for the distribution of defendants has been reflected in any form of agreement or memorandum of understanding between the ICTR and the government of Rwanda.⁹⁰ Conflicts over exercise of jurisdiction that have arisen to date have been resolved on an ad hoc basis.⁹¹

87. See Statute of the ICTR, *supra* note 37, art. 9(2).

88. See *id.*

89. See Discussions with Rwandan Officials and ICTR Personnel, *supra* note 76.

90. See Conversations with Faustin Ntezilyayo, *supra* note 72, and with Louise Arbour, Prosecutor, ICTY/R, in The Hague, The Netherlands (Jan. 28, 1997) (on file with author).

91. For example, discussion ensued between the ICTR Prosecutor and the government of Rwanda in the spring of 1996 regarding the disposition of twelve suspects who had been arrested in Cameroon. In those discussions, the ICTR Prosecutor insisted upon the ICTR pursuing prosecution of three of those individuals, citing the leadership positions of those suspects as a critical criterion making it essential that the ICTR exercise its primacy of jurisdiction in those cases. See Conversation with Richard Goldstone, ICTR Prosecutor, Nov. 1993-96, in Johannesburg, South Africa (Jan. 17, 1997) (on file with author). Some high officials of the Rwandan government understood those discussions also to have included a commitment by the ICTR Prosecutor to the effect that, in the future, the ICTR would not pursue prosecution of suspects whom the government of Rwanda had already begun pursuing. Telephone Conversation with Rwandan governmental official, in Brussels, Belgium (July 23, 1996) (name withheld) (notes on file with author). The ICTR Prosecutor, however, did not understand those discussions to have included any such commitment. See Richard Goldstone Conversation, *supra*.

After the discussions on the Cameroon arrestees, Froduard Karamira became the object of a brief “tug of war” between the ICTR and the government of Rwanda. Karamira is believed to have been among the leaders of the Rwandan genocide. See Cullen, *supra* note 79. Karamira was in the course of being deported from India to Rwanda, at the request of the government of Rwanda, when he attempted to leave the airport during a transit stopover in Addis Ababa, Ethiopia. At that point, the ICTR requested that the government of Ethiopia detain Karamira on behalf of the ICTR. See Conversation with Rwandan Minister of Foreign Affairs, in Geneva, Switzerland (June 19, 1996). As it happened, several days later a number of Rwandan cabinet ministers and the ICTR Prosecutor were in Geneva for a donor round table. At the request of the Rwandan Minister of Justice, she and the ICTR Prosecutor (and several other parties) met to discuss the Karamira matter. The Minister of Justice pointed out the importance to the Rwandan justice system that Karamira be tried in Rwanda, and also pointed to the extensive efforts that Rwanda had already invested in gaining custody of Karamira. See Notes of Madeline Morris from Meeting with Minister of Justice and ICTR Prosecutor, in Geneva, Switzerland (June 20, 1996) (on file with author). The ICTR Prosecutor stated that he had not been aware that Karamira had been detained at the instance of the Rwandan government. In light of that information, he stated, he would reconsider his request to the Ethiopian government. See *id.* Several hours after that meeting, the ICTR Prosecutor informed the Ethiopian government that he was withdrawing his request for the detention of Karamira until the earlier request of the Rwandan government had been acted upon. See Conversation with Richard Goldstone, *supra*. Karamira was subsequently deported from Ethiopia to Rwanda.

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.⁹² But those provisions giving deference to national courts would not apply where the international criminal court's jurisdiction had been invoked by the Security Council, as can occur under the Draft Statute.⁹³ In such instances, the same difficulties regarding distribution of defendants as have arisen in Rwanda would be likely to recur.

The Draft Statute for a permanent International Criminal Court does not directly address whether an International Criminal Court's role would be especially tied to trying leadership-level defendants. Article 35 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."⁹⁴ 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 first defendant 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 Criminal Court to try

He recently stood trial and was sentenced to death in Rwandan national courts. *See Death Sentence in Genocide*, N.Y. TIMES, Feb. 15, 1997, at 6.

92. *See Report of the International Law Commission on the Work of its Forty-Sixth Session: Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Agenda Item 140, art. 35, U.N. Doc. A/49/355 (1994).

93. *See id.* art. 23.

94. *Id.* art. 35.

“small fry.”

Whether the role of an international criminal tribunal (ICTR, ICTY or ICC) should be specially tied to the prosecution of leaders depends, obviously, on what the purpose of that international criminal tribunal is. Some have suggested that a primary purpose of an international tribunal is to supplement or substitute for national courts where national justice systems are overwhelmed or incapacitated.⁹⁵ This function of an international criminal tribunal carries no implications for the best distribution of defendants other than that the international tribunal should do that which best assists or complements national efforts. Others have suggested that an international criminal tribunal should exercise jurisdiction only when there is “little prospect of fair trial under national criminal jurisdiction.”⁹⁶ Once again, this conception of the purpose of an international criminal court suggests no general principle regarding the distribution of defendants on the basis of leadership.

Clearly, the rationale for a regime of “stratified-concurrent jurisdiction,” in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defendants, cannot rest on a view of international tribunals as supplements or substitutes for reluctant, ineffective, or incapacitated national courts. Having an international tribunal try a few top-level defendants while leaving the staggering bulk of the caseload to the national courts would not necessarily be a sensible strategy if the goal were to provide a stand-in or supplement for an incapacitated or unwilling national judicial system. (In the Rwandan context, for instance, application of the stratified-concurrent jurisdiction model results in the ICTR trying a tiny fraction of the defendants while leaving 90,000-plus cases to Rwandan national courts.)⁹⁷ Rather, massive assistance to the national system or, taking the opposite tack, provision of an international court designed to handle the bulk of the

95. See, e.g., Statute of the ICTR, *supra* note 37, pmbl.

96. Timothy L.H. McCormack & Gerry J. Simpson, *A New International Criminal Law Regime?*, 42 NETHERLANDS INT'L L. REV. 177, 180 (1995).

There is no evidence to suggest that such a principle underlies the scheme of concurrent jurisdiction in effect in Rwanda. Rather, what is envisioned there is the concurrent and active operation of two legitimate jurisdictions.

97. This outcome is particularly ironic in light of the fact that the Security Council Resolution establishing the ICTR lists among the purposes for creating the Tribunal “a need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.” Statute of the ICTR, *supra* note 37, pmbl.

cases would be a more appropriate strategy if the goal were to respond to incapacity or recalcitrance in a national system.

A different rationale which is sometimes offered to support a regime of stratified-concurrent jurisdiction is based on the need for deterrence. The argument here is that ensuring strong deterrents against leading and organizing mass crimes is of surpassing importance because, without leaders, the mass crimes would not occur. Be that as it may,⁹⁸ this argument actually is not relevant to the question of the *distribution* of defendants between national and international fora. Few would deny that it is important for deterrent (and other) purposes to prosecute the leaders of crimes of mass violence. But the question is whether those leaders should be tried in national or international fora. Presumably deterrence can be accomplished through trial and punishment in either forum. So the deterrence argument in the end tells us little about *which* forum should exercise jurisdiction over the leaders.

Some may argue, that, while in theory deterrence can be accomplished through trial at the national or the international level, in practice leaders typically will have fled from their countries before they can be prosecuted by national authorities. Moreover, those "leaders-in-exile" often will have the resources and influence to find refuge in countries that will shield them from the reach of their own national prosecutorial authorities. In such cases where national judicial authorities cannot obtain extradition of suspects,⁹⁹ an *international* criminal tribunal may well have more success in gaining custody of prospective defendants. Therefore, the argument concludes, if effective deterrence is to be achieved at the leadership level, it will have to rest on the realistic threat of prosecution before an international tribunal.

Again, while this may at first appear to be a strong argument supporting stratified-concurrent jurisdiction, closer inspection reveals flaws in its logic. *If* it is possible for an international tribunal but not a national tribunal to gain custody of a suspect who should be prose-

98. The proposition that the most effective deterrent effect can be achieved by deterring potential *leaders* of mass crimes is, in fact, a debatable one. Perhaps leaders tend to be more zealous, more driven, less reticent and, hence, less deterrable than others. If so, then focusing deterrence efforts primarily on the leaders may not be the most effective strategy.

99. In addition to possible political obstacles to extradition, the extradition and civil rights laws of certain countries may virtually preclude extradition to some countries, particularly where, as in Rwanda, defendants may be subject to capital punishment. Countries refusing to extradite might or might not proceed with prosecutions, under universal jurisdiction, in their own courts.

cuted, then it makes sense for the international tribunal to prosecute that suspect. But that proposition is, in fact, not at all related to whether the suspect in question was a leader. The proposition could apply equally to any suspect, leader or otherwise. Thus, potential problems in obtaining custody, and the fact that those problems may arise disproportionately where leaders are involved, does not constitute a sound argument for a regime of stratified-concurrent jurisdiction. It is true that, if the custody issue tends to arise disproportionately where leaders are involved, then this may result in an international tribunal trying a disproportionate number of leaders. But that would be a result of the politics of custody, *not* an argument for an international tribunal *seeking* to prosecute leadership-level defendants pursuant to a stratified-concurrent jurisdiction model for distribution of defendants.

Putting the same point somewhat differently, the issue of which jurisdiction is more likely to be successful in obtaining custody is separate and not logically related to the question: If the country holding a suspect were equally willing to transfer that suspect to the custody of the national or the international forum, which forum then should exercise jurisdiction? Instances in which this was the operative question—where a third-party state was willing to transfer a particular suspect to the international or the national jurisdiction—have already arisen in the Rwandan context.¹⁰⁰ Notwithstanding the ability of the national jurisdiction to gain custody, the argument still was made in those cases that the ICTR should exercise jurisdiction if the suspect was a major leader.¹⁰¹ Obviously, in those cases, the view that the ICTR should try the leaders was not based on relative likelihood of gaining custody. The custody factor thus does not provide a satisfactory explanation of the stratified-concurrent jurisdiction model in theory or in practice.

The rationales for stratified-concurrent jurisdiction considered thus far have failed to withstand careful scrutiny. The final rationale to be considered as a possible basis for stratified-concurrent jurisdiction is essentially a moral proposition: that crimes of a certain magnitude and of a certain nature should be condemned by an international entity, a “voice of humanity.”

Even accepting the premise that an essential purpose of an international criminal tribunal is to condemn certain crimes on behalf

100. See *supra* note 91.

101. See Discussions with Rwandan Officials and ICTR Personnel, *supra* note 76.

of all humanity, we still must ask why it is the leaders in those crimes, the architects and not the executors, who should be prosecuted before an international court. Does it manifest more evil to organize, at a distance, the murder of thousands than to torture or kill while looking into the eyes of a pleading victim? No self-evident moral truth that "organizing is worse" can be relied upon to support the pervasive assumption that the role of an international tribunal is to prosecute the leaders.

One might, however, make a related but somewhat different argument for stratified-concurrent jurisdiction based on the international nature of leadership responsibility. The reasoning here would be that those who lead others and who hold the power to create a holocaust have a particular type of duty, similar to a fiduciary duty, which extends beyond national boundaries. A breach of that duty of leadership is a distinctive type of crime, a crime against the world community. Thus, one might reason, an international court's role is to try the leaders because the nature of the leaders' transgressions is global.

But a regime of stratified-concurrent jurisdiction is not satisfactorily supported even by this conception of international responsibility. *All* crimes of genocide and crimes against humanity, whether committed by leaders or by followers, are international crimes. As such, *all* of those crimes are defined as being of distinctly international concern.

It may be true that, while the international community has an interest in denouncing international crime committed by persons at all levels, it has a special, added interest based on special international responsibility where the perpetrator is a leader. But this added interest simply does not seem to be of sufficient significance or force to make it the sine qua non of an international tribunal's proper exercise of jurisdiction. The benefits of trying the leaders before an international tribunal are not sufficiently compelling to define the proper distribution of defendants between national and international fora.¹⁰² Rather, those benefits may better be viewed as constituting one consideration among others to be taken into account in balancing the benefits of national and international exercise of jurisdiction.

Given the lack of a compelling categorical argument supporting

102. This is not to overlook the possibility that there might be political or policy reasons for focusing international prosecutorial efforts on leaders in some contexts. The point, rather, is that there does not appear to be a compelling argument for an overarching or axiomatic policy of stratified-concurrent jurisdiction.

stratified-concurrent jurisdiction, it is questionable whether a regime of stratified-concurrent jurisdiction rests on a secure foundation in principle. This question would be far less pressing if stratified-concurrent jurisdiction did not have nefarious consequences in practice. Unfortunately, however, as currently exercised, stratified-concurrent jurisdiction creates a number of anomalous consequences and potential obstacles to justice.

First, stratified-concurrent jurisdiction tends in practice to render injustices because trial before an international tribunal will tend, systematically, to be more favorable for defendants than would trial before national courts (leaving aside sham courts established to whitewash defendants). As illustrated in the Rwandan case, the advantages to defendants of being tried in an international rather than a national forum will be several. First, an international court will not have a death penalty, while many national courts (such as those of Rwanda) do.¹⁰³ Second, the prisons used for sentences imposed by an international court may often afford better conditions of incarceration than would the prisons of the national courts in question.¹⁰⁴ Third, an international tribunal would be expected to guarantee to defendants the utmost in due process, while national courts (especially national courts struggling with post-holocaust resources and an overwhelming caseload) may not.¹⁰⁵ And, finally, defendants in national courts will have more reason than defendants tried before an international tribunal to fear bias, in the form of victor's justice or of personal partiality. In sum, there are very substantial advantages, possibly making the difference between life and death, to being prosecuted in the international rather than the national forum.

Anomalously, under the stratified-concurrent jurisdiction model, all of those advantages go to the leaders, those who were at the helm of the holocaust. This surely is an unintended and an unjust outcome. Yet, these "anomalies of inversion," in which the most responsible defendants get the least harsh treatment, are not coincidental; they are a predictable, structural problem that will be recurrent under the stratified-concurrent jurisdiction model, in which the international tribunal tries the leaders and the national courts try the rest.

Anomalies of inversion, however, are not the only obstacles to

103. See *supra* note 81.

104. See *supra* note 82.

105. See *supra* note 83.

justice that may be posed by the stratified-concurrent jurisdiction model. In addition, stratified-concurrent jurisdiction may tend to undermine the use of plea agreements, which may be a particularly important tool in the prosecution of mass-scale crimes, as exemplified in the Rwandan case.

Thus, not only is it unclear that the stratified-concurrent jurisdiction model rests on a sound principled basis, but stratified-concurrent jurisdiction in practice also poses significant anomalies of inversion and other obstacles to the administration of justice. For these reasons, it is far from clear that the stratified-concurrent jurisdiction approach should take pride of place among the possible models for the distribution of defendants. Rather, the arguably added value in prosecuting leadership-level perpetrators before an international tribunal may be one factor to be considered and weighed among others relevant to the distribution of defendants.

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 U.N. Preparatory Committee on the Establishment of an International Criminal Court. For example, debate is underway as to whether and how an International Court should provide assistance to bona fide national investigations or prosecutions (for example, by facilitating interstate judicial assistance).¹⁰⁶ 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.¹⁰⁷

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 purposes for an international tribunal will not be identical across contexts. The needs that are likely to be present in greater or lesser degree, singly or in combination, include: responding to an

106. See Jeffrey L. Bleich, *Cooperation with National Systems*, 13 NOUVELLES ETUDES PÉNALES 245, 254 (1997).

107. See, e.g., *Discussions of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., U.N. Doc. A/AC.244/L.2-L.3 (1995).

overwhelmed national justice system; substituting for a national system where the fact or appearance of bias would substantially undermine justice processes (whether because of a lack of will to prosecute, or of a will to prosecute “with a vengeance”); substituting for a national justice system where the national system would be unable to obtain custody of suspects; and/or 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.

Two important benefits can be gained by articulating the particular needs to be met by convening each particular 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 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 courts *could* gain custody. Such an instance would require a very careful analysis 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.¹⁰⁸

108. To require that the purposes of an international tribunal be clearly articulated and suitably implemented in each instance is not to favor ad hocism nor to suggest that no underlying principles should be applied across contexts. Rather, what is suggested is the recognition of consistent principles (e.g. deference to national courts, if they have adequate capacity and impartiality to render meaningful prosecutions) the application of which will be, by their very nature, necessarily context-specific.

IV. CONCLUSION: 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 and a half years after the massacres and yet at the very beginning of the trials 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 to maximize the effectiveness of both national and international jurisdictions in responding to crimes of mass violence.